CASES AND MATERIALS

ADMIRALTY ENVIRONMENTAL AND INSURANCE CLAIMS

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*Footnotes in cases have not been included except as set forth herein.

Chapter 1: Sources of Maritime Law

United States Constitution, Article III

The judicial Power shall extend to . . . all Cases of admiralty and maritime Jurisdiction . . . .

Judiciary Act of 1789

SEC. 9. And be it further enacted, That the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . .

28 U.S.C. § 1333

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. . . .

The Lottawanna, 88 U.S. 558 (1875)

Justice Bradley delivered the opinion of the Court:

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The ground on which we are asked to overrule the judgment in the case of *The General Smith* is, that by the general maritime law, those who furnish necessary materials, repairs, and supplies to a vessel, upon her credit, have a lien on such a vessel therefor, as well when furnished in her home port as when furnished in a foreign port, and that the courts of admiralty are bound to give effect to that lien. The proposition assumes that the general maritime law governs this case, and is binding on the courts of the United States.

But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several States of this Union also presents an analogous case. It is the basis of all the State laws; but is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with, or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed--as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries, are not one and the same in every particular; but that whilst there is a general correspondence between them arising from the fact that each adopts the essential principles, and the great mass of the general maritime law, as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate, and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore,* but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens, that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world.

This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole. The government of one country may be willing to give to its citizens, who supply a ship with provisions at her home port where the owner himself resides, a lien on the ship; whilst that of another country may take a contrary view as to the expediency of such a rule. The difference between them in a matter that concerns only their own citizens, in each case, cannot seriously affect the harmony and consistency of the common maritime law which each adopts and observes. ***

That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase "admiralty and maritime jurisdiction" is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of "cases in law and equity," or of "suits at common law," without defining those terms, assuming them to be known and understood.

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The question is discussed with great felicity and judgment by Chief Justice Taney, delivering the opinion of the court in the case of *The St. Lawrence,* where he says: "Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the Constitution to the Federal government in general terms, and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided to them; the extent of the jurisdiction conferred depending very much upon the character of the government in which they were created; and this circumstance, with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States. This difficulty was increased by the complex character of our government, where separate and distinct specified powers of sovereignty are exercised by the United States and a State independently of each other within the same territorial limits. And the reports of the decisions of the court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries; but certainly no State law can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal government."

Guided by these sound principles, this court has felt itself at liberty to recognize the admiralty jurisdiction as extending to localities and subjects which, by the jealousy of the common law, were prohibited to it in England, but which fairly belong to it on every ground of reason when applied to the peculiar circumstances of this country, with its extended territories, its inland seas, and its navigable rivers, especially as the narrow restrictions of the English law had never prevailed on this side of the Atlantic, even in colonial times.

The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no State law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.

To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian, and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages, and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and Constitution are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed.

But we must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law, and that of commercial regulation are not coterminous, it is true, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrolment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime. And with regard to the question now under consideration, namely, the rights of materialmen in reference to supplies and repairs furnished to a vessel in her home port, there does not seem to be any great reason to doubt that Congress might adopt a uniform rule for the whole country, though, of course, this will be a matter for consideration should the question ever be directly presented for adjudication. ***

Be this, however, as it may, and whether the power of Congress is or is not sufficient to amend the law on this subject (if amendment is desirable), this court is bound to declare the law as it now stands. And according to the maritime law as accepted and received in this country, we feel bound to declare that no such lien exists as is claimed by the appellees in this case. The adjudications in this court before referred to, which it is unnecessary to review, are conclusive on the subject; and we see no sufficient ground for disturbing them. ***

***The Moses Taylor*, 71 U.S. 411 (1886)**

Justice Field delivered the opinion of the Court.

This case arises upon certain provisions of a statute of California regulating proceedings in civil cases in the courts of that State. The sixth chapter of the statute relates to actions against steamers, vessels, and boats, and provides that they shall be liable--1st, for services rendered on board of them, at the request of, or on contract with, their respective owners, agents, masters, or consignees; 2d, for supplies furnished for their use upon the like request; 3d, for materials furnished in their construction, repair, or equipment; 4th, for their wharfage and anchorage within the State; 5th, for non-performance or mal-performance of any contract for the transportation of persons or property made by their respective owners, agents, masters, or consignees; 6th, for injuries committed by them to persons or property; and declares that these several causes of action shall constitute liens upon the steamers, vessels, and boats, for one year after the causes of action shall have accrued, and have priority in the order enumerated, and preference over all other demands. The statute also provides that actions for demands arising upon any of these grounds may be brought directly against the steamers, vessels, or boats by name; that process may be served on the master, mate, or any person having charge of the same; that they may be attached as security for the satisfaction of any judgment which may be recovered; and that if the attachment be not discharged, and a judgment be recovered by the plaintiff, they may be sold, with their tackle, apparel, and furniture, or such interest therein as may be necessary, and the proceeds applied to the payment of the judgment. ***

In 1863, the steamship Moses Taylor, a vessel of over one thousand tons burden, was owned by Marshall O. Roberts, of the city of New York, and was employed by him in navigating the Pacific Ocean, and in carrying passengers and freight between Panama and San Francisco. In October of that year the plaintiff in the court below, the defendant in error in this court, entered into a contract with Roberts, as owner of this steamship, by which, in consideration of one hundred dollars, Roberts agreed to transport him from New York to San Francisco as a steerage passenger, with reasonable despatch, and to furnish him with proper and necessary food, water, and berths, or other conveniences for lodging, on the voyage. The contract, as set forth in the complaint, does not in terms provide for transportation on any portion of the voyage by the Moses Taylor, but the case was tried upon the supposition that such was the fact, and we shall, therefore, treat the contract as if it specified a transportation by that steamer on the Pacific for the distance between Panama and San Francisco. For alleged breach of this contract the present action was brought, under the statute mentioned, in a court of a justice of the peace held within the city of San Francisco. Courts held by justices of the peace were at that time by another statute invested with jurisdiction of these cases, where the amount claimed did not exceed two hundred dollars, except where the action was brought to recover seamen's wages for a voyage performed, in whole or in part, without the waters of the State.

The agent for the Moses Taylor appeared to the action, and denied the jurisdiction of the court, insisting that the cause of action was one over which the courts of admiralty had exclusive jurisdiction, and also traversed the several matters alleged as breaches of the contract.

The justice of the peace overruled the objection to his jurisdiction, and gave judgment for the amount claimed. On appeal to the County Court the action was tried de novo upon the same pleadings, but in all respects as if originally commenced in that court. The want of jurisdiction there, and the exclusive cognizance of such causes of action by the courts of admiralty were again urged and were again overruled; and a similar judgment to that of the justice of the peace was rendered. ***

The case presented is clearly one within the admiralty and maritime jurisdiction of the Federal courts. The contract for the transportation of the plaintiff was a maritime contract. As stated in the complaint, it related exclusively to a service to be performed on the high seas, and pertained solely to the business of commerce and navigation. ***

The action against the steamer by name, authorized by the statute of California, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world. ***

The statute of California, to the extent in which it authorizes actions in rem against vessels for causes of action cognizable in the admiralty, invests her courts with admiralty jurisdiction, and so the Supreme Court of that State has decided in several cases. ***

The question presented for our determination is, therefore, whether such cognizance by the Federal courts is exclusive, and this depends either upon the constitutional grant of judicial power, or the validity of the provision of the ninth section of the act of Congress.

The Constitution declares that the judicial power of the United States "shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens, or subjects."

How far this judicial power is exclusive, or may, by the legislation of Congress, be made exclusive, in the courts of the United States, has been much discussed, though there has been no direct adjudication upon the point. ***

The cognizance of civil causes of admiralty and maritime jurisdiction vested in the District Courts by the ninth section of the Judiciary Act, may be supported upon like considerations. It has been made exclusive by Congress, and that is sufficient, even if we should admit that in the absence of its legislation the State courts might have taken cognizance of these causes. But there are many weighty reasons why it was so declared. "The admiralty jurisdiction," says Mr. Justice Story, "naturally connects itself, on the one hand, with our diplomatic relations and the duties to foreign nations and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and domestic. There is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort which cannot be yielded, except for the general good, and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home."

The case before us is not within the saving clause of the ninth section. That clause only saves to suitors "the right of a common-law remedy, where the common law is competent to give it." It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding in rem, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common-law courts, it is given by statute.

It follows, from the views expressed, that the judgment of the County Court must be reversed, and the cause remanded, with directions to dismiss the action for want of jurisdiction.

United States Constitution, Article I, Section 8

The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States . . . .

Gibbons v. Ogden, 22 U.S. 1 (1824)

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Aaron Ogden filed his bill in the Court of Chancery of [New York] against Thomas Gibbons, setting forth the several acts of the Legislature thereof, enacted for the purpose of securing to Robert R. Livingston and Robert Fulton, the exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years which has not yet expired; and authorizing the Chancellor to award an injunction, restraining any person whatever from navigating those waters with boats of that description. The bill stated an assignment from Livingston and Fulton to one John R. Livingston, and from him to the complainant, Ogden, of the right to navigate the waters between Elizabethtown, and other places in New-Jersey, and the city of New-York; and that Gibbons, the defendant below, was in possession of two steam boats, called the Stoudinger and the Bellona, which were actually employed in running between New-York and Elizabethtown, in violation of the exclusive privilege conferred on the complainant, and praying an injunction to restrain the said Gibbons from using the said boats, or any other propelled by fire or steam, in navigating the waters within the territory of New-York. The injunction having been awarded, the answer of Gibbons was filed; in which he stated, that the boats employed by him were duly enrolled and licensed, to be employed in carrying on the coasting trade, under the act of Congress, passed the 18th of February, 1793, c. 3. entitled, "An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same." And the defendant insisted on his right, in virtue of such licenses, to navigate the waters between Elizabethtown and the city of New-York, the said acts of the Legislature of the State of New-York to the contrary notwithstanding. At the hearing, the Chancellor perpetuated the injunction, being of the opinion, that the said acts were not repugnant to the constitution and laws of the United States, and were valid. This decree was affirmed in the Court for the Trial of Impeachments and Correction of Errors, which is the highest Court of law and equity in the State, before which the cause could be carried, and it was thereupon brought to this Court by appeal.

Chief Justice Marshall delivered the opinion of the Court, and, after stating the case, proceeded as follows:

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States.

They are said to be repugnant --

1st. To that clause in the constitution which authorizes Congress to regulate commerce.

2d. To that which authorizes Congress to promote the progress of science and useful arts. ***

As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the object, for which is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can inure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.

The words are, “Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplate_in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted—that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted. ***

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word "commerce."

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term. ***

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a

State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State. ***

We are now arrived at the inquiry—What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New-York, and act upon the very waters to which the prohibition now under consideration applies.***

Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924)

Justice McReynolds delivered the opinion of the Court. ***

The immediate question presented by number three hundred sixty-six is whether one engaged in the business of stevedoring whose employees work only of board ships in the navigable waters of Puget Sound, can be compelled to contribute to the accident fund provided for by the Workmen's Compensation Act of Washington. The State maintains that the objections to such requirement pointed out in Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, were removed by the Act of June 10, 1922, c. 216, 42 Stat. 634. Its Supreme Court ruled otherwise. 122 Wash. 572, 582.

In number six hundred eighty-four the Supreme Court, of California approved the conclusion of the Supreme Court of Washington and declared the Act of June 10, 1922, went beyond the power of Congress. It accordingly held the Industrial Accident Commission had no jurisdiction to award compensation for the death of a workman killed while actually engaged at maritime work, under maritime contract, upon a vessel moored at her dock in San Francisco Bay and discharging her cargo. 220 Pac. 669.

The judgments below must be affirmed; the doctrine of Knickerbocker Ice Co. v. Stewart, to which we adhere, permits no other conclusion. There we construed the Act of October 6, 1917, c. 97, 40 Stat. 395, which undertook to amend the provision of §§ 24 and 256, Judicial Code, which saves to suitors in all civil causes of admiralty and maritime jurisdiction "the right of a common-law remedy where the common law is competent to give it," by adding the words "and to claimants the rights and remedies under the workmen's compensation law of any State." After declaring the true meaning and purpose of the act, we held it beyond the power of Congress.

Except as to the master and members of the crew, the Act of 1922 must be read as undertaking to permit application of the workmen's compensation laws of the several States to injuries within the admiralty and maritime jurisdiction substantially as provided by the Act of 1917. The exception of master and crew is wholly insufficient to meet the objections to such enactments heretofore often pointed out. Manifestly, the proviso which denies jurisdiction to district courts of the United States over causes arising out of the injuries specified was intended to supplement the provision covering rights and remedies under state compensation laws. As that provision is ineffective, so is the proviso. To hold otherwise would bring about an unfortunate condition wholly outside the legislative intent. ***

In Knickerbocker Ice Co. v. Stewart (pp. 163, 164, 166), where claim was made under the New York Act on account of the death of a bargeman who fell into the Hudson River and drowned, this was said—

"We conclude that [by the Act of October 6, 1917] Congress undertook to permit application of Workmen's Compensation Laws of the several States to injuries within the admiralty and maritime jurisdiction; and to save such statutes from the objections pointed out by Southern Pacific Co. v. Jensen. It sought to authorize and sanction action by the States in prescribing and enforcing, as to all parties concerned, rights, obligations, liabilities and remedies designed to provide compensation for injuries suffered by employees engaged in maritime work.

"And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

"Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do so ad they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant. See Sudden & Christenson v. Industrial Accident Commission, 188 Pac. Rep. 803. ***

Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States. The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress. Knickerbocker Ice Co. v.

Stewart. Exercising another power—to regulate commerce—Congress has prescribed the liability of interstate carriers by railroad for damages to employees (Act April 22, 1908, c. 149, 35 Stat. 65) and thereby abrogated conflicting local rules. New York Central R.R. Co. v. Winfield, 244 U.S. 147.

This cause presents a situation where there was no attempt to prescribe general rules. On the contrary, the manifest purpose was to permit any State to alter the maritime law and thereby introduce conflicting requirements. To prevent this result the Constitution adopted the law of the sea as the measure of maritime rights and obligations. The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the States may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interest must yield to the common welfare. The Constitution is supreme. ***

***Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990)**

Justice O'Connor delivered the opinion of the Court.

We decide whether the parent of a seaman who died from injuries incurred aboard respondents' vessel may recover under general maritime law for loss of society, and whether a claim for the seaman's lost future earnings survives his death.

I.

Ludwick Torregano was a seaman aboard the vessel M/V Archon. On the evening of July 18, 1984, Clifford Melrose, a fellow crew member, stabbed Torregano repeatedly, killing him. At the time, the ship was docked in the harbor of Vancouver, Washington.

Mercedel Miles, Torregano's mother and administratrix of his estate, sued Apex Marine Corporation and Westchester Marine Shipping Company, the vessel's operators, Archon Marine Company, the charterer, and Aeron Marine Company, the Archon's owner (collectively Apex), in the United States District Court for the Eastern District of Louisiana. Miles alleged negligence under the Jones Act, 41 Stat. 1007, as amended, 46 U.S.C. App. § 688, for failure to prevent the assault on her son, and breach of the warranty of seaworthiness under general maritime law for hiring a crew member unfit to serve. She sought compensation for loss of support and services and loss of society resulting from the death of her son, punitive damages, and compensation to the estate for Torregano's pain and suffering prior to his death and for his lost future income.

At trial, the District Court granted Apex's motion to strike the claim for punitive damages, ruled that the estate could not recover Torregano's lost future income, and denied Miles' motion for a directed verdict as to negligence and unseaworthiness. The court instructed the jury that Miles could not recover damages for loss of society if they found that she was not financially dependent on her son.

The jury found that Apex was negligent and that Torregano was 7% contributorily negligent in causing his death, but that the ship was seaworthy. After discounting for Torregano's contributory negligence, the jury awarded Miles $7,254 for the loss of support and services of her son and awarded the estate $130,200 for Torregano's pain and suffering. The jury also found that Miles was not financially dependent on her son and therefore not entitled to damages for loss of society. The District Court denied both parties' motions for judgment notwithstanding the verdict and entered judgment accordingly.

The United States Court of Appeals for the Fifth Circuit affirmed in part, reversed in part, and remanded. 882 F.2d 976 (1989). The court affirmed the judgment of negligence on the part of Apex, but held that there was insufficient evidence to support the contributory negligence finding. Id. at 983-985. Miles was therefore entitled to the full measure of $7,800 for loss of support and services, and the estate was entitled to $140,000 for Torregano's pain and suffering. The court also found that Melrose's extraordinarily violent disposition demonstrated that he was unfit and therefore that the Archon was unseaworthy as a matter of law. Id. at 983. Because this ruling revived Miles' general maritime claim, the court considered two questions concerning the scope of damages under general maritime law. The court reaffirmed its prior decision in Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455 (1985), holding that a nondependent parent may not recover for loss of society in a general maritime wrongful death action. 882 F.2d at 989. It also held that general maritime law does not permit a survival action for decedent's lost future earnings. *Id.* at 987.

We granted Miles' petition for certiorari on these two issues, 494 U.S. 1003 (1990), and now affirm the judgment of the Court of Appeals.

II.

We rely primarily on Moragne v. States Marine Lines, Inc., 398 U.S. 375, 26 L. Ed. 2d 339, 90 S. Ct. 1772 (1970). Edward Moragne was a longshoreman who had been killed aboard a vessel in United States and Florida territorial waters. His widow brought suit against the shipowner, seeking to recover damages for wrongful death due to the unseaworthiness of the ship. The District Court dismissed that portion of the complaint because neither federal nor Florida statutes allowed a wrongful death action sounding in unseaworthiness where death occurred in territorial waters. General maritime law was also no help; in *The Harrisburg*, 119 U.S. 199, 30 L. Ed. 358, 7 S. Ct. 140 (1886), this Court held that maritime law does not afford a cause of action for wrongful death. The Court of Appeals affirmed.

This Court overruled The Harrisburg. After questioning whether The Harrisburg was a proper statement of the law even in 1886, the Court set aside that issue because a “development of major significance had intervened.” Moragne, supra, at 388. Specifically, the state legislatures and Congress had rejected wholesale the rule against wrongful death. Every State in the Union had enacted a wrongful death statute. In 1920, Congress enacted two pieces of legislation creating a wrongful death action for most maritime deaths. The Jones Act, 41 Stat. 1007, as amended, 46 U. S. C. App. § 688, through incorporation of the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U. S. C. §§ 51-59, created a wrongful death action in favor of the personal representative of a seaman killed in the course of employment. The Death on the High Seas Act (DOHSA), 41 Stat. 537, 46 U. S. C. App. §§ 761, 762, created a similar action for the representative of anyone killed on the high seas.

These statutes established an unambiguous policy in abrogation of those principles that underlay The Harrisburg. Such a policy is “to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law.” Moragne, supra, at 391. Admiralty is not created in a vacuum; legislation has always served as an important source of both common law and admiralty principles. 398 U.S. at 391, 392, citing Landis, Statutes and the Sources of Law, in Harvard Legal Essays 213, 214, 226-227 (R. Pound ed. 1934). The unanimous legislative judgment behind the Jones Act, DOHSA, and the many state statutes created a strong presumption in favor of a general maritime wrongful death action.

But legislation sends other signals to which an admiralty court must attend. “The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect.” Moragne, supra, at 392. Congress, in the exercise of its legislative powers, is free to say “this much and no more.” An admiralty court is not free to go beyond those limits. The Jones Act and DOHSA established a policy in favor of maritime wrongful death recovery. The central issue in Moragne was whether the limits of those statutes proscribed a more general maritime cause of action. 398 U.S. at 393.

The Court found no such proscription. Rather, the unfortunate situation of Moragne’s widow had been created by a change in the maritime seascape that Congress could not have anticipated. At the time Congress passed the Jones Act and DOHSA, federal courts uniformly applied state wrongful death statutes for deaths occurring in state territorial waters. Except in those rare cases where state statutes were also intended to apply on the high seas, however, there was no recovery for wrongful death outside territorial waters. See Moragne, supra, at 393, and n.10. DOHSA filled this void, creating a wrongful death action for all persons killed on the high seas, sounding in both negligence and unseaworthiness.

Congress did not extend DOHSA to territorial waters because it believed state statutes sufficient in those areas. 398 U.S. at 397-398.

And so they were when DOHSA was passed. All state statutes allowed for wrongful death recovery in negligence, and virtually all DOHSA claims sounded in negligence. Unseaworthiness was "an obscure and relatively little used remedy," largely because a shipowner's duty at that time was only to use due diligence to provide a seaworthy ship. *See* G. Gilmore & C. Black, The Law of Admiralty 383, 375 (2d ed. 1975). Thus, although DOHSA permitted actions in both negligence and unseaworthiness, it worked essentially as did state wrongful death statutes. DOHSA created a near uniform system of wrongful death recovery. ***

The emergence of unseaworthiness as a widely used theory of liability made manifest certain anomalies in maritime law that had not previously caused great hardship. First, in territorial waters, general maritime law allowed a remedy for unseaworthiness resulting in injury, but not for death. Second, DOHSA allowed a remedy for death resulting from unseaworthiness on the high seas, but general maritime law did not allow such recovery for a similar death in territorial waters. Finally, in what Moragne called the "strangest" anomaly, in those States whose statutes allowed a claim for wrongful death resulting from unseaworthiness, recovery was available for the death of a longshoreman due to unseaworthiness, but not for the death of a Jones Act seaman. See Moragne, supra, at 395-396. This was because wrongful death actions under the Jones Act are limited to negligence, and the Jones Act pre-empts state law remedies for the death or injury of a seaman. See Gillespie v. United States Steel Corp., 379 U.S. 148, 154-156, 13 L. Ed. 2d 199, 85 S. Ct. 308 (1964).

The United States, as amicus curiae, urged the Moragne Court to eliminate these inconsistencies and render maritime wrongful death law uniform by creating a general maritime wrongful death action applicable in all waters. The territorial limitations placed on wrongful death actions by DOHSA did not bar such a solution. DOHSA was itself a manifestation of congressional intent "to achieve 'uniformity in the exercise of admiralty jurisdiction.'" Moragne, supra, at 401, quoting *Gillespie*, *supra*, at 155. Nothing in that Act or in the Jones Act could be read to preclude this Court from exercising its admiralty power to remedy nonuniformities that could not have been anticipated when those statutes were passed. Moragne, supra, at 399-400. The Court therefore overruled The Harrisburg and created a general maritime wrongful death cause of action. This result was not only consistent with the general policy of both 1920 Acts favoring wrongful death recovery, but also effectuated "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" Moragne, supra, at 402, quoting The Lottawanna, 88 U.S. 558, 21 Wall. 558, 575, 22 L. Ed. 654 (1875).

III.

We have described Moragne at length because it exemplifies the fundamental principles that guide our decision in this case. We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.

Apex contends that Moragne's holding, creating a general maritime wrongful death action, does not apply in this case because Moragne was a longshoreman, whereas Torregano was a true seaman. Apex is correct that Moragne does not apply on its facts, but we decline to limit Moragne to its facts.

Historically, a shipowner's duty of seaworthiness under general maritime law ran to seamen in the ship's employ. See Sieracki, 328 U.S. 85 at 90. In Sieracki, we extended that duty to stevedores working aboard ship but employed by an independent contractor. *Id.* at 95. As this was Moragne's situation, Moragne's widow was able to bring an action for unseaworthiness under general maritime law. In a narrow sense, Moragne extends only to suits upon the death of longshoremen like Moragne, so-called Sieracki seamen. Torregano was a true seaman, employed aboard the Archon. Were we to limit Moragne to its facts, Miles would have no general maritime wrongful death action. Indeed, were we to limit Moragne to its facts, that case would no longer have any applicability at all. In 1972, Congress amended the Longshore and Harbor Workers' Compensation Act (LHWCA), 86 Stat. 1251, as amended, 33 U. S. C. §§ 901-950, to bar any recovery from shipowners for the death or injury of a longshoreman or harbor worker resulting from breach of the duty of seaworthiness. See 33 U. S. C. § 905(b); American Export Lines, Inc. v. Alvez, 446 U.S. 274, 282, n.9, 64 L. Ed. 2d 284, 100 S. Ct. 1673 (1980). If Moragne's widow brought her action today, it would be foreclosed by statute. ***

IV.

Moragne did not set forth the scope of the damages recoverable under the maritime wrongful death action. The Court first considered that question in Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 39 L. Ed. 2d 9, 94 S. Ct. 806 (1974). Respondent brought a general maritime action to recover for the wrongful death of her husband, a longshoreman. The Court held that a dependent plaintiff in a maritime wrongful death action could recover for the pecuniary losses of support, services, and funeral expenses, as well as for the nonpecuniary loss of society suffered as the result of the death. *Id. at* 591. Gaudet involved the death of a longshoreman in territorial waters. Consequently, the Court had no need to consider the preclusive effect of DOHSA for deaths on the high seas or the Jones Act for deaths of true seamen.

We considered DOHSA in Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 56 L. Ed. 2d 581, 98 S. Ct. 2010 (1978). That case involved death on the high seas and, like *Gaudet*, presented the question of loss of society damages in a maritime wrongful death action. The Court began by recognizing that Gaudet, although broadly written, applied only in territorial waters and therefore did not decide the precise question presented. 436 U.S. at 622-623. Congress made the decision for us. DOHSA, by its terms, limits recoverable damages in wrongful death suits to "pecuniary loss sustained by the persons for whose benefit the suit is brought." 46 U. S. C. App. § 762 (emphasis added). This explicit limitation forecloses recovery for nonpecuniary loss, such as loss of society, in a general maritime action.

Respondents argued that admiralty courts have traditionally undertaken to supplement maritime statutes. The Court's answer in Higginbotham is fully consistent with those principles we have here derived from Moragne: Congress has spoken directly to the question of recoverable damages on the high seas, and "when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." Higginbotham, supra, at 625. Moragne involved gap filling in an area left open by statute; supplementation was entirely appropriate. But in an "area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." Higginbotham, supra, at 625.

The logic of Higginbotham controls our decision here. The holding of Gaudet applies only in territorial waters, and it applies only to longshoremen. Gaudet did not consider the preclusive effect of the Jones Act for deaths of true seamen. We do so now.

Unlike DOHSA, the Jones Act does not explicitly limit damages to any particular form. Enacted in 1920, the Jones Act makes applicable to seamen the substantive recovery provisions of the older FELA. See 46 U. S. C. App. § 688. FELA recites only that employers shall be liable in "damages" for the injury or death of one protected under the Act. 45 U. S. C. § 51. In Michigan Central R. Co. v. Vreeland, 227 U.S. 59, 57 L. Ed. 417, 33 S. Ct. 192 (1913), however, the Court explained that the language of the FELA wrongful death provision is essentially identical to that of Lord Campbell's Act, 9 & 10 Vict. ch. 93 (1846), the first wrongful death statute. Lord Campbell's Act also did not limit explicitly the "damages" to be recovered, but that Act and the many state statutes that followed it consistently had been interpreted as providing recovery only for pecuniary loss. Vreeland, 227 U.S. at 69-71. The Court so construed FELA. Ibid.

When Congress passed the Jones Act, the Vreeland gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation. See Cannon v. University of Chicago, 441 U.S. 677, 696-697, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979). There is no recovery for loss of society in a Jones Act wrongful death action.

The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime claim here alleged that Torregano had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

Our decision also remedies an anomaly we created in Higginbotham. Respondents in that case warned that the elimination of loss of society damages for wrongful deaths on the high seas would create an unwarranted inconsistency between deaths in territorial waters, where loss of society was available under Gaudet, and deaths on the high seas. We recognized the value of uniformity, but concluded that a concern for consistency could not override the statute. Higginbotham, supra, at 624. Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.

V.

We next must decide whether, in a general maritime action surviving the death of a seaman, the estate can recover decedent's lost future earnings. Under traditional maritime law, as under common law, there is no right of survival; a seaman's personal cause of action does not survive the seaman's death. Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 371, 77 L. Ed. 368, 53 S. Ct. 173 (1932); Romero v. International Terminal Operating Co., 358 U.S. 354, 373, 3 L. Ed. 2d 368, 79 S. Ct. 468 (1959); Gillespie, 379 U.S. at 157.

Congress and the States have changed the rule in many instances. The Jones Act, through its incorporation of FELA, provides that a seaman's right of action for injuries due to negligence survives to the seaman's personal representative. See 45 U. S. C. § 59; Gillespie, supra, at 157. Most States have survival statutes applicable to tort actions generally, see 1 S. Speiser, Recovery for Wrongful Death 2d § 3.2 (1975 and Supp. 1989), 2 id., §§ 14.1, 14.3, App. A, and admiralty courts have applied these state statutes in many instances to preserve suits for injury at sea. . . . Where these state statutes do not apply, however, or where there is no state survival statute, there is no survival of unseaworthiness claims absent a change in the traditional maritime rule.

Several Courts of Appeals have relied on Moragne to hold that there is a general maritime right of survival. . . . As we have noted, Moragne found that congressional and state abrogation of the maritime rule against wrongful death actions demonstrated a strong policy judgment, to which the Court deferred. Moragne, 398 U.S. at 388-393. Following this reasoning, the lower courts have looked to the Jones Act and the many state survival statutes and concluded that these enactments dictate a change in the general maritime rule against survival. See, e.g., Spiller, supra, at 909; Barbe, supra, at 799-800, and n.6.

Miles argues that we should follow the Courts of Appeals and recognize a general maritime survival right. Apex urges us to reaffirm the traditional maritime rule and overrule these decisions. We decline to address the issue, because its resolution is unnecessary to our decision on the narrow question presented: whether the income decedent would have earned but for his death is recoverable. We hold that it is not.

Recovery of lost future income in a survival suit will, in many instances, be duplicative of recovery by dependents for loss of support in a wrongful death action; the support dependents lose as a result of a seaman's death would have come from the seaman's future earnings. Perhaps for this reason, there is little legislative support for such recovery in survival. In only a few States can an estate recover in a survival action for income decedent would have received but for death. At the federal level, DOHSA contains no survival provision. The Jones Act incorporates FELA's survival provision, but, as in most States, recovery is limited to losses suffered during the decedent's lifetime. See 45 U. S. C. § 59; Van Beeck v. Sabine Towing Co., 300 U.S. 342, 347, 81 L. Ed. 685, 57 S. Ct. 452 (1937); St. Louis, I. M. & S. R. Co. v. Craft, 237 U.S. 648, 658, 59 L. Ed. 1160, 35 S. Ct. 704 (1915).

This state and federal legislation hardly constitutes the kind of "wholesale" and “unanimous” policy judgment that prompted the Court to create a new cause of action in Moragne. See Moragne, supra, at 388, 389. To the contrary, the considered judgment of a large majority of American legislatures is that lost future income is not recoverable in a survival action. Were we to recognize a right to such recovery under maritime law, we would be adopting a distinctly minority view.

This fact alone would not necessarily deter us, if recovery of lost future income were more consistent with the general principles of maritime tort law. There are indeed strong policy arguments for allowing such recovery. See, e.g., R. Posner, Economic Analysis of Law 176-181 (3d ed. 1986) (recovery of lost future income provides efficient incentives to take care by ensuring that the tortfeasor will have to bear the total cost of the victim's injury or death). Moreover, Miles reminds us that admiralty courts have always shown a special solicitude for the welfare of seamen and their families. “Certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy." Moragne, supra, at 387, quoting Chief Justice Chase in The Sea Gull, 1 Chase 145, 21 F. Cas. 909, 910 (No. 12,578) (CC Md. 1865). See also Gaudet, 414 U.S. at 583.

We are not unmindful of these principles, but they are insufficient in this case. We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in survival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act.

The Jones Act/FELA survival provision limits recovery to losses suffered during the decedent's lifetime. See 45 U. S. C. § 59. This was the established rule under FELA when Congress passed the Jones Act, incorporating FELA, see St. Louis, I. M. & S. R. Co., supra, at 658, and it is the rule under the Jones Act. See Van Beeck, supra, at 347.Congress has limited the survival right for seamen's injuries resulting from negligence. As with loss of society in wrongful death actions, this forecloses more expansive remedies in a general maritime action founded on strict liability. We will not create, under our admiralty powers, a remedy that is disfavored by a clear majority of the States and that goes well beyond the limits of Congress' ordered system of recovery for seamen's injury and death. Because Torregano's estate cannot recover for his lost future income under the Jones Act, it cannot do so under general maritime law.

VI.

Cognizant of the constitutional relationship between the courts and Congress, we today act in accordance with the uniform plan of maritime tort law Congress created in DOHSA and the Jones Act. We hold that there is a general maritime cause of action for the wrongful death of a seaman, but that damages recoverable in such an action do not include loss of society.***

Chapter 2: Federal Environmental Common Law

Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518 (1852)

Justice McLean delivered the opinion of the Court.

This bill was filed in the clerk's office of this court, in July, 1849. It charged that the defendants, under color of an act of the Legislature of Virginia, but in direct violation of its terms, were engaged in the construction of a bridge across the Ohio River, at Wheeling, which would obstruct its navigation, to and from the ports of Pennsylvania, by steamboats and other craft which navigate the same. That the State of Pennsylvania owns certain valuable public works, canals, and railways, constructed at great expense as channels of commerce, for the transportation of passengers and goods, from which a large revenue, as tolls, was received by the State. That these works terminate on the Ohio River, and were constructed with direct reference to its free navigation; the goods and passengers transported on these lines were conveyed in steamboats, on the Ohio River; and the Wheeling Bridge would so obstruct the navigation of that river, as to cut off and direct trade and business from the public works of Pennsylvania, impair and diminish the tolls and revenue of the State, and render its improvements useless. The bill prayed an injunction against the erection of the bridge, as a public nuisance, and for general relief. ***

At the December term of this court, 1849, another supplemental bill was filed, representing that defendants had completed the erection of the bridge, and that it had obstructed the passage of steamboats carrying freight and passengers to and from the ports of Pennsylvania; that it also hindered the passage of steamships and sea-going vessels, which were accustomed to be constructed at the ports of Pennsylvania, and would injure and destroy the trade and business of ship and boat building, which was carried on by the citizens of Pittsburg, and it prayed an abatement of the bridge as a public nuisance, and for general relief.

In their answers the defendants allege the exclusive sovereignty of Virginia over the Ohio River, and set forth the act authorizing the erection of the bridge. ***

At December term, 1849, the question of jurisdiction was argued on both sides, and it was sustained by the entry of an order of reference to the Hon. R. H. Walworth, as special commissioner . . . . ***

At the ensuing term, near its close, the commissioner made his report, together with the report of the engineer employed, and the evidence taken before him, deciding,

1. That the bridge is not an obstruction to the free navigation of the Ohio by any vessels propelled by sails.

2. That the bridge is an obstruction of the free navigation of the Ohio by vessels propelled by steam.

3. That the change or alteration which can and should be made in the construction and existing condition of the bridge is, to raise the cables and flooring in such manner as to give a level headway, at least three hundred feet wide, over a convenient part of the channel, of not less than one hundred and twenty feet above the level of zero on the Wheeling water-gauge. ***

It is matter of history, as well as in proof, that Pennsylvania, for many years past, has been engaged in making extensive improvements by canals, railroads, and turnpikes, many of them extending from Eastern Pennsylvania to Pittsburg, by which the transportation of goods and passengers is greatly facilitated, and that a large portion of the goods and passengers thus transported are conveyed to and from Pittsburg on the Ohio River.

On the 18th of December, 1789, an act was passed by Virginia, consenting to the erection of the State of Kentucky out of its territory, on certain conditions, among which are the following: "That the use and navigation of the River Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States." Virg. Revised Code, 1819, p. 19. To this act the assent of Congress was given. 1 Stat. at Large, 189.

That the Ohio River is navigable, is a historical fact, which all courts may recognize. For many years the commerce upon it has been regulated by Congress, under the commercial power, by establishing ports, requiring vessels which navigate it to take out licenses, and to observe certain rules for the safety of their passengers and cargoes. Appropriations by Congress have been frequently made, to remove obstructions to navigation from its channel.

It appears that Pennsylvania has constructed a combined line of canal and railroad from Pittsburg and Alleghany cities, to the city of Philadelphia, a distance of about four hundred miles, at an expense of about sixteen millions of dollars, all of which are owned by the State. There is also a railroad from Pittsburg to Harrisburg which will soon be completed, at an expense of some eight or ten millions of dollars. There is also a slack-water navigation from Pittsburg to Brownsville, and up the Yaughegany to West Newton, and there are other lines of communication between Pittsburg and the East, which are owned in whole or in part by the State, and from which it derives revenue.

And the witnesses generally say, that any obstruction on the Ohio River, to the free passage of steamboats, must affect injuriously the revenue from the above public works, as it would divert the transportation of goods and passengers from the lines to and from Pittsburg, to the northern lines through New York. Whilst the witnesses differ as to the amount of such an injury, they generally agree in saying, that any serious obstruction on the Ohio would diminish the trade and lessen the revenue of the State. The value of the goods to and from Pittsburg, transported on the above lines of communication, is estimated at from forty to fifty millions annually. And it is shown that the commerce on the Ohio, to and from Pittsburg, amounts to about the same sum.

If the bridge be such an obstruction to the navigation of the Ohio as to change, to any considerable extent, the line of transportation through Pennsylvania to the northern route through New York, or to a more southern route, an injury is done to the State of Pennsylvania, as the principal proprietor of the lines of communication, by canal and railroad, from Philadelphia to Pittsburg. And this injury is of a character for which an action at law could afford no adequate redress. It is of daily occurrence, and would require numerous, if not daily prosecutions, for the wrong done; and from the nature of that wrong, the compensation could not be measured or ascertained with any degree of precision. The effect would be, if not to reduce the tolls on these lines of transportation, to prevent their increase with the increasing business of the country.

If the obstruction complained of be an injury, it would be difficult to state a stronger case for the extraordinary interposition of a court of chancery. In no case could a remedy be more hopeless by an action at common law. The structure complained of is permanent, and so are the public works sought to be protected. The injury, if there be one, is as permanent as the work from which it proceeds, and as are the works affected by it. And whatever injury there may now be, will become greater in proportion to the increase of population and the commercial developments of the country. And in a country like this, where there would seem to be no limit to its progress, the injury complained of would be far greater in its effects than under less prosperous circumstances.

As we are now considering the obstruction of the bridge, not as to the relief prayed for, but as to the form of the remedy adopted by the complainant, we are brought to the conclusion, as before announced by this court to the parties, that there is made out a *prima facie* case for the exercise of jurisdiction. The witnesses who testify to the obstruction are numerous, and the weight of their testimony is not impaired by the impeachment of their credit, or a denial of the facts stated by them.

But it is objected, if not as a matter going to the jurisdiction, as fatal to any further action in the case, that there are no statutory provisions to guide the court, either by the State of Virginia, or by Congress. It is said that there is no common law of the Union on which the procedure can be founded; that the common law of Virginia is subject to its legislative action, and that the bridge, having been constructed under its authority, it can in no sense be considered a nuisance. That whatever shall be done within the limits of a State, is subject to its laws, written or unwritten, unless it be a violation of the Constitution, or of some act of Congress. ***

In the second section of the third article of the Constitution it is declared, "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority." ***

An indictment at common law could not be sustained in the federal courts by the United States, against the bridge as a nuisance, as no such procedure has been authorized by Congress. But a proceeding, on the ground of a private and an irreparable injury, may be sustained against it by an individual or a corporation. Such a proceeding is common to the federal courts, and also to the courts of the State. The injury makes the obstruction a private nuisance to the injured party; and the doctrine of nuisance applies to the case where the jurisdiction is made out, the same as in a public prosecution. If the obstruction be unlawful, and the injury irreparable, by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery.

Such a proceeding is as common and as free from difficulty as an ordinary injunction-bill, against a proceeding at law, or to stay waste or trespass. The powers of a court of chancery are as well adapted, and as effectual for relief in the case of a private nuisance, as in either of the cases named. And, in regard to the exercise of these powers, it is of no importance whether the eastern channel, over which the bridge is thrown, is wholly within the limits of the State of Virginia. The Ohio being a navigable stream, subject to the commercial power of Congress, and over which that power has been exerted; if the river be within the State of Virginia, the commerce upon it, which extends to other States, is not within its jurisdiction; consequently, if the act of Virginia authorized the structure of the bridge, so as to obstruct navigation, it could afford no justification to the Bridge Company.

The act of Virginia, under which the bridge was built, with scrupulous care, guarded the rights of navigation. In the 19th section, it is declared "That, if the said bridge shall be so constructed as to injure the navigation of the said river, the said bridge shall be treated as a public nuisance, and shall be liable to abatement, upon the same principles and in the same manner that other public nuisances are." And, in the act of the 19th of March, 1847, to revive the first act, it is declared, in the 14th section, "that if the bridge shall be so erected as to obstruct the navigation of the Ohio River, in the usual manner, by such steamboats and other crafts as are now commonly accustomed to navigate the same, when the river shall be as high as the highest floods hereinbefore known, then, unless, upon such obstruction being found to exist, such obstruction shall be immediately removed or remedied, the said last-mentioned bridge may be treated as a public nuisance, and abated accordingly."

This is a full recognition of the public right on this great highway, and the grant to the Bridge Company was made subject to that right.
It is objected that there is no act of Congress prohibiting obstructions on the Ohio River, and that until there shall be such a regulation, a State, in the construction of bridges, has a right to exercise its own discretion on the subject.

Congress have not declared in terms that a State, by the construction of bridges, or otherwise, shall not obstruct the navigation of the Ohio, but they have regulated navigation upon it, as before remarked, by licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, and inflicting severe penalties for neglect of those duties, by which damage to life or property has resulted. And they have expressly sanctioned the compact made by Virginia with Kentucky, at the time of its admission into the Union, "that the use and navigation of the River Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States." Now, an obstructed navigation cannot be said to be free. It was, no doubt, in view of this compact, that in the charter for the bridge, it was required to be so elevated, as not, at the greatest height of the water, to obstruct navigation. Any individual may abate a public nuisance. 5 Bac. Ab. 797; 2 Roll. Ab. 144, 145; 9 Co. 54; Hawk. P.C. 75, sect. 12.

This compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action? In the case of Green et al. *v.* Biddle, (8 Wheat. 1) this court held that a law of the State of Kentucky, which was in violation of this compact between Virginia and Kentucky, was void; and they say this court has authority to declare a State law unconstitutional, upon the ground of its impairing the obligation of a compact between different States of the Union. ***

No State law can hinder or obstruct the free use of a license granted under an act of Congress. Nor can any State violate the compact, sanctioned as it has been, by obstructing the navigation of the river. More than this is not necessary to give a civil remedy for an injury done by an obstruction. Congress might punish such an act criminally, but until they shall so provide, an indictment will not lie in the courts of the United States for an obstruction which is a public nuisance. But a public nuisance is also a private nuisance, where a special and an irremediable mischief is done to an individual. ***

The object of the suit was, not the recovery of damages, but to enjoin the defendants from building the bridge which would injure the plaintiff. If the bridge be a material obstruction to the navigation of the Ohio, it is not denied that the plaintiff would be injured. The ground of defense taken and maintained is, that the bridge is not a material obstruction to commerce on the river. On this point there is no doubt. A jury, in such a case could give no aid to the court, nor security to the parties. ***

From the data referred to, the defendants' counsel contend that in a few years, at most, there will be a concentration of railroads at Wheeling, and at other places on the Ohio, connecting the Eastern with the Western country, which, from their speed and safety, must take from the river the passengers and a considerable portion of the freight now transported in steamboats. That these roads, crossing the Ohio River, will reach the commercial ports of the interior, and diffuse a larger amount of commerce than that which is now transported on the Ohio. And it is intimated that the Wheeling Bridge may be used by the railroad cars; but it is clearly proved that the bridge is not calculated for such a transportation.

However numerous these roads may be, there can be no doubt, that, like similar roads in other parts of the country, their cars will be loaded with freight and passengers. But it may not follow that the Ohio and our other rivers will be deserted, or their business reduced. We have an extent of river coast, counting both shores, exceeding twenty-five thousand miles, through countries the most fertile on the globe. This is a greater distance than the combined railways of the world. That our railroads, as avenues of commerce, may develop our resources in a greater degree than is now anticipated, must be the desire of every one. But the great thoroughfares, provided by a beneficent Providence, should neither be neglected nor abandoned. They will still remain the great arteries of commerce.

Past experience teaches us, that however the facilities of commerce may be multiplied, her tracks will be filled with productions which enrich the country and add to the comforts and enjoyments of its rapidly increasing population. The rewards of labor will give an irresistible impulse to enterprise which must secure to our country a prosperity unequalled in history. Our internal commerce is more than three times as great as our foreign, and the increased lines of intercourse will cause both rapidly to advance. The protection of the river commerce is by no means hostile to any other. The multiplication of commercial facilities will, in the same proportion, increase the articles of trade.

If viaducts must be thrown over the Ohio for the contemplated railroads, and bridges for the accommodation of the numerous and rising cities upon the banks of the river, it is of the highest importance that they should not be so built as materially to obstruct its commerce. If the obstructions which have been demonstrated to result from the Wheeling Bridge, are to be multiplied as these crossways are needed, our beautiful rivers will, in a great measure, be abandoned. An experience of forty years shows how much may be done in the structure of steamboats, in the improvement of their machinery, and the propelling power, to increase the speed and the comfort of that mode of transportation, under a continued reduction of expense. But if the limit of advance, in this respect, has already been passed; and a retrograde movement is necessary, by rejecting the improvements recommended by ingenuity and experience, we close our eyes to one great source of our prosperity. What would the West now have been if steam had not been introduced upon our rivers, and their navigation had not remained free? Without an outlet for the products of a prolific soil and the instruments of mechanical ingenuity, the country could have made but little advance.

It is said that the interest of commerce requires navigable waters to be crossed, and that in such a case the inquiry should be, whether the benefit conferred upon commerce by the cross route, is not greater than the injury done. In the case of the King *v.* Sir John Morris, 1 Barn. & Adol. 441, it was held, that the injury cannot be balanced against the benefits secured. And in the case of the King *v.* George Henry Ward, 4 Ad. & El. 384, it was held, where the jury found that an embankment complained of was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration it amounted to a verdict of guilty.
If the obstruction be slight, as a draw in a bridge, which would be safe and convenient for the passage of vessels, it would not be regarded as a nuisance, where proper attention is given to raise the draw on the approach of vessels. Of this character is the complaint of the plaintiff against the bridge, that it obstructs sea-vessels built at Pittsburg. Sails cannot be used to advantage on the Ohio or the Mississippi, consequently there can be no necessity of raising the masts until it becomes necessary to hoist the sails. Such vessels float down the river or are towed by steam-vessels.

It is true the injury done to the State of Pennsylvania may seem to be small, when compared to the magnitude of this subject. It applies to all our rivers, and affects annually a transportation of many millions of passengers, and a commerce worth not less than six hundred millions of dollars. It would be as unwise as it is unlawful to fetter, in any respect, this vast commerce.

In all the charters, granted for the construction of bridges over navigable waters, it is believed all the States, not excepting Virginia, have provided that their navigation should not be obstructed. ***

For the reasons and facts stated, we think that the bridge obstructs the navigation of the Ohio, and that the State of Pennsylvania has been, and will be, injured in her public works, in such manner as not only to authorize the bringing of this suit, but to entitle her to the relief prayed. ***

Chief Justice Taney dissenting.

As this is a case of much importance to the parties and the public, and I do not concur in the judgment of the court, it is my duty to express my opinion. I shall do so as briefly as I can.

The first question to be decided is, whether this bridge is a public nuisance or not, which this court has a right to abate. The State of Pennsylvania, it is true, complains of an interruption to her canals, in which, in her character as a State, she has a proprietary interest, analogous to that of an individual owner. She seeks redress for this injury. But she proceeds upon the ground that the bridge is a public nuisance, from which the State receives a particular injury to its property beyond that which the public in general sustain. And the foundation of her claim, as stated in the bill, is, that the bridge is an unlawful obstruction to the navigation of a public river, and therefore a public nuisance. The immense mass of testimony, contained in this record, is directed almost altogether to that point. In order, therefore to maintain the bill, it is incumbent upon the State to show that this bridge is a public nuisance. And, if it is a public nuisance, it must be because it is a violation of some law which this court has a right to administer.

In examining this question, it must be borne in mind that, although the suit is brought in this court, the law of the case and the rights of the parties are the same as if it had been brought in the Circuit Court of Virginia, in which the bridge is situated. Pennsylvania, as a State, has the right to sue in this court. But a suit here merely changes the forum, and does not change the law of the case or the rights of the parties. And if, in the Circuit Court of the United States, sitting in Virginia, this bridge could not be adjudged a nuisance, and abated as such, neither can it be done in this court. The State, in this controversy, has the same rights as an individual, and nothing more. And the court is bound to administer to the State here the same law that would be administered to an individual suitor, suing for a like cause, in a Circuit Court of the United States, sitting in the State where the bridge is erected.

Assuming, then, that it does obstruct a public navigable river, and would, at common law, be a public nuisance, I proceed to inquire whether this court is authorized to declare it to be such, and order it to be abated.

The Ohio being a public navigable stream, Congress have undoubtedly the power to regulate commerce upon it. They have the right to prohibit obstructions to its navigation; to declare any such obstruction a public nuisance; to direct the mode of proceeding in the courts of the United States to remove it; and to punish anyone who may erect or maintain it; or it may declare what degree or description of obstruction shall be a public nuisance: as, for example, the height of a bridge over the river, or the distance to which a wharf may be extended into its navigable waters.

But this power has not been exercised. There is no law of the United States declaring an obstruction in the Ohio or nay other navigable river, to be a public nuisance, and directing it to be abated as such. Nor is there any act of Congress regulating the height of bridges over the river. We can derive no jurisdiction, therefore, upon this subject, from any law of the United States, and if we exercise it we must derive our authority from some other source.

But we cannot derive it from the common law. For it has been settled, since the beginning of this government, that the courts of the United States as such, have no common-law jurisdiction, civil or criminal, unless conferred upon them by act of Congress. It is true that the courts of the United States, when sitting in a State, administer the common law, where it has been adopted by the State. But it is administered as the law of the State, under the authority and direction of the act of Congress, which makes the laws of the State the rule of decision in a court of the United States, when sitting in the State, provided such laws are not contrary to the Constitution, laws, or treaties, of the United States. We cannot, under the rule of decision thus prescribed, adjudge this bridge to be a nuisance, although it may obstruct the navigation of the river, unless it is a nuisance by the common law, as adopted in Virginia and modified by its statutes. But this bridge was built under the authority of a statute of the State. The structure, in its present form, has been sanctioned by the legislature. It is therefore no offence against the laws of the State; and a Circuit Court of the United States, sitting in the State and governed by its laws, when not in conflict with the Constitution or laws of the United States, or treaties, could not order it to be abated as a public nuisance; and this court has no higher power over this subject, either at law or in equity, nor any other rule to guide it, than a Circuit Court sitting in Virginia. And as the bridge is not a nuisance by the laws of that State, and there is no act of Congress making the obstruction of a public river an offence against the United States, and we have no common law to which the court may resort for jurisdiction, I do not understand by what law, or under what authority, this court can adjudge it to be a public nuisance and proceed to abate it, either upon a proceeding in chancery or by a process at law. ***

If, therefore, there be an evil, it may easily be corrected by the legislative authority of the general government. But if Congress have not thought proper, or do not think proper, to exercise this power, and public mischief has arisen, or may arise from it, it does not follow that the judicial power of the United States may step in and supply what the legislative authority has omitted to perform. It does not by any means follow that the judicial power may declare an obstruction in or over a navigable stream, an offence against the United States before the legislative power has forbidden it, and conferred authority upon the courts to punish or remove it.***

Missouri v. Illinois, 200 U.S. 496 (1906)

Justice Holmes delivered the opinion of the Court.

This is a suit brought by the State of Missouri to restrain the discharge of the sewage of Chicago through an artificial channel into the Desplaines River, in the State of Illinois. That river empties into the Illinois River, and the latter empties into the Mississippi at a point about forty-three miles above the city of St. Louis. It was alleged in the bill that the result of the threatened discharge would be to send fifteen hundred tons of poisonous filth daily into the Mississippi, to deposit great quantities of the same upon the part of the bed of the last-named river belonging to the plaintiff, and so to poison the water of that river, upon which various of the plaintiff's cities, towns and inhabitants depended, as to make it unfit for drinking, agricultural, or manufacturing, purposes. It was alleged that the defendant Sanitary District was acting in pursuance of a statute of the State of Illinois and as an agency of that State. The case is stated at length in 180 U.S. 208, where a demurrrer to the bill was overruled. A supplemental bill alleges that since the filing of the original bill the drainage canal has been opened and put into operation and has produced and is producing all the evils which were apprehended when the injunction first was asked. The answers deny the plaintiff's case, allege that the new plan sends the water of the Illinois River into the Mississippi much purer than it was before, that many towns and cities of the plaintiff along the Missouri and Mississippi discharge their sewage into those rivers, and that if there is any trouble the plaintiff must look nearer home for the cause.

The decision upon the demurrer discussed mainly the jurisdiction of the court, and, as leave to answer was given when the demurrer was overruled, naturally there was no very precise consideration of the principles of law to be applied if the plaintiff should prove its case. That was left to the future with the general intimation that the nuisance must be made out upon determinate and satisfactory evidence, that it must not be doubtful and that the danger must be shown to be real and immediate. The nuisance set forth in the bill was one which would be of international importance–a visible change of a great river from a pure stream into a polluted and poisoned ditch. The only question presented was whether as between the States of the Union this court was competent to deal with a situation which, if it arose between independent sovereignties, might lead to war. ***

The first question to be answered was put in the well known case of the Wheeling bridge. Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518. In that case, also, there was a bill brought by a State to restrain a public nuisance, the erection of a bridge alleged to obstruct navigation, and a supplemental bill to abate it after it was erected. The question was put most explicitly by the dissenting judges but it was accepted by all as fundamental. The Chief Justice observed that if the bridge was a nuisance it was an offence against the sovereignty whose laws had been violated, and he asked what sovereignty that was. 13 How. 581; Daniel, J., 13 How. 599. *See also* Kansas v. Colorado, 185 U.S. 125. It could not be Virginia, because that State had purported to authorize it by statute. The Chief Justice found no prohibition by the United States. 13 How. 580. No third source of law was suggested by any one. The majority accepted the Chief Justice's postulate, and found an answer in what Congress had done.

It hardly was disputed that Congress could deal with the matter under its power to regulate commerce. The majority observed that although Congress had not declared in terms that a State should not obstruct the navigation of the Ohio, by bridges, yet it had regulated navigation upon that river in various ways and had sanctioned the compact between Virginia and Kentucky when Kentucky was let into the Union. By that compact the use and navigation of the Ohio, so far as the territory of either State lay thereon, was to be free and common to the citizens of the United States. The compact, by the sanction of Congress, had become a law of the Union. A state law which violated it was unconstitutional. Obstructing the navigation of the river was said to violate it, and it was added that more was not necessary to give a civil remedy for an injury done by the obstruction. 13 How. 565, 566. At a later stage of the case, after Congress had authorized the bridge, it was stated again in so many words that the ground of the former decision was that "the act of the Legislature of Virginia afforded no authority or justification. It was in conflict with the acts of Congress, which were the paramount law." 18 How. 421, 430.

In the case at bar, whether Congress could act or not, there is no suggestion that it has forbidden the action of Illinois. The only ground on which that State's conduct can be called in question is one which must be implied from the words of the Constitution. The Constitution extends the judicial power of the United States to controversies between two or more States and between a State and citizens of another State, and gives this court original jurisdiction in cases in which a State shall be a party. Therefore, if one State raises a controversy with another, this court must determine whether there is any principle of law and, if any, what, on which the plaintiff can recover. But the fact that this court must decide does not mean, of course, that it takes the place of a legislature. Some principles it must have power to declare. For instance, when a dispute arises about boundaries, this court must determine the line, and in doing so must be governed by rules explicitly or implicitly recognized. Rhode Island v. Massachusetts, 12 Pet. 657, 737. It must follow and apply those rules, even if legislation of one or both of the States seems to stand in the way. But the words of the Constitution would be a narrow ground upon which to construct and apply to the relations between States the same system of municipal law in all its details which would be applied between individuals. If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be the establishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States sanctioned by the legislature of the United States.

The difficulties in the way of establishing such a system of law might not be insuperable, but they would be great and new. Take the question of prescription in a case like the present. The reasons on which prescription for a public nuisance is denied or may be granted to an individual as against the sovereign power to which he is subject have no application to an independent state. *See* 1 Oppenheim, International Law, 293, §§ 242, 243. It would be contradicting a fundamental principle of human nature to allow no effect to the lapse of time, however long, Davis v. Mills, 194 U.S. 451, 457, yet the fixing of a definite time usually belongs to the legislature rather than the courts. The courts did fix a time in the rule against perpetuities, but the usual course, as in the instances of statutes of limitation, the duration of patents, the age of majority, etc., is to depend upon the lawmaking power.

It is decided that a case such as is made by the bill may be a ground for relief. The purpose of the foregoing observations is not to lay a foundation for departing from that decision, but simply to illustrate the great and serious caution with which it is necessary to approach the question whether a case is proved. It may be imagined that a nuisance might be created by a State upon a navigable river like the Danube, which would amount to a casus belli for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi the controversy would be resolved by the more peaceful means of a suit in this court. But it does not follow that every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction equally would warrant an interference by this court with the action of a State. It hardly can be that we should be justified in declaring statutes ordaining such action void in every instance where the Circuit Court might intervene in a private suit, upon no other ground than analogy to some selected system of municipal law, and the fact that we have jurisdiction over controversies between States. ***

Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side. *See* Kansas v. Colorado, 185 U.S. 125.

As to the principle to be laid down the caution necessary is manifest. It is a question of the first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity. To decide the whole matter at one blow by an irrevocable fiat would be at least premature. If we are to judge by what the plaintiff itself permits, the discharge of sewage into the Mississippi by cities and towns is to be expected. We believe that the practice of discharging into the river is general along its banks, except where the levees of Louisiana have led to a different course. The argument for the plaintiff asserts it to be proper within certain limits. These are facts to be considered. Even in cases between individuals some consideration is given to the practical course of events. In the black country of England parties would not be expected to stand upon extreme rights. St. Helen's Smelting Co. v. Tipping, 11 H.L.C. 642. *See* Boston Ferrule Co. v. Hills, 159 Massachusetts, 147, 150. Where, as here, the plaintiff has sovereign powers and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but, as some of those discharges are above the intake of St. Louis, it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that courts should not be curious to apportion the blame.

We have studied the plaintiff's statement of the facts in detail and have perused the evidence, but it is unnecessary for the purposes of decision to do more than give the general result in a very simple way. At the outset we cannot but be struck by the consideration that if this suit had been brought fifty years ago it almost necessarily would have failed. There is no pretense that there is a nuisance of the simple kind that was known to the older common law. There is nothing which can be detected by the unassisted senses—no visible increase of filth, no new smell. On the contrary, it is proved that the great volume of pure water from Lake Michigan which is mixed with the sewage at the start has improved the Illinois River in these respects to a noticeable extent. Formerly it was sluggish and ill smelling. Now it is a comparatively clear stream to which edible fish have returned. Its water is drunk by the fishermen, it is said, without evil results. ***

We might go more into detail, but we believe that we have said enough to explain our point of view and our opinion of the evidence as it stands. What the future may develop of course we cannot tell. But our conclusion upon the present evidence is that the case proved falls so far below the allegations of the bill that it is not brought within the principles heretofore established in the cause. ***

***New Jersey v. City of New York*, 283 U.S. 473 (1931)**

Justice Butler delivered the opinion of the Court.

New Jersey invokes our original jurisdiction under § 2, Art. III of the Constitution.The complaint alleges that the City of New York for many years has dumped and still is dumping noxious, offensive and injurious materials -- all of which are for brevity called garbage -- into the ocean; that great quantities of the same, moving on or near the surface of the water, frequently have been and are being cast upon the beaches belonging to the State, its municipalities and its citizens, thereby creating a public nuisance and causing great and irreparable injury. It prays an injunction restraining the City from dumping garbage into the ocean or waters of the United States off the coast of New Jersey and from otherwise polluting its waters and beaches.

Defendant by its amended answer denies the allegations that constitute the gravamen of the complaint.

For a first defense it states that for many years it has dumped garbage into the Atlantic Ocean under the supervision of the supervisor of the harbor of New York and in accordance with permits issued by him under the Act of June 29, 1888 (33 U. S. C., §§ 441, 443, 449 and 451) at points about 8, 12 and 20 miles southeast from the Scotland Lightship and about 10, 12 1/2 and 22 miles respectively from the New Jersey shore and not in the waters of New Jersey or of the United States, and that in view of these facts the Court has no authority to enjoin it from so dumping garbage.

And for a second defense it alleges that for many years garbage in large quantities has been and is being dumped by others inside and outside the entrance of the harbor and at various places from 2 1/2 to 8 miles from the New Jersey shore and at other places from 3 to 25 miles southeast of Scotland Light, that this material would float upon the New Jersey beaches alleged to have been polluted, that it is impossible to determine whether garbage dumped by defendant is carried to such beaches, and that, if any injury or damage is suffered by New Jersey, its municipalities or citizens, the injury is not chargeable to defendant.

And for a third defense it alleges that the complaint fails to state facts sufficient to entitle plaintiff to any relief.

The Court appointed Edward K. Campbell as Special Master and authorized him to take and report the evidence together with his findings of fact, conclusions of law and recommendations for a decree. The Master filed his report and the evidence introduced by the parties. It sets forth his findings, conclusions, and recommendations.***

New Jersey borders on the Atlantic for about 100 miles. The shore principally involved extends from Atlantic Highlands southerly 50 miles to Beach Haven. On this stretch of shore, there are 29 municipalities. The State has conveyed or leased portions of the frontage to municipalities and individuals. It still owns 285,000 lineal feet between Sea Bright and Beach Haven. Municipalities have about 13,000 lineal feet and private parties the rest. The assessed value of property within these municipalities exceeds $139,000,000, and their population is more than 160,000. They are summer resorts, and the number of summer visitors is many times greater than their population. The beaches are gently sloping and wide and have been improved at great expense. The ocean and bathing, fishing and boating are the principal attractions. Inhabitants of the municipalities chiefly depend for their livelihood upon the business of maintaining these summer resorts. Approximately 500 persons are engaged in the operation of fish pounds constructed under authority of the State within three nautical miles from the coastline. This is a commercial activity that results in the taking of large quantities of fish annually.

Vast amounts of garbage are cast on the beaches by the waters of the ocean and extend in piles and windrows along them. These deposits are unsightly and noxious, constitute a menace to public health and tend to reduce property values. Prompt removal is necessary, and men are regularly employed to haul them away. At times there are 50 truckloads deposited on a single beach. When garbage is carried upon the shore the adjacent waters hold large quantities in suspension. Floating garbage makes bathing impracticable, frequently tears and damages fish pound nets and injuriously affects the business of fishing. Usually the sea along the shore clears within a few days and sometimes within a single day. The deposits generally occur when the winds are from the east or northeast, but sometimes southeast winds bring them in. The heavier deposits occur four or five times in a season and frequently throughout the year, varying in number on different beaches.

For about 20 years prior to 1918 defendant disposed of its garbage by a reduction system and, except for a brief period in 1906, did not dump any at sea. A plant was destroyed by fire in 1917 and a contractor failed. It then applied to the supervisor of the harbor for permission to dispose of its garbage at sea and, because of the conditions then existing, he gave such permission and designated a dumping place. But later, because of complaint from New Jersey beaches, he designated the areas specified in defendant's answer. The defendant has installed and uses some incinerating plants but, by reason of increasing population and volume of garbage, the quantities still being dumped at sea are very large.

Weather permitting, the City dumps garbage daily. Less is dumped in the winter than in the summer. In February, 1929, the quantity was 52,000 cubic yards, while in June of the same year it was 192,000. When dumped, the mass forms piles about a foot above the water, spreads over the surface and breaks into large areas. Some materials remain on the surface and others are held in suspension. These masses float for indefinite periods and have been found to move at the rate of more than a mile per hour. Areas of garbage have been seen between the dumping places and the New Jersey beaches, and some have been followed from the place where dumped to the shore. In his report to the chief of engineers for 1918 and in each of his subsequent annual reports the supervisor of the harbor of New York stated that garbage deposited in the sea, no matter what the distance from the shore, is liable to wash up on the beaches.

The Master concluded that large parts of these floating and submerged areas of garbage, dumped by the defendant, are driven and carried by winds and water to and upon the shores of the plaintiff, and constitute the objectionable materials thereon and in the adjacent water.

In 1907 a committee appointed by the mayor reported to him: "All of the refuse collections could be dumped into the Atlantic ocean, but unfortunately the least harmful material sinks and the foulest floats, so that much of the floatable mass will be scattered along beaches through the action of current and wind. This fouling of beaches creates a nuisance that the public should not be asked to tolerate." In June, 1921, a committee composed of heads of departments and officials of the City reported to the mayor: "Aside, however, from the question of cost it seems undesirable to dump garbage at sea as it is being done at present. It is known that the Federal authorities quietly resent, if they do not openly object to it, and there is always the possibility of objections from other communities which have in the past claimed that they have been injured by the practice. When these objections become sufficiently strong it may be that New York will find itself so unprepared as to be unable to quickly introduce a more satisfactory form of disposal." The defendant, through its mayor and other representatives, has for years been informed that the dumping of its garbage is undesirable, and that other municipalities by the sea have suffered injury as the result of such dumping. Governors and the legislature of New Jersey have repeatedly complained to defendant. In 1929 the City had 20 incinerators and considerable garbage is being destroyed by them. In December of that year the department of sanitation presented to the mayor a program for increasing the number. The cause of the delay in providing an adequate disposal system was not shown.

The Master concluded that the method of disposing of garbage by dumping at sea was not an approved or a good system and disposition of such material by incineration or the "reduction system" was a proper way to dispose of the same. He found that the delay of defendant in adopting a proper method of disposal had been unreasonably long.

The Master found that whatever garbage reaches the plaintiff's shores from vessels and other dumpings than those of the defendant was negligible in comparison with that constantly being dumped by the defendant.

As his conclusions of law, the Master reports that the defendant has created and continues to create a public nuisance on the property of New Jersey and that the latter is entitled to relief in accordance with the prayer of its complaint, but that defendant should be given reasonable time within which to put into operation sufficient incinerators. He recommends that decree be entered accordingly. ***

Defendant contends that, as it dumps the garbage into the ocean and not within the waters of the United States or of New Jersey, this Court is without jurisdiction to grant the injunction. But the defendant is before the Court and the property of plaintiff and its citizens that is alleged to have been injured by such dumping is within the Court's territorial jurisdiction. The situs of the acts creating the nuisance, whether within or without the United States, is of no importance. Plaintiff seeks a decree in personam to prevent them in the future. The Court has jurisdiction. Cf. Massie *v.* Watts, 6 Cranch 148, 158 et seq. Hart v. Sansom, 110 U.S. 151, 154. Cole v. Cunningham*,* 133 U.S. 107, 116. Philadelphia Co. v. Stimson*,* 223 U.S. 605, 622-623.

There is no merit in defendant's contention, suggested in its amended answer, that compliance with the supervisor's permits in respect of places designated for dumping of its garbage leaves the Court without jurisdiction to grant the injunction prayed and relieves defendant in respect of the nuisance resulting from the dumping. There is nothing in the Act that purports to give to one dumping at places permitted by the supervisor immunity from liability for damage or injury thereby caused to others or to deprive one suffering injury by reason of such dumping of relief that he otherwise would be entitled to have. There is no reason why it should be given that effect.

The Master's conclusions of law and recommendations for a decree are approved. A decree will be entered declaring that the plaintiff, the State of New Jersey, is entitled to an injunction as prayed in the complaint, but that before injunction shall issue a reasonable time will be accorded to the defendant, the City of New York, within which to carry into effect its proposed plan for the erection and operation of incinerators to destroy the materials such as are now being dumped by it at sea or to provide other means to be approved by the decree for the disposal of such materials. And, in as much as the evidence does not disclose what is such reasonable time the case is referred to the same Special Master for findings of fact upon that subject. ***

***Illinois v. City of Milwaukee*, 406 U.S. 91 (1972)**

Justice Douglas delivered the opinion of the Court.

This is a motion by Illinois to file a bill of complaint under our original jurisdiction against four cities of Wisconsin, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee. The cause of action alleged is pollution by the defendants of Lake Michigan, a body of interstate water. According to plaintiff, some 200 million gallons of raw or inadequately treated sewage and other waste materials are discharged daily into the lake in the Milwaukee area alone. Plaintiff alleges that it and its subdivisions prohibit and prevent such discharges, but that the defendants do not take such actions. Plaintiff asks that we abate this public nuisance.***

II.

Title 28 U. S. C. § 1331 (a) provides that “the district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $ 10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.”

The considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount provided in § 1331 (a). See Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co., 239 U.S. 121; Mississippi & Missouri R. Co. v. Ward, 2 Black 485, 492; Ronzio v. Denver & R. G. W. R. Co., 116 F.2d 604, 606; C. Wright, The Law of Federal Courts 117-119 (2d ed. 1970); Note, 73 Harv. L. Rev. 1369. The question is whether pollution of interstate or navigable waters creates actions arising under the "laws" of the United States within the meaning of § 1331 (a). We hold that it does; and we also hold that § 1331 (a) includes suits brought by a State.

Mr. Justice Brennan, speaking for the four members of this Court in Romero v. International Terminal Operating Co., 358 U.S. 354, 393 (dissenting and concurring), who reached the issue, concluded that “laws,” within the meaning of § 1331 (a), embraced claims founded on federal common law:

“The contention cannot be accepted that since petitioner's rights are judicially defined, they are not created by ‘the laws . . . of the United States’ within the meaning of § 1331 . . . . In another context, that of state law, this Court has recognized that the statutory word ‘laws’ includes court decisions. The converse situation is presented here in that federal courts have an extensive responsibility of fashioning rules of substantive law . . . . These rules are as fully ‘laws’ of the United States as if they had been enacted by Congress.” (Citations omitted.) ***

We see no reason not to give “laws” its natural meaning, see Romero v. International Terminal Operating Co., supra, at 393 n. 5 (Brennan, J., dissenting and concurring), and therefore conclude that § 1331 will support claims founded upon federal common law as well as those of a statutory origin.

As respects the power of a State to bring an action under § 1331 (a), Ames v. Kansas, 111 U.S. 449, 470-472, is controlling. There Kansas had sued a number of corporations in its own courts and, since federal rights were involved, the defendants had the cases removed to the federal court. Kansas resisted, saying that the federal court lacked jurisdiction because of Art. III, § 2, cl. 2, of the Constitution, which gives this Court “original Jurisdiction” in “all Cases . . . in which a State shall be Party.” The Court held that where a State is suing parties who are not other States, the original jurisdiction of this Court is not exclusive (Id. at 470) and that those suits “may now be brought in or removed to the Circuit

Courts [now the District Courts] without regard to the character of the parties." Ibid. We adhere to that ruling.

III.

Congress has enacted numerous laws touching interstate waters. In 1899 it established some surveillance by the Army Corps of Engineers over industrial pollution, not including sewage, Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, a grant of power which we construed in United States v. Republic Steel Corp., 362 U.S. 482, and in United States v. Standard Oil Co., 384 U.S. 224.

The 1899 Act has been reinforced and broadened by a complex of laws recently enacted. The Federal Water Pollution Control Act, 62 Stat. 1155, as amended, 33 U. S. C. § 1151, tightens control over discharges into navigable waters so as not to lower applicable water quality standards. By the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U. S. C. § 4321 et seq., Congress "authorizes and directs" that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act" and that "all agencies of the Federal Government shall . . . identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations." Sec. 102, 42 U. S. C. § 4332. Congress has evinced increasing concern with the quality of the aquatic environment as it affects the conservation and safeguarding of fish and wildlife resources. See, e.g., Fish and Wildlife Act of 1956, 70 Stat. 1119, 16 U.S.C. § 742a; the Act of Sept. 22, 1959, 73 Stat. 642, authorizing research in migratory marine game fish, 16 U. S. C. § 760e; and the Fish and Wildlife Coordination Act, 48 Stat. 401, as amended, 16 U. S. C. § 661.

Buttressed by these new and expanding policies, the Corps of Engineers has issued new Rules and Regulations governing permits for discharges or deposits into navigable waters. 36 Fed. Reg. 6564 et seq.

The Federal Water Pollution Control Act in § 1 (b) declares that it is federal policy "to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution." But the Act makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters.[1] While the States are given time to establish water quality standards, § 10 (c)(1), if a State fails to do so the federal administrator 4
promulgates one. § 10 (c)(2). Section 10 (a) makes pollution of interstate or

3 The contrary indication in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n. 3, was based on the preoccupation of that litigation with public nuisance under Ohio law, not the federal common law which we now hold is ample basis for federal jurisdiction under 28 U. S. C. § 1331 (a).

navigable waters subject "to abatement" when it "endangers the health or welfare of any persons." [*103] The abatement that is authorized follows a long-drawn-out procedure unnecessary to relate here. It uses the conference procedure, hoping for amicable settlements. But if none is reached, the federal administrator may request the Attorney General to bring suit on behalf of the United States for abatement of the pollution. § 10 (g).

The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." Textile Workers v. Lincoln Mills, 353 U.S. 448, 457. When we deal with air and water in their ambient or interstate aspects, there is a federal common law, as Texas v. Pankey, 441 F.2d 236, recently held.

The application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act. Congress provided in § 10 (b) of that Act that, save as a court may decree otherwise in an enforcement action, "state and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not . . . be displaced by Federal enforcement action." ***

Our decisions concerning interstate waters contain the same theme. Rights in interstate streams, like questions of boundaries, "have been recognized as presenting federal questions." Hinderlider v. La Plata Co., 304 U.S. 92, 110. The question of apportionment of interstate waters is a question of "federal common law" upon which state statutes or decisions are not conclusive. Ibid. ***

When it comes to water pollution this Court has spoken in terms of "a public nuisance," New York v. New Jersey, 256 U.S., at 313; New Jersey v. New York City, 283 U.S. 473, 481, 482. In Missouri v. Illinois, 200 U.S. 496, 520-521, the Court said, "It may be imagined that a nuisance might be created by a State upon a navigable river like the Danube, which would amount to a casus belli for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi the controversy would be resolved by the more peaceful means of a suit in this court."

It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. While federal law governs, consideration of state standards may be relevant. Cf. Connecticut v. Massachusetts, 282 U.S. 660, 670; Kansas v. Colorado, 185 U.S. 125, 146-147. Thus, a State with high water-quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor. There are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern.

We deny, without prejudice, the motion for leave to file. While this original suit normally might be the appropriate vehicle for resolving this controversy, we exercise our discretion to remit the parties to an appropriate district court whose powers are adequate to resolve the issues. ***

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971)

Justice Harlan delivered the opinion of the Court.

By motion for leave to file a bill of complaint, Ohio seeks to invoke this Court's original jurisdiction. Because of the importance and unusual character of the issues tendered we set the matter for oral argument, inviting the Solicitor General to participate and to file a brief on behalf of the United States, as *amicus curiae*. For reasons that follow we deny the motion for leave to file.

The action, for abatement of a nuisance, is brought on behalf of the State and its citizens, and names as defendants Wyandotte Chemicals Corp. (Wyandotte), Dow Chemical Co. (Dow America), and Dow Chemical Company of Canada, Ltd. (Dow Canada). Wyandotte is incorporated in Michigan and maintains its principal office and place of business there. Dow America is incorporated in Delaware, has its principal office and place of business in Michigan, and owns all the stock of Dow Canada. Dow Canada is incorporated, and does business, in Ontario. A majority of Dow Canada's directors are residents of the United States.

The complaint alleges that Dow Canada and Wyandotte have each dumped mercury into streams whose courses ultimately reach Lake Erie, thus contaminating and polluting that lake's waters, vegetation, fish, and wildlife, and that Dow America is jointly responsible for the acts of its foreign subsidiary. Assuming the State's ability to prove these assertions, Ohio seeks a decree: (1) declaring the introduction of mercury into Lake Erie's tributaries a public nuisance; (2) perpetually enjoining these defendants from introducing mercury into Lake Erie or its tributaries; (3) requiring defendants either to remove the mercury from Lake Erie or to pay the costs of its removal into a fund to be administered by Ohio and used only for that purpose; (4) directing defendants to pay Ohio monetary damages for the harm done to Lake Erie, its fish, wildlife, and vegetation, and the citizens and inhabitants of Ohio.

Original jurisdiction is said to be conferred on this Court by Art. III of the Federal Constitution. Section 2, cl. 1, of that Article, provides: "The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State . . .

and between a State . . . and foreign . . . Citizens or Subjects." Section 2, cl. 2, provides: "In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction." Finally, 28 U. S. C. § 1251 (b) provides: "The Supreme Court shall have original but not exclusive jurisdiction of . . . (3) All actions or proceedings by a State against the citizens of another State or against aliens."

While we consider that Ohio's complaint does state a cause of action that falls within the compass of our original jurisdiction, we have concluded that this Court should nevertheless decline to exercise that jurisdiction. ***
Thus, we think it apparent that we must recognize "the need [for] the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States." *Massachusetts* v. *Missouri*, 308 U.S. 1, 19 (1939), opinion of Chief Justice Hughes. See also *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 464-465 (1945), and *id. at* 469-471 (dissenting opinion).[3]

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[3] In our view the federal statute, 28 U. S. C. § 1251 (b)(3), providing that our original jurisdiction in cases such as these is merely concurrent with that of the federal district courts, reflects this same judgment. However, this particular case cannot be disposed of by transferring it to an appropriate federal district court since this statute by itself does not actually confer jurisdiction on those courts, see C. Wright, Federal Courts 502 (2d ed. 1970), and no other statutory jurisdictional basis exists. The fact that there is diversity of citizenship among the parties would not support district court jurisdiction under 28 U. S. C. § 1332 because that statute does not deal with cases in which a State is a party. Nor would federal question jurisdiction exist under 28 U. S. C. § 1331. So far as it appears from the present record, an action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

Chapter 3: General Maritime Law Remedies for Pollution

California v. S.S. BOURNEMOUTH, 307 F. Supp. 922 (C.D. Cal. 1969)

Warren J. Ferguson, District Judge:

The plaintiff, State of California, by and through its Department of Fish and Game, filed a complaint *in rem* against the vessel S.S. *Bournemouth* to recover damages incurred by discharging a quantity of bunker oil into the navigable waters of the State of California and of the United States.

The complaint alleges that the S.S. *Bournemouth* (hereinafter called "*Bournemouth"*) is a ship of the Liberian Flag, Lloyds Registry Identification Number 516-2504, Official Number 720, owned and operated by Bournemouth Shipping Company, Monrovia, Liberia, and presently under charter to States Marine Lines, Inc., a Delaware corporation.

The acts complained of allegedly occurred on or about October 3, 1969, while the *Bournemouth* was moored in the navigable waters at Long Beach, California, Berth 10, Pier A, to discharge cargo. Plaintiff seeks relief in the form of damages to compensate for injury to property arising out of pollution to the water and for costs of abatement.

The *Bournemouth,* while lying at anchor at Berth 10, Pier A, Long Beach, California, was seized, arrested and taken into possession October 5, 1969, by the United States Marshal for the Central District of California subject to a warrant for arrest in an action *in rem*. A bond was posted, and the *Bournemouth* was permitted to leave the United States.

The defendant made a restricted appearance under Admiralty and Maritime Claims Rule E(8) and moved to dismiss for lack of jurisdiction over the subject matter, lack of jurisdiction over the vessel, and failure to state a cause of action. The defendant's motion is premised on the belief that the plaintiff acted solely under authority granted in Sections 151 and 152 of the California Harbors and Navigation Code, which both parties concede does not provide for a remedy *in rem*. Defendant urges that since Section 151 does not provide for a lien or privilege upon the offending thing, the plaintiff is not entitled to proceed *in rem,* but is entitled to prosecute the matter only by obtaining *in personam* jurisdiction over the owners of the vessel. The motion correctly asserts, and it is not contested by plaintiff, that a maritime lien is a necessary condition to a suit *in rem* in admiralty. Duchess, 1926 A.M.C. 1389, 15 F.(2d) 198, 199 (E.D.N.Y., 1926), Resolute, 168 U.S. 437, 440 (1897).

Plaintiff in opposition to the motion to dismiss points out that the complaint contained no mention of the California Harbors and Navigation Code. Plaintiff urges instead, that the act of causing oil to be placed in the navigable waters of the State is a maritime tort: (1) within the admiralty jurisdiction of the United States pursuant to 46 U.S. Code sec. 740; and (2) states a cause of action long recognized by admiralty courts without the existence of a statute.

The Statutory Basis.

Defendant, in reply to plaintiff's opposition to the motion to dismiss, agrees with plaintiff that 46 U.S. Code, sec. 740 is applicable, conceding that "pollution of harbor waters obviously is a maritime tort which is within the admiralty jurisdiction of this court." This court has jurisdiction pursuant to 28 U.S. Code, sec. 1333(1). Defendant argues, however, that jurisdiction under 46 U.S. Code, sec. 740 as applied to the facts of this case, is *in personam* and not *in rem,* requiring the court to dismiss for want of jurisdiction over the vessel in the absence of a maritime lien to support this action.

Both parties, however, are in error in relying on 46 U.S. Code, sec. 740. The statute, designated the Extension of Admiralty Jurisdiction Act, provides:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, *notwithstanding that such damage or injury be done or consummated on land.* (Emphasis added.)

"In any such case suit may be brought *in rem* or *in personam* according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided,* That as to any suit for damage or injury done or consummated on land by a vessel on navigable waters, * * *."

While the Constitution of the United States establishes that the federal judicial power extends to "all cases of admiralty and maritime Jurisdiction" the boundaries of that jurisdiction were left to the courts to define. Historically, the single most important factor in determining whether a tort was within the scope of the admiralty court's jurisdiction was the situs of the occurrence. In Plymouth, 70 U.S. 20, 33-34 (1865), the Court stated:

"In the case of *Thomas* vs. *Lane,* Mr. Justice STORY, in a case where the imprisonment was stated in the libel to be on shore, observed: 'In regard to torts, I have always understood that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never, I believe, deliberately claimed to have, any jurisdiction over torts, except such as are maritime torts; that is, torts upon the high seas, or on waters within the ebb and flow of the tide.' Since the case of the *Genessee Chief,* navigable waters may be substituted for tide waters. This view of the jurisdiction over maritime torts has not been denied."

The Court, in Plymouth, supra, at 36, also stated as dictum that the jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters.

Strict application of the locality rule has often resulted in obvious inequities. Actions in tort for damages to a bridge, Troy, 208 U.S. 321 (1908); to a pier, Curtin, 152 Fed. 588 (E.D. Pa., 1907); or to a building struck by a vessel, Johnson vs. Chicago & Pacific Elev. Co., 119 U.S. 388 (1886), for example, as extensions of the land, have historically been held not within the maritime jurisdiction. As a consequence, while the vessel could bring an action in admiralty for damages, and benefit from the substantive and procedural advantages peculiar to admiralty jurisdiction, the owner of the land-based property had no recourse for relief but to the local law of the place of the injury.

Adoption of the Extension of Admiralty Jurisdiction Act (46 U.S. Code, sec. 740) was intended to modify the traditional rule that tort jurisdiction in admiralty did not embrace damage consummated on land. The legislative history clearly indicates that the Act makes available a concurrent remedy in admiralty for the existing common-law action. No new cause of action was contemplated by Congress in passing the Act; rather those causes of action which the cases have termed "ship-to-shore" torts now have a new form of relief available in admiralty. Fematt vs. City of Los Angeles, 1961 A.M.C. 2391, 196 F. Supp. 89 (S.D. Cal., 1961); United States vs. Matson Nav. Co., 1953 A.M.C. 272, 201 F.(2d) 610 (9 Cir., 1953); Nacirema Co. vs. Johnson, 396 U.S. 212, 1969 A.M.C. 1967 (slip sheet opinion dated December 9, 1969, pp. 9-11).

In the complaint filed by the plaintiff, State of California, no injury caused by a vessel on navigable water, "done or consummated on land" was alleged. Here, the injury was to the water itself and presumably the marine life therein. It appears that reliance on 46 U.S. Code, sec. 740 is unwarranted and misplaced. Another basis must therefore be found to exist in order to bring this type of action within the admiralty jurisdiction of the United States and subject the *Bournemouth* to *in rem* jurisdiction in this court. Otherwise, the plaintiff would be left with common-law remedies *in personam* against the owners of the vessel only.

The Maritime Tort Basis.

Plaintiff alternatively urges that injury caused by oil pollution to its navigable waters states a maritime cause of action giving rise to a maritime lien and a suit *in rem* in admiralty independent of any statute. Defendant, on the other hand, contends that not every maritime tort results in a maritime lien, which lien both parties agree is a condition precedent to an action *in rem*. Defendant takes the position that only two types of maritime torts create maritime liens: collision claims and personal injury claims.

The issue before the court in ruling on defendant's motion to dismiss is therefore a narrow one. Stated simply, the issue is whether the tort of injury to plaintiff's property (navigable waters and marine life) will give rise to a maritime lien and thereby support an admiralty action *in rem* against the *Bournemouth*.

The court finds no merit in defendant's position and is of the opinion that the tort in question is maritime in nature; that a maritime lien against the *Bournemouth* arises in favor of the plaintiff which will support an admiralty action *in rem,* as a matter of general maritime law without the aid or necessity of a statutory lien.

The general proposition advanced by defendant that not every maritime tort results in a maritime lien is not established by the cases cited by defendant in support of the proposition. ***

The court acknowledges the fact that the great bulk of maritime tort litigation involving suits *in rem* which hold that a maritime lien arises against the vessel falls within the two broad categories: collision claims and personal injury claims, suggested by defendant. The cases do not, however, support the view that these categories are all inclusive or that the tort liability of a vessel for its unlawful acts should be so limited. Nor can the court find support in any public policy or set of reasons advanced by defendant for so limiting maritime liens.

To give rise to a lien a claim must be in the first instance maritime. A number of cases and writers criticize the validity of the traditional locality test applied to maritime torts as being too narrow. It is nonetheless an adequate test on the facts of the instant case. While legislative "extensions of the admiralty tort jurisdiction" give tacit recognition to the proposition that the scope of the jurisdiction should logically depend on a relationship to maritime commerce generally, rather than on any fixed reliance on the situs of the injury, the tort complained of here occurred on the navigable waters of the State of California and is maritime in nature. Plymouth, *supra*. ***

A maritime tort involving no accident, and mere injury to property, is obviously out of the ordinary; collision and personal injury suits are common. But relative frequency of occurrence is not a reasonable standard by which an admiralty court will determine the range of appropriate remedies for various types of maritime torts. A number of cases recognize a maritime lien for injury to property by conversion.

In Escanaba, 96 Fed. 252 (N.D. Ill., 1899), the conversion by the master of the vessel of goods shipped thereon constituted a tort and the claim therefor by the owners of the goods against the vessel was given preference over liens for supplies furnished prior to the tort. In Atlanta, 1948 A.M.C. 1769, 82 F. Supp. 218 (S.D. Ga., 1948), the court held that a lien existed against the vessel for such tortious damages as conversion of property by the unauthorized use of a lighter by the ship's crew. Also, in Lydia, 1924 A.M.C. 1001, 1 F.(2d) 18 (2 Cir., 1924), where the libellant delivered coal to the vessel, the master after demand refused to issue a bill of lading therefor, departed with the coal and later disposed of it, the court, at page 23 of 1 F.(2d), page 1009 of 1924 A.M.C., stated: "Suit *in rem* for conversion is by no means unknown to the admiralty nor to this court . . . . The reason for the exercise of admiralty jurisdiction is that conversion is a tort, . . . and if that tort is committed on navigable waters, admiralty has jurisdiction." ***

Conclusion.

It is the view of this court that the general maritime law has consistently provided *in rem* relief to the owner of property tortiously damaged by conversion while such property is upon the navigable waters. While here the alleged injury was to the water itself, and possibly the marine life also, efforts to distinguish between various types of injury which may occur to various types of property would serve no useful purpose. Appropriate to such an exercise would be the language of Judge MORRIS of the Fourth Circuit in Anaces, supra, at 244, in which case an attempt was made by the defendant, not unlike the one made here by the defendant, to distinguish between kinds of tortious conduct in specific instances from tortious conduct in general:

"Every consideration of Justice and of convenience urges that the maritime lien, if it exists, should be maintained in cases like the present one. The owners of the vessel almost invariably are unknown and inaccessible. To require the libellant to serve process on them is practically to deny him any remedy. Under the statutes of the United States, the owners of all the vessel property, foreign and domestic, are given, to the fullest extent, the privilege of limiting their liability to the value of their interest in the vessel. The injured party cannot touch their property, outside of their interest in the ship, if they claim to limit their liability; and there are strong reasons of justice and convenience why he should have a maritime lien upon that specific property, and why distinctions, not founded in reason, between claims of the same general merit, should not gain a place in a system of jurisprudence which is intended to approach natural justice."

In the instant case it is admitted by defendant's counsel that the owners of the *Bournemouth* are not present and subject to personal service of process. It is further admitted that the vessel's present schedule does not call for her to return to the United States. The injury to property alleged to have been caused by defendant in discharging bunker oil into the navigable waters of the State of California is the basis for a claim of the same general merit as any conversion of property historically recognized by the general maritime law and is protected by the creation of a maritime lien.

Oil pollution of the nation's navigable waters by seagoing vessels both foreign and domestic is a serious and growing problem. The cost to the public, both directly in terms of damage to the water and indirectly of abatement, is considerable. In cases where it can be proven that such damage to property does in fact occur, the governmental agencies charged with protecting the public interest have a right of recourse *in rem* against the offending vessel for damages to compensate for the loss.

As a final basis and authority for the proposition that pollution of California's navigable waters by the *Bournemouth* created no maritime lien, defendant cites a bill to amend the Federal Water Pollution Control Act, H.R. 4148, 91st Cong., 1st Sess. (1969), recently passed by the United States House of Representatives.* Section 17(e) (1) of the bill expressly provides for a lien against a vessel for damage arising out of oil pollution to the navigable waters of the United States. The offending vessel would be liable *in rem* for the costs of abatement. The position of the defendant, in effect, is that if a maritime lien already existed for this type of damage the House would not have written a lien into the bill. This argument is without merit in light of existing federal statutes, 33 U.S. Code, secs. 433 and 434, which provide penalties for liability to the United States, including a lien in an action *in rem* against a vessel which discharges oil into the navigable waters of the United States. In 1966, Congress amended the Oil Pollution Act, 1924, for the purpose of expanding and providing incentives to curtail water pollution and to provide penalties to meet the costs of abatement. The original Act was designed primarily to protect the nation's coastal waters against pollution discharge from vessels. The 1966 amendments (Clean Water Restoration Act) extended the application of the 1924 Act to navigable and interstate as well as coastal waters and the adjoining shorelines. Oil discharges were prohibited not only from vessels but from boats, shore installations, and terminal facilities. The Oil Pollution Act, 1924, expressly provided that the statutory provisions were "in addition to the existing laws for the preservation and protection of navigable waters and shall not be construed as repealing, modifying, or in any manner affecting the provisions of these laws." The mere fact that Congress codifies a cause of action and provides a penalty creates no presumption of the nonexistence of similar rights at common law, here in the general maritime law, but is merely recognition of the significance a particular problem has in modern society. ***

***Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927)**

Justice Holmes delivered the opinion of the Court.

This is a libel by time charterers of the steamship Bjornefjord against the Dry Dock Company to recover for the loss of use of the steamer between August 1 and August 15, 1917.

By the terms of the charter party the steamer was to be docked at least once in every six months, and payment of the hire was to be suspended until she was again in proper state for service. In accordance with these terms the vessel was delivered to the petitioner and docked, and while there the propeller was so injured by the petitioner's negligence that a new one had to be put in, thus causing the delay for which this suit is brought. The petitioner seems to have had no notice of the charter party until the delay had begun, but on August 10, 1917, was formally advised by the respondents that they should hold it liable. It settled with the owners on December 7, 1917, and received a release of all their claims.

The present libel "in a cause of contract and damage" seems to have been brought in reliance upon an allegation that the contract for dry docking between the petitioner and the owners "was made for the benefit of the libellants and was incidental to the aforesaid charter party" &c. But it is plain, as stated by the Circuit Court of Appeals, that the libellants, respondents here, were not parties to that contract "or in any respect beneficiaries" and were not entitled to sue for a breach of it "even under the most liberal rules that permit third parties to sue on a contract made for their benefit." 13 F.2d 4. "Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least show that it was intended for his direct benefit." *German Alliance Insurance Co*. v. *Home Water Supply Co.,* 226 U.S. 220, 230. Although the respondents still somewhat faintly argue the contrary, this question seems to us to need no more words. But as the case has been discussed here and below without much regard to the pleadings we proceed to consider the other grounds upon which it has been thought that a recovery could be maintained.

The District Court allowed recovery on the ground that the respondents had a "property right" in the vessel, although it is not argued that there was a demise, and the owners remained in possession. This notion also is repudiated by the Circuit Court of Appeals and rightly. The question is whether the respondents have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter. If they have, it must be worked out through their contract relations with the owners, not on the postulate that they have a right *in rem* against the ship. ***

Of course the contract of the petitioner with the owners imposed no immediate obligation upon the petitioner to third persons, as we already have said, and whether the petitioner performed it promptly or with negligent delay was the business of the owners and of nobody else. But as there was a tortious damage to a chattel it is sought to connect the claim of the respondents with that in some way. The damage was material to them only as it caused the delay in making the repairs, and that delay would be a wrong to no one except for the petitioner's contract with the owners. The injury to the propeller was no wrong to the respondents but only to those to whom it belonged. But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners--and while intentionally to bring about a breach of contract may give rise to a cause of action, *Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.,* 151 U.S. 1, no 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, unknown to the doer of the wrong. See *Savings Bank v. Ward,* 100 U.S. 195. The law does not spread its protection so far. A good statement, applicable here, will be found in *Elliott Steam Tug Co., Ltd*. v. *The Shipping Controller*, [1922] 1 K. B. 127, 139, 140. *Byrd v. English*, 117 Ga. 192. *The Federal No. 2*, 21 F.2d 313.

The decision of the Circuit Court of Appeals seems to have been influenced by the consideration that if the whole loss occasioned by keeping a vessel out of use were recovered and divided a part would go to the respondents. It seems to have been thought that perhaps the whole might have been recovered by the owners, that in that event the owners would have been trustees for the respondents to the extent of the respondents' share, and that no injustice would be done to allow the respondents to recover their share by direct suit. But justice does not permit that the petitioner be charged with the full value of the loss of use unless there is some one who has a claim to it as against the petitioner. The respondents have no claim either in contract or in tort, and they cannot get a standing by the suggestion that if some one else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents. The whole notion of such a recovery is based on the supposed analogy of bailees who if allowed to recover the whole are chargeable over, on what has been thought to be a misunderstanding of the old law that the bailees alone could sue for a conversion and were answerable over for the chattel to their bailor. Whether this view be historically correct or not there is no analogy to the present case when the owner recovers upon a contract for damage and delay. ***

Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974)

Sneed, Circuit Judge:

This is another case growing out of the Santa Barbara oil spill of 1969. The plaintiffs are commercial fishermen. Each of their complaints alleges that the cause of action has been brought under the provisions of the Outer Continental Shelf Lands Act of 1953, 43 U.S. Code, sec. 1331, et seq.; that the defendants joined in an enterprise, the day-to-day operation of which was within the control and under the management of defendant Union Oil Company, to drill for oil in the waters of the Santa Barbara Channel; that during the period commencing on or about January 28, 1969, vast quantities of raw crude oil were released and subsequently carried by wind, wave and tidal currents over vast stretches of the coastal waters of Southern California; and that as a consequence the plaintiffs have suffered various injuries for which damages are sought. Jurisdiction rests on 28 U.S. Code, sec. 1333 and 43 U.S. Code, sec. 1333(b). ***

"On or about January 28, 1969, oil began to escape under and near Union Oil Company of California's Platform 'A' located on the Outer Continental Shelf of the United States in the Santa Barbara Channel. The undersigned agree that the following is a fair statement of the facts with respect to the Santa Barbara Channel occurrence (hereinafter 'occurrence'):

> "A. Certain operations conducted on Platform 'A' resulted in the release of unascertained amounts of crude oil from the ocean floor underneath and near Platform 'A.' "B. Such crude oil release was carried by natural forces of winds and tides to various areas of the ocean's surface and towards and in some instances to the adjacent coast lines. "C. An unascertained amount of damage has resulted from said occurrence."

Paragraph 3 of the Stipulation, which sets out the defendants' undertaking to pay damages, provides as follows: "In order to provide a basis for the disposition of the above referenced claims it is agreed by the undersigned defendants that they will pay to the above referenced persons and/or plaintiffs who are, or who by reason of subsequent joinder herein become, parties hereto, *all legally compensable damages arising from a legally cognizable injury* caused by the aforementioned occurrence . . . .

In May of 1972, the defendants moved for partial summary judgment before the special masters to strike from plaintiffs' prayers "that item of damage usually denominated as 'ecological damage.'" More specifically, the defendants sought to eliminate from the prayers any element of damages consisting of profits lost as a result of the reduction in the commercial fishing potential of the Santa Barbara Channel which may have been caused by the occurrence. According to the defendants, such long-term ecological damage is not compensable under the law and thus is not within their undertaking as set forth in the Stipulation. ***

I.

The Applicable Law.

Determination of the proper law by which the defendants' motion for partial summary judgment is to be judged turns out to be analytically complex but less significant functionally than one would have imagined. As the plaintiffs assert in their complaints, these cases are brought under the Outer Continental Shelf Lands Act ("Lands Act"), 43 U.S. Code, sec. 1331, *et seq*. Pursuant to Section 1333(a)(1) of this Act, federal law is made applicable "to the subsoil and seabed of the Outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon * * *." However, as the Supreme Court has pointed out in *Rodrigue v.. Aetna Casualty Company*, 395 U.S. 352, 365, 1969 AMC 1082, 1090 (1969), state law is adopted as a surrogate for federal law under the Act to the extent that such state law is applicable and not inconsistent with * * * other Federal laws." *See* 43 U.S. Code, sec. 1333(a)(2). Thus, when applied in the context of the Act, state law becomes federal law federally enforced. 395 U.S. at 365, 1969 AMC at 1092.

It is apparent from the briefs of the parties that their analysis did not advance beyond the point of concluding that, since there appeared to be no inconsistent federal law, the law of California was controlling. However, this Court's opinion in *Oppen v.. Aetna Insurance Company,* 1973 AMC 2165, 485 F.2d 252 (9 Cir. 1973), makes clear that the parties' analysis is not necessarily determinative of the issue before us. There remains yet a third possibility--*i.e.* that admiralty law is exclusively applicable to the present controversy. As was said in *Aetna Insurance,* the Lands Act does not eliminate this possibility.

The Supreme Court in *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 1973 AMC 1 (1972), has instructed us that the determination of whether the admiralty jurisdiction of the federal courts embraces a tortious act depends, not only on the place of the tort, but also on whether the wrong bears a significant relationship to a traditional maritime activity. *Id.,* 409 U.S. at 268, 1973 AMC at 15. Acting on this instruction, this Court in *Aetna Insurance* held that an injury to maritime vessels and an interference with their right of navigation, resulting from the same oil spill which is involved here, constituted a maritime tort cognizable in admiralty. In so holding, it was recognized that the "activity" whose relationship to traditional maritime activity was to be examined was that of the injured party, not that of the tortfeasor. For this reason, the fact that drilling for oil from fixed platforms located over the outer Continental Shelf is not in itself a traditional maritime activity was held not to constitute a basis for refusing to classify the wrong as a maritime tort.

It follows that, in order to determine the applicability of admiralty law to the facts of this case, it is necessary to inquire whether a reduction in plaintiffs' anticipated profits, caused by what for present purposes we must assume to be the negligent conduct of the defendants, bears a significant relationship to traditional maritime activity. Were it necessary for this issue to be decided to dispose of this case, our inclination would be to hold that such a relationship does exist. In numerous ways, the fishing industry is clearly a part of traditional maritime activity; and to assert otherwise would amount to a repudiation of much of maritime history. ***

We are, however, not driven to the choice between maritime law and the law of California. So far as our research reveals, neither forum has made a definitive ruling on the precise issue before us. As a consequence, it has become necessary for us to examine a fairly large body of authorities, drawn from numerous jurisdictions and secondary sources, in order to reach what we regard as the proper resolution of this dispute. In that the same authorities and sources must be examined and evaluated without regard to whether this process is characterized as an examination of admiralty law or the law of California, we are convinced that under either body of law the actions of the special masters and the district judge in denying the defendants' motion for partial summary judgment were correct.

Moreover, maritime law itself frequently looks to both the statutory and decisional law of the states for sources from which to fashion its principles. *See Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 1970 AMC 967 (1970) (new maritime cause of action for wrongful death to be implemented by reference to other federal law and state statutory and decisional law); Shutler, *Pollution of the Sea By Oil,* 7 Houston L. Rev. 415, 434 (1970); Comment, *Oil Pollution of the Sea,* 10 Harv. Int. L.J. 316, 347 (1969). Although in some instances this derivative assistance may entail the application of state law principles, unlike our diversity jurisdiction there is no requirement--albeit some scholars have suggested such a course for certain areas in admiralty--that state law be adopted. *See* Robertson, *Admiralty and Federalism* 194-201 (1970) and the authorities cited therein.

In any event, we shall proceed in a manner that we believe is faithful to the spirit of California tort law in disposing of the issue before us. For this reason we are content to say that for purposes of this case we regard it as irrelevant whether our efforts are designated as an exposition of admiralty law or the law of California.

II.

Recovery for Pure Economic Loss in Negligence: The General Rule.

Defendants support their motion for partial summary judgment by pointing to the widely recognized principle that no cause of action lies against a defendant whose negligence prevents the plaintiff from obtaining a prospective pecuniary advantage. *See,* e.g., Prosser, *Law of Torts* 952 (4th ed. 1971) (hereinafter Prosser); Harvey, *Economic Losses and Negligence,* 50 Can. Bar Rev. 580 (1972); Note, 49 Can. Bar Rev. 619 (1971); Note, *Negligence and Economic Loss,* 117 The Solicitors' Jour. 255 (1971); Note, *Negligent Interference with Economic Expectancy: The Case for Recovery,* 16 Stan. L. Rev. 664 (1964). *See also Restatement* (Second) *of Torts,* Tent. Draft No. 14, section 766B. As the defendants see it, any diminution of the sea life in the Santa Barbara Channel caused by the occurrence, which, it must be remembered, is attributable to the defendants' negligence by reason of the parties' Stipulation, consists of no more than the loss of an economic advantage which is not a "legally cognizable injury" and thus not "legally compensable."

Their argument has strength. It rests upon the proposition that a contrary rule, which would allow compensation for all losses of economic advantages caused by defendant's negligence, would subject the defendant to claims based upon remote and speculative injuries which he could not foresee in any practical sense of the term. Accordingly, in some cases it has been stated as the general rule that the negligent defendant owes no duty to plaintiffs seeking compensation for such injuries. In others of the cases, the courts have invoked the doctrine of proximate cause to reach the same result; and in yet a third class of cases the "remoteness" of the economic loss is relied upon directly to deny recovery. The consequence of these cases is that a defendant is normally relieved of the burden to defend against such claims, and the courts of a class of cases the resolution of which is particularly difficult.

The general rule has been applied in a wide variety of situations. ***
The citation of cases applying the general rule could be extended, but this bridged collection is sufficient to emphasize the point that it operates in a wide variety of settings. For purposes of our analysis, however, one further setting in which the rule has been applied requires mention--that being the area of the law dealing with products liability. In this area, the issue is usually couched in terms of whether a purchaser can recover in tort from a negligent manufacturer, with whom the purchaser is not in privity, for economic losses caused by the failure of the purchased article to perform in accordance with the purchaser's reasonable expectations. Defendants in the present action rely heavily on California cases which indicate that no such recovery is possible. ***

III.

Some Exceptions to the General Rule. ***

Prosser recognizes that a recovery for pure economic losses in negligence has been permitted in instances in which there exists "some special relation between the parties." Prosser at 952. The failure of the plaintiff to obtain a contract because of a telegraph company's negligent transmission of a message has been held to be legally cognizable, and is cited as an example of the "special relationship" qualification. *Id. at* 952, n. 79. *See also McQuilkin v. Postal Telegraph Cable Company,* 27 Cal. App. 698, 151 P. 21 (1915) (injury from lost advantageous contract must not be remote and uncertain). Other examples which have been cited are the negligent failure to perform a gratuitous promise to obtain insurance, and the negligent dealy in acting upon an application for insurance. *See* Prosser, at 952, n. 80, 81.

A more recent development in California law involves the right to recover, absent privity, from a defendant whose negligent failure to obtain a proper attestation of the will of a third party has deprived the plaintiff of a bequest which had been granted in the improperly attested will. *Biakanja v. Irving*, 49 Cal.2d 647, 320 P.2d

16 (1958). On appeal to the Supreme Court of California, the plaintiff's pure economic loss was held to be a legally cognizable injury, a position which has been subsequently reaffirmed in *Lucas v. Hamm*, 56 Cal.2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961) (recovery denied because of the absence of negligence).

The approach adopted by the California Supreme Court in *Biakanja* is particularly instructive. After stating that the question before it was "whether defendant was under a duty to exercise due care to protect plaintiff from injury and was liable for damages caused plaintiff by his negligence even though they were not in privity of contract," the court stated:

> "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm."

49 Cal.2d at 650, 320 P.2d at 19 (1958). It is thus obvious that California does not blindly follow the general rule upon which the defendants here rely. ***

Recovery for pure economic loss legally attributable to the defendant's negligence has also been recognized in traditional maritime settings. Thus, fishermen in Scotland who worked under a profitsharing arrangement with the owner of a trawler damaged by the defendant's negligence have been permitted to recover their portion of the anticipated profits of the fishing venture even though they suffered no physical injury. *Main* v. *Leask* [1910] S.C. 771 (Ct. of Session). More important, however, is the fact that this Circuit has reached precisely the same conclusion in an admiralty proceeding. *Carbone v. Ursich, Del Rio*, 1954 AMC 169, 209 F.2d 178 (9 Cir. 1953). In so doing, we refused to apply the teaching of *Robins Dry Dock and Repair Company v. Flint, supra,* to the situation with which the fishermen were confronted and observed:

> "This long recognized rule [the right of fishermen to recover their share of the prospective catch] is no doubt a manifestation of the familiar principle that seamen are the favorites of admiralty and their economic interests entitled to the fullest possible legal protection. These considerations have given rise to a special right comparable to that of a master to sue for the loss of services of his servant, or the right of a husband or father to sue for the loss of services of wife or child."

1954 AMC at 175, 209 F.2d at 182.

Another instance in which a claim from economic loss, unaccompanied by any physical injury to the person or property of the claimant, has been recognized under admiralty law is illustrated by *Aktieselskabet Cuzco v. Sucarseco*, 294 U.S. 394, 1935 AMC 412 (1935). The issue before the Court in that case was whether the owners of cargo, shipped on a vessel which ultimately collided with defendant's vessel, could recover for their general average contribution when both vessels were at fault and both were damaged. The Supreme Court held in the affirmative. Although the cargo was physically damaged by the collision, this fact appears to have had no bearing on the Court's resolution of the issue. Rather, the Court recognized that the right of the cargo owners to have their general average contribution restored sprang directly from the tort and was in no sense derivative or parasitically dependent upon the presence of a physical injury. ***

This much abridged catalogue of exceptions and qualifications to the general rule can be brought to a close for purposes of our analysis by calling attention to several cases in which pollution of a stream has enabled one whose business is injured thereby to recover his lost profits. For example, in *Fort Worth & Rio Grande Railway Company v. Hancock,* 286 S.W. 335 (Tex. Civ. App. 1926) the plaintiff, who operated a swimming pool in the channel of a river, was permitted to recover lost profits which had resulted from the defendant's negligent pollution of the river. Similarly, downstream riparian owners, engaged in operating a business dependent upon fishing, have been permitted to recover for the injury to their business caused by the pollution of the stream. *See Masonite Corporation v. Steede, 198 Miss*. 530, 547, 23 So.2d 756 (1945); *Hampton v. North Carolina Pulp Company,* 223 N.C. 535, 27 S.E.2d 538 (1943). It should be noted that in each of these cases the plaintiff was a riparian owner, and in the latter two there was no indication that the defendant's conduct was merely negligent and not intentional. However, in neither *Masonite* nor *Hampton* does there appear any recognition that mere negligence would have absolved the defendants. Both assumed the existence of a nuisance which could well have rested upon the defendants' negligent conduct. *See* Prosser at 575. ***

IV.

The Instant Action.

It is thus apparent that we are not foreclosed by precedent from examining on its merits the issue presented by the defendants' motion for partial summary judgment. As we see it, the issue is whether the defendants owed a duty to the plaintiffs, commercial fishermen, to refrain from negligent conduct in their drilling operations, which conduct reasonably and foreseeably could have been anticipated to cause a diminution of the aquatic life in the Santa Barbara Channel area and thus cause injury to the plaintiffs' business.

In finding that such a duty exists, we are influenced by the manner in which the Supreme Court of California has approached the duty issue in tort law. In holding that the mother of a child, killed by the defendant's negligent operation of an automobile, could recover for emotional disturbance and shock even though she was not within the zone of physical impact, the court in *Dillon v. Legg,* 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (1968) stated that:

> "Defendant owes a duty, in the sense of a potential liability for damages, only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous, and hence negligent, in the first instance. (See KEETON, *Legal Cause in the Law of Torts* (1963) 18-20; SEAVEY, *Mr. Justice Cardozo and the Law of Torts* (1939) 52 Harv. L. Rev. 372; SEAVEY, *Principles of Torts* (1942) 56 Harv. L. Rev. 72.)
>
> "Harper and James state the prevailing view. The obligation turns on whether 'the offending conduct foreseeably involved unreasonably great risk of harm to the interests of someone other than the actor * * *. [T]he obligation to refrain from * * * particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous. Duty, in other words, is measured by the scope of the risk which negligent conduct foreseeably entails.' (2 Harper & James, *The Law of Torts, supra,* at p. 1018; footnotes omitted.) * * *
>
> "Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case. Because it is inherently intertwined with foreseeability such duty or obligation must necessarily be adjudicated only upon a case-by-case basis." 68 Cal.2d at 739-740, 69 Cal. Rptr. at 79, 441 P.2d at 919-920. ***

The same conclusion is reached when the issue before us is approached from the standpoint of economics. Recently a number of scholars have suggested that liability for losses occasioned by torts should be apportioned in a manner that will best contribute to the achievement of an optimum allocation of resources. *See,* e.g., Calabresi, *The Cost of Accidents,* 69-73 (1970) (hereinafter Calabresi); Coase, *The Problem of Social Cost,* 3 J. Law & Econ. 1 (1960). This optimum, in theory, would be that which would be achieved by a perfect market system. In determining whether the cost of an accident should be borne by the injured party or be shifted, in whole or in part, this approach requires the court to fix the identity of the party who can avoid the costs most cheaply. Once fixed, this determination then controls liability. It turns out, however, that fixing the identity of the best or cheapest cost-avoider is more difficult than might be imagined. In order to facilitate this determination, Calabresi suggests several helpful guidelines. The first of these would require a rough calculation designed to exclude as potential cost-avoiders those groups/activities which could avoid accident costs only at an extremely high expense. Calabresi at 140-43. While not easy to apply in any concrete sense, this guideline does suggest that the imposition of oil spill costs directly upon such groups as the consumers of staple groceries is not a sensible solution. Under this guideline, potential liability becomes resolved into a choice between, on an ultimate level, the consumers of fish and those of products derived from the defendants' total operations.

To refine this choice, Calabresi goes on to provide additional guidelines which, in this instance, have proven none too helpful. For example, he suggests an evaluation of the administrative costs which each party would be forced to bear in order to avoid the accident costs. Calabresi at 143-44. He also states that an attempt should be made to avoid an allocation which will impose some costs on those groups or activities which neither consume fish nor utilize those products of the defendants derived from their operations in the Santa Barbara Channel. Calabresi at 144-50. On the record before us, we have no way of evaluating the relative administrative costs involved. However, we do recognize that it is probable that by imposing liability on the defendants some portion of the accident costs in this case may be borne by those who neither eat fish nor use the petroleum products derived from the defendants' operations in Santa Barbara.

Calabresi's final guideline, however, unmistakably points to the defendants as the best cost-avoider. Under this guideline, the loss should be allocated to that party who can best correct any error in allocation, if such there be, by acquiring the activity to which the party has been made liable. Calabresi at 150-52. The capacity "to buy out" the plaintiffs if the burden is too great is, in essence, the real focus of Calabresi's approach. On this basis there is no contest--the defendants capacity is superior.

Our holding that the defendants are under a duty to commercial fishermen to conduct their drilling and production in a reasonably prudent manner so as to avoid the negligent diminution of aquatic life is not foreclosed by the fact that the defendants' negligence could constitute a public nuisance under California law. Contrary to the situation that existed in *Oppen v. Aetna Insurance Company, supra,* in which we held that an interference with the public's right of navigation in the navigable waters of California did not vest a private cause of action in those who lost the use of their private pleasure craft, in the case now before us the plaintiffs assert an injury to their commercial enterprises, not to their "occasional Sunday piscatorial pleasure." *Id.* 1973 AMC at 2177, 485 F.2d at 260. The right of commercial fishermen to recover for injuries to their businesses caused by pollution of public waters has been recognized on numerous occasions. *See* Masonite Corporation v. Steede, supra; Hampton v. North Carolina Pulp Company, supra; Prosser, *Private Action for Public Nuisance,* 52 Va.L.Rev. 997, 1013-16 (1906). The injury here asserted by the plaintiff is a pecuniary loss of a particular and special nature, limited to the class of commercial fishermen which they represent.

This injury must, of course, be established in the proceedings that will follow this appeal. To do this it must be shown that the oil spill did in fact diminish aquatic life, and that this diminution reduced the profits the plaintiffs would have realized from their commercial fishing in the absence of the spill. This reduction of profits must be established with certainty and must not be remote, speculative or conjectural. *See* McCormick, *Damages,* 97-101 (1935). These are not small burdens, nor can they be eased by our abhorrence of massive oil spills. All that we do here is to permit the plaintiffs to attempt to prove their case, and to reject the idea urged upon us by the defendants that a barrier to such an effort exists in the form of the rule that negligent interference with an economic advantage is not actionable.

Finally, it must be understood that our holding in this does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by the oil spill of January 28, 1969 The general rule urged upon us by defendants has a legitimate sphere within which to operate. Nothing said in this opinion is intended to suggest, for example, that every decline in the general commercial activity of every business in the Santa Barbara area following the occurrences of 1969 constitutes a legally cognizable injury for which the defendants may be responsible. The plaintiffs in the present action lawfully and directly make use of a resource of the sea, *viz.* its fish, in the ordinary course of their business. This type of use is entitled to protection from negligent conduct by the defendants in their drilling operations. Both the plaintiffs and defendants conduct their business operations away from land and in, on and under the sea. Both must carry on their commercial enterprises in a reasonably prudent manner. Neither should be permitted negligently to inflict commercial injury on the other. We decide no more than this.

***Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652 (1st Cir. 1980)**

Campbell, Circuit Judge:

In the early morning hours of March 18, 1973, the S.S. *Zoe Colocotroni,* a tramp oil tanker, ran aground on a reef three and a half miles off the south coast of Puerto Rico. To refloat the vessel, the captain ordered the dumping of more than 5,000 tons of crude oil into the surrounding waters. An oil slick four miles long, and a tenth of a mile wide, floated towards the coast and came ashore at an isolated peninsula on the southwestern tip of the island—a place called Bahia Sucia. The present appeal concerns an action in admiralty brought by the Commonwealth of Puerto Rico and the local Environmental Quality Board (EQB) to recover damages for harm done to the coastal environment by the spilled oil. ***

I.

The following facts found by the district court are not in serious dispute. On March 15, 1973, the *Zoe Colocotroni* departed La Salina, Venezuela, carrying 187,670 barrels of crude oil en route to Guayanilla, Puerto Rico. For the first two days of the voyage, the vessel proceeded by celestial navigation. The last star fix, however, was taken at 1859 hours on March 17. For the next eight hours, the ship proceeded by dead reckoning. As the vessel approached the south coast of Puerto Rico, it was, the district court stated, "hopelessly lost." At 0300 hours on March 18, the ship grounded on a reef. Efforts to free the tanker by alternately running the engines in forward and reverse were unsuccessful. After ten minutes, the captain ordered the crew to lighten ship by emptying the cargo of crude oil into the sea. 4 By the time the vessel refloated, some 1.5 million gallons of crude oil -- 5,170.1 tons—had poured into the surrounding waters. ***

C.

The district court made the following findings on the issue of damages:

"1. Plaintiffs' proven claim of damage to marine organisms covers an approximate area of about 20 acres in and around the West Mangrove. The surveys conducted by plaintiffs reliably establish that there was a decline of approximately 4,605,486 organisms per acre as a direct result of the oil spill. This means that 92,109,720 marine animals were killed by the *Colocotroni* oil spill. The uncontradicted evidence establishes that there is a ready market with reference to biological supply laboratories, thus allowing a reliable calculation of the cost of replacing these organisms. The lowest possible replacement cost figure is $ .06 per animal, with many species selling from $1.00 to $4.50 per individual. Accepting the lowest replacement cost, and attaching damages only to the lost marine animals in the West Mangrove area, we find the damages caused by defendants to amount to $5,526,583.20.

"2. The evidence is overwhelming to the effect that the sediments in and around the West Mangrove continue to be impregnated with oil. The solutions proposed by plaintiffs to this problem are unacceptable in that they would bring about the total destruction of this environment without any real guarantee of ultimate success. Furthermore, there is substantial scientific evidence to the effect that much of the undesirable effects of the oil in the sediments will be corrected in time by the weathering processes of nature. The most affected spots in the West Mangrove cover an area of approximately 23 acres. It is the Court's opinion that these areas can best be reestablished by the intensive planting of mangrove and restoration of this area to its condition before the oil spill. The evidence shows that the planting of mangrove runs at about $16,500 per acre, thus bringing the cost of replanting 23 acres to $379,500. The evidence further demonstrates that the planting will require a five year monitoring and fertilizing program which will cost

$36,000 per year or $180,000 for the five years. The total damages thus suffered by plaintiffs by reason of the pollution of the mangrove in the West Mangrove amount to $559,500. ***

V.

We now turn from procedural matters to the extremely difficult substantive issues concerning damages. Defendants challenge: (A) the so called "standing" of Puerto Rico and the EQB to recover damages for environmental injury; (B) the district court's failure to limit damages by commercial or market value standards; and (C) the approach and data relied upon by the court in assessing damages.

A

We turn first to the issue of plaintiffs' right to bring this lawsuit. The district court held that the Commonwealth had "standing" to recover for damages to natural resources, namely the mangrove trees and the various species of marine creatures living in and around them, on the theory that the Commonwealth was the "trustee of the public trust in these resources" and had an interest in them as *parens patriae*. 1979 AMC at 32, 456 F. Supp. at 1337; *see Maryland v. Amerada Hess Corp.,* 1974 AMC 1003, 350 F. Supp. 1060 (D. Md. 1972); *Maine v. M/V Tamano,* 1973 AMC 1131, 357 F. Supp. 1097 (D. Me. 1973); *In re Steuart Transportation Co.,* 1980 AMC 1713, 495 F. Supp. 38 (E.D. Va. 1980). The court also ruled that the Environmental Quality Board had standing to proceed as co-plaintiff seeking similar relief under a state statute authorizing the EQB to bring damages actions for environmental injuries. 1979 AMC at 32, 456 F. Supp. at 1337; 12 L.P.R.A., sec. 1131(29).

While the parties and the district court speak in terms of "standing," we think the question is more properly whether plaintiffs have stated a cognizable cause of action. 19 Defendants concede that Puerto Rico, as owner of the real property primarily affected by the oil spill, see 48 U.S. Code, sec. 749, would, like any private landowner, have a cause of action in admiralty to recover whatever damages it could prove under conventional principles for its private economic loss as measured by diminution of market value in the coastal land. See 46 U.S. Code, sec. 740. The Commonwealth made no attempt to show such damages, however. It seeks relief instead under an asserted right to recover as a governmental entity on behalf of its people for the loss of living natural resources on the land such as trees and animals. ***

Here the Commonwealth of Puerto Rico, exercising its undisputed authority to protect and conserve its natural environment, has by statute authorized one of its agencies to maintain actions of this sort. Under the statute, 12 L.P.R.A., sec. 1131(29), co-plaintiff Environmental Quality Board has, among others, the following duties, powers and functions:

"(29) To bring, represented by the Secretary of Justice, by the Board's attorneys, or by a private attorney contracted for such purpose, civil actions for damages in any court of Puerto Rico or the United States of America to recover the total value of the damages caused to the environment and/or natural resources upon committing any violation of this chapter and its regulations. The amount of any judgment collected to such effect shall be covered into the Special Account of the Board on Environmental Quality."

We read this statute both as creating a cause of action of the type described by its terms and as designating the EQB as the proper party to bring such an action. ***

Equally unavailing would be any argument that this state statutory action is not cognizable in admiralty. An oil spill on the navigable waters is a breach of federal maritime law. *Maryland. v. Amerada Hess Corp.,* 1974 AMC 1003, 1008-10, 350 F. Supp. 1060, 1065 (D. Md. 1972); *American Waterways Operators, Inc. v. Askew,* 1972 AMC 91, 98-99, 335 F. Supp. 1241, 1247 (M.D. Fla. 1971) (three-judge court), *rev'd on other grounds*, 411 U.S. 325, 1973 AMC 811 (1973); *California v. S.S. Bournemouth,* 1970 AMC 642, 646-47, 307 F. Supp. 922, 926 (D. Cal. 1969). Where the injury occurs in the territorial waters of a state, the general rule is that admiralty will give "broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction." *Just v. Chambers,* 312 U.S. 383, 391, 1941 AMC 430, 435-36 (1941). See also *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 373-74, 1959 AMC 832, 846-48 (1959). Defendants do not argue, nor could they, that this action runs counter to the essential features of federal jurisdiction. See *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 1973 AMC 811 (1973).

B

Defendants next argue the district court erred in failing to apply the common law "diminution in value" rule in calculating damages. Under the traditional rule, the measure of damages for tortious injury to real property is the difference in the commercial or market value of the property before and after the event causing injury. See *Restatement (Second) of Torts,* sec. 929(1)(a) (1979). Where the property can be restored to its original condition for a sum less than the diminution in value, however, the cost of restoration may be substituted as a measure of damages. See, e.g., *Big Rock Mountain Corp. v. Stearns-Roger Corp.,* 388 F.2d 165, 168-69 (8 Cir. 1968). Defendants introduced evidence at trial tending to show that the market value of comparable property in the vicinity of Bahia Sucia was less than $5,000 per acre, based on recent sales. Thus, defendants contend, damages here could not have exceeded $5,000 per affected acre even if the land were shown to have lost all value.

We believe that defendants have misconceived the character of the remedy created by section 1131. The EQB is not concerned with any loss in the market or other commercial value of the Commonwealth's land. In point of fact, the EQB concedes the land has no significant commercial or market value. The claim, rather, is for the injury--broadly conceived--that has been caused to the natural environment by the spilled oil. The question before us is not whether in a typical land damage case a claim of this sort could be successfully advanced--we assume it could not--but rather whether Puerto Rico's statute empowering the EQB to proceed in cases such as this envisions the awarding of damages on a different basis than would have been traditionally allowed.

The district court found that the once flourishing natural environment of the West Mangrove had been seriously damaged by the oil, to the point where some of the underlying sediments were no longer capable of supporting any but the most primitive forms of organic life, such as worms. The Puerto Rico statute authorizing this action specifically empowers the EQB to recover "the *total value* of the damages caused to the environment and/or natural resources" upon a violation of the antipollution provisions. 12 L.P.R.A., sec. 1131(29) (emphasis added). Implicit in this choice of language, we think, is a determination not to restrict the state to ordinary market damages. Many unspoiled natural areas of considerable ecological value have little or no commercial or market value. Indeed, to the extent such areas have a commercial value, it is logical to assume they will not long remain unspoiled, absent some governmental or philanthropic protection. A strict application of the diminution in value rule would deny the state any right to recover meaningful damages for harm to such areas, and would frustrate appropriate measures to restore or rehabilitate the environment.

This perception is confirmed by the course of recent federal legislation in the area of oil pollution. The Clean Water Act of 1972 provided that the United States could recover, up to certain pre-set limits, the costs it incurred in cleaning up after an oil spill, but made no explicit reference to environmental damages. Pub. L. No. 92-500, 92d Cong., 2d Sess., sec. 311, 86 Stat. 816 (1972), codified at 33 U.S. Code, sec. 1321(f) (1976). The Clean Water Act Amendments of 1977 significantly expanded the scope of a vessel owner's potential liability. In particular, the federal government and the states were authorized to recover "costs or expenses incurred * * * in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance." 33 U.S. Code, sec. 1321(f)(4). Recoverable removal costs were defined as including the expense "of such * * * actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches." *Id.* sec. 1321(a)(8).The liability provision concluded:

> "The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered

> shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal government, or the State government." *Id.* sec. 1321(f)(5).

Similarly, in the Outer Continental Shelf Lands Act Amendments of 1978, Congress provided that the government could recover damages for economic loss arising out of an oil spill, including "injury to, or destruction of, natural resources," 43 U.S. Code, sec. 1813(a)(2)(C), and "loss of use of natural resources," *id.* sec. 1813(a)(2)(D). The Submerged Lands Act, which forms the basis for the Outer Continental Shelf Lands Act, see 43 U.S. Code, sec. 1811(9), defines "natural resources" as including, "without limiting the generality thereof, oil, gas, and other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life." 43 U.S. Code, sec. 1301(e). While the latter acts do not, by their terms, apply to Puerto Rico, see 43 U.S. Code, sec. 1301(g), like the Clean Water Act they do give some indication that Congress has determined that it is desirable to provide for environmental damages apart from the commercial loss, ordinarily measured by a market value yardstick, suffered by landowners and/or exploiters of natural resources. This perception is reinforced by the section of the OCS Lands Act which provides that sums the state recovers "shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of * * * the State, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources." 43 U.S. Code, sec. 1813(b)(3).

Especially in light of this recent federal statutory activity, we think that limitation of recovery to those damages recoverable under the common law "diminution in value" rule would be inconsistent with the manifest intent of Puerto Rico's environmental statute. In enacting section 1131, Puerto Rico obviously meant to sanction the difficult, but perhaps not impossible, task of putting a price tag on resources whose value cannot always be measured by the rules of the marketplace. Although the diminution rule is appropriate in most contexts, 21 and may indeed be appropriate in certain cases under section 1131, see infra, it does not measure the loss which the statute seeks to redress in a context such as the present. No market exists in which Puerto Rico can readily replace what it has lost. The loss is not only to certain plant and animal life but, perhaps more importantly, to the capacity of the now polluted segments of the environment to regenerate and sustain such life for some time into the future. That the Commonwealth did not intend, and perhaps was unable, to exploit these life forms, and the coastal areas which supported them, for commercial purposes should not prevent a damages remedy in the face of the clearly stated legislative intent to compensate for "the total value of the damages caused to the environment and/or natural resources." 12 L.P.R.A., sec. 1131(29). In recent times, mankind has become increasingly aware that the planet's resources are finite and that portions of the land and sea which at first glance seem useless, like salt marshes, barrier reefs, and other coastal areas, often contribute in subtle but critical ways to an environment capable of supporting both human life and the other forms of life on which we all depend. The Puerto Rico statute is obviously aimed at providing a damages remedy with sufficient scope to compensate for, and deter, the destruction of such resources; and while we can see many problems in fashioning such a remedy, we see no reason to try to frustrate that endeavor. We therefore do not limit damages herein to the loss of market value of the real estate affected.

C

We turn now to whether the damages awarded by the district court were appropriate. To review the court's award, we must ascertain what a fair and equitable damages measure would be in these circumstances, and, to that end, it will be helpful to examine the remedial provisions in recent similar federal statutes. There is a strong emphasis in Congressional oil pollution enactments on the concept of restoration. As discussed earlier, the 1977 Clean Water Act amendments provided that the state's representative, acting as public trustee, could "recover for the costs of replacing or restoring [natural] resources." 33 U.S. Code, sec. 1321(f)(5). In accordance with the trust analogy, the statute provided: "Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies * * *." *Id*. The legislative history further elaborates this standard:

> "New subsections (f)(4) and (5) make governmental expenses in connection with damage to or destruction of natural resources a cost of removal which can be recovered from the owner or operator of the discharged source under section 311. For those resources which can be restored or rehabilitated, the measure of liability is the reasonable costs actually incurred by Federal or State authorities in replacing the resources or otherwise mitigating the damage. Where the damaged or destroyed resource is irreplaceable (as an endangered species or an entire fishery), the measure of liability is the reasonable cost of acquiring resources to offset the loss." House Conf. Rpt. No. 95-830, 95th Cong., 1st Sess. 92, reprinted in [1977] U.S. Code Cong. & Ad. News 4424, 4467.

Borrowing from the suggestion provided by this federal legislation, we think the appropriate primary standard for determining damages in a case such as this 22 is the cost reasonably to be incurred by the sovereign or its designated agency to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is feasible without grossly disproportionate expenditures. The focus in determining such a remedy should be on the steps a reasonable and prudent sovereign or agency would take to mitigate the harm done by the pollution, with attention to such factors as technical feasibility, harmful side effects, compatibility with or duplication of such regeneration as is naturally to be expected, and the extent to which efforts beyond a certain point would become either redundant or disproportionately expensive. Admittedly, such a remedy cannot be calculated with the degree of certainty usually possible when the issue is, for example, damages on a commercial contract. On the other hand, a district court can surely calculate damages under the foregoing standard with as much or more certainty and accuracy as a jury determining damages for pain and suffering or mental anguish.

There may be circumstances where direct restoration of the affected area is either physically impossible or so disproportionately expensive that it would not be reasonable to undertake such a remedy. Some other measure of damages might be reasonable in such cases, at least where the process of natural regeneration will be too slow to ensure restoration within a reasonable period. The legislative history of the Clean Water Act amendments, quoted above, suggests as one possibility "the reasonable cost of acquiring resources to offset the loss." *Id.* Alternatives might include acquisition of comparable lands for public parks or, as suggested by defendants below, reforestation of a similar proximate site where the presence of oil would not pose the same hazard to ultimate success. As with the remedy of restoration, the damages awarded for such alternative measures should be reasonable and not grossly disproportionate to the harm caused and the ecological values involved. The ultimate purpose of any such remedy should be to protect the public interest in a healthy, functioning environment, and not to provide a windfall to the public treasury. 24 In emphasizing the above measures, we do not mean to rule out others in appropriate circumstances. There may indeed be cases where traditional commercial valuation rules will afford the best yardstick, as where there is a market in which the damaged resource could have been sold that reflects its actual value. Much must necessarily be left to the discretion of courts, especially before a body of precedent has arisen.

But while the district court's discretion is extensive, we are unable to agree with the approach taken by the court here in placing a value on the damaged resources. Plaintiffs presented two principal theories of damages to the court. The first theory was somewhat analogous to the primary standard we have enunciated above, focusing on plaintiffs' plan to remove the damaged mangrove trees and oil-impregnated sediments from a large area and replace them with clean sediment and container-grown mangrove plants. This plan was estimated to cost approximately $7 million. The district court sensibly and correctly rejected this plan as impractical, inordinately expensive, and unjustifiably dangerous to the healthy mangroves and marine animals still present in the area to be restored. We can find no fault with the district court's conclusion that this draconian plan was not a step that a reasonable trustee of the natural environment would be expected to take as a means of protecting the corpus of the trust.

Plaintiffs' second theory, which the court accepted, focused on the supposed replacement value of the living creatures . . . alleged to have been permanently destroyed or damaged by the oil spill. Plaintiffs repeatedly disavowed any connection between this theory and an actual restoration plan. In other words, plaintiffs did not represent that they proposed to purchase 92 million invertebrate animals for actual introduction into the sediments, (which, being contaminated with oil, would hardly support them), but rather wished to use the alleged replacement value of these animals as a yardstick for estimating the quantum of harm caused to the Commonwealth. This theory has no apparent analog in the standards for measuring environmental damages we have discussed above. To be sure, the federal statutes from which we have borrowed speak in places of replacement as a part of the appropriate recovery. See, e.g., *33 U.S. Code, sec. 1321*(f)(5). But we believe these references, in context, should be interpreted as meaning replacement as a component in a practicable plan for actual restoration. Thus, for example, if a state were seeking to restore a damaged area of forest, a portion of the damages sought might be allocated to replacement of wild birds or game animals or such other creatures as would not be expected to regenerate naturally within a relatively finite period of time even with appropriate restoration. This is a far different matter from permitting the state to recover money damages for the loss of small, commercially valueless creatures which assertedly would perish if returned to the oil-soaked sands, yet probably would replenish themselves naturally if and when restoration--either artificial or natural--took place. ***

Thus, leaving aside the question whether plaintiffs' evidence was sufficient to establish that 92 million creatures were destroyed and that six cents represented an appropriate replacement cost estimate, we are unable to endorse the theory of damages in support of which this evidence was advanced. We thus hold that it was error to award $5,526,583.20 for the replacement value of the destroyed organisms.

D

We come finally to the disposition of this case. Defendants argue that, having rejected plaintiffs' damages theories, we should reverse the district court's judgment, except as to the Commonwealth's undisputed cleanup costs. While this is superficially an attractive course, we do not think the matter is quite so simple. To say that the law on this question is unsettled is vastly to understate the situation. The parties in this lawsuit, and we ourselves, have ventured far into uncharted waters. We do not think plaintiffs could reasonably have been expected to anticipate where this journey would take us. Though we have affirmed the district court's rejection of the Commonwealth's original, rather grandiose restoration plan, we believe the EQB should still have an opportunity to show, if it can, that some lesser steps are feasible that would have a beneficial effect on the West Mangrove ecosystem without excessive destruction of existing natural resources or disproportionate cost. The costs projected for the carrying out of such reasonable lesser steps would be an appropriate award of damages to the EQB. Plaintiffs may wish, at the same time, to reopen the question of alternative-site restoration, as to which the district court initially declined to take evidence, although we hasten to add that we do not now rule on whether the concept of alternative site restoration would make sense in this case as a measure of damages. We therefore remand the case to the district court with instructions to reopen the record for further evidence on the issue of damages in line with our discussion of the principles governing recovery in cases of this sort. Defendants cannot successfully claim that this disposition will prejudice their rights appreciably. Defendants themselves introduced evidence at the first trial on damages seeking to establish that restoration projects less extensive and less costly than plaintiffs' were possible. Had the district court accepted these proposals in lieu of plaintiffs', defendants would have had a potential liability of up to $1 million. We do not mean to suggest that plaintiffs are necessarily entitled to recover this, or any other specific amount. Nor do we put any limits on defendants' right to contest any proposals put forward by plaintiffs, or to offer counterproposals. In essence, while the court and the parties are entitled to rely on the record already developed to the extent they wish to do so, we think the record should be reopened on the issue of damages, with a renewed evidentiary hearing to be conducted in light of the standards for measuring such damages we have announced today. While we regret the necessity this will entail for further delay in this already protracted litigation, we trust that the district court, with the good faith assistance of the parties, will be able to carry out further proceedings without unreasonable delay. ***

Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985) (en banc)

Higginbotham, Circuit Judge:

We are asked to abandon physical damage to a proprietary interest as a prerequisite to recovery for economic loss in cases of unintentional maritime tort. We decline the invitation.

I.

In the early evening of July 22, 1980, the M/V *Sea Daniel,* an inbound bulk carrier, and the M/V *Testbank,* an outbound container ship, collided at approximately mile forty-one of the Mississippi River Gulf outlet. At impact, a white haze enveloped the ships until carried away by prevailing winds, and containers aboard *Testbank* were damaged and lost overboard. The white haze proved to be hydrobromic acid and the contents of the containers which went overboard proved to be approximately twelve tons of pentachlorophenol, PCP, assertedly the largest such spill in United States history. The United States Coast Guard closed the outlet to navigation until August 10, 1980 and all fishing, shrimping, and related activity was temporarily suspended in the outlet and four hundred square miles of surrounding marsh and waterways.

Forty-one lawsuits were filed and consolidated before the same judge in the Eastern District of Louisiana. These suits presented claims of shipping interests, marina and boat rental operators, wholesale and retail seafood enterprises not actually engaged in fishing, seafood restaurants, tackle and bait shops, and recreational fishermen. They proffered an assortment of liability theories, including maritime tort, private actions pursuant to various sections of the Rivers and Harbors Appropriation Act of 1899 and rights of action under Louisiana law. Jurisdiction rested on the proposition that the collision and contamination were maritime torts and within the court's maritime jurisdiction. See 28 U.S.C. sec. 1333.

Defendants moved for summary judgment as to all claims for economic loss unaccompanied by physical damage to property. The district court granted the requested summary judgment as to all such claims except those asserted by commercial oystermen, shrimpers, crabbers and fishermen who had been making a commercial use of the embargoed waters. The district court found these commercial fishing interests deserving of a special protection akin to that enjoyed by seamen. See *State of Louisiana ex rel. Guste v. M/V Testbank,* 1982 AMC 2246, 2250-53, 524 F. Supp. 1170, 1173-74 (ED La. 1981).

On appeal a panel of this court affirmed, concluding that claims for economic loss unaccompanied by physical damage to a proprietary interest were not ecoverable in maritime tort. 1984 AMC 2951, 728 F.2d 748 (5th Cir. 1984). The panel, as did the district court, pointed to the doctrine of *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 1928 AMC 61 (1927), and its development in this circuit. Judge Wisdom specially concurred, agreeing that the denial of these claims was required by precedent, but urging reexamination *en banc*. We then took the case *en banc* for that purpose. After extensive additional briefs and oral argument, we are unpersuaded that we ought to drop physical damage to a proprietary interest as a prerequisite to recovery for economic loss. To the contrary, our reexamination of the history and central purpose of this pragmatic restriction on the doctrine of foreseeability heightens our commitment to it. Ultimately we conclude that, without this limitation, foreseeability loses much of its ability to function as a rule of law.

II.

Plaintiffs first argue that the "rule" of *Robins Dry Dock* is that "a tort to the property of one which results in the negligent interference with contractual relationships of another does not state a claim," and that so defined, *Robins Dry Dock* is here inapplicable. Next and relatedly, plaintiffs urge that physical damage is not a prerequisite to recovery of economic loss where the damages suffered were foreseeable. Third, plaintiffs argue that their claims are cognizable in maritime tort because the pollution from the collision constituted a public nuisance and violated the Rivers and Harbors Appropriation Act of 1899, as well as Louisiana law.

Defendants urge the opposite: that *Robins Dry Dock* controls these cases; that the physical damage limitation on foreseeability ought to be retained; and that plaintiffs stated no claim for "federal pollution," either as a nuisance or under the Rivers and Harbors Act. Finally, defendants reply that state law is not applicable to this maritime collision case and in any event provides plaintiffs no claim.

III.

The meaning of *Robins Dry Dock v. Flint,* 275 U.S. 303, 1928 AMC 61 (1927) (Holmes, J.) is the flag all litigants here seek to capture. We turn first to that case and to its historical setting.

Robins broke no new ground but instead applied a principle, then settled both in the United States and England, which refused recovery for negligent interference with "contractual rights." Stated more broadly, the prevailing rule denied a plaintiff recovery for economic loss if that loss resulted from physical damage to property in which he had no proprietary interest. See, e.g., *Byrd v. English,* 117 Ga. 191, 43 S.E. 419 (1903); Cattle v. Stockton Waterworks Co., 10 Q.B. 453, 457 (C.A. 1875). See also James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal,* 25 Vand. L.Rev. 43, 44-46 (1972) (discussing history of the rule); Carpenter, *Interference with Contract Relations,* 41 Harv. L.Rev. 728 (1928). Professor James explains this limitation on recovery of pure economic loss: "The explanation . . . is a pragmatic one: the physical consequences of negligence usually have been limited, but the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended." James, supra, at 45. ***

2.

The principle that there could be no recovery for economic loss absent physical injury to a proprietary interest was not only well established when *Robins Dry Dock* was decided, but was remarkably resilient as well. Its strength is demonstrated by the circumstance that *Robins Dry Dock* came ten years after Judge Cardozo's shattering of privity in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). See also *Glanzer v. Shepard,* 233 N.Y. 236, 135 N.E. 275 (1922). Indeed this limit on liability stood against a sea of change in the tort law. Retention of this conspicuous bright-line rule in the face of the reforms brought by the increased influence of the school of legal realism is strong testament both to the rule's utility and to the absence of a more "conceptually pure" substitute. The push to delete the restrictions on recovery for economic loss lost its support and by the early 1940's had failed. ***

3.

Plaintiffs would confine *Robins* to losses suffered for inability to perform contracts between a plaintiff and others, categorizing the tort as a species of interference with contract. When seen in the historical context described above, however, it is apparent that *Robins Dry Dock* represents more than a limit on recovery for interference with contractual rights. Apart from what it represented and certainly apart from what it became, its literal holding was not so restricted. If a time charterer's relationship to its negligently injured vessel is too remote, other claimants without even the connection of a contract are even more remote.

It is true that in *Robins* the lower courts had sustained recovery on contract principles, but the Supreme Court pushed the steamship company's contract arguments aside and directly addressed its effort to recover in tort. The language and the cases the Court pointed to as "good statement[s]" of the principle make plain that the charterer failed to recover its delay claims from the dry dock because the Court believed them to be too remote. Notably, although the dry dock company did not know of the charter party when it damaged the propeller, delay losses by users of the vessel were certainly foreseeable. Thus *Robins* was a pragmatic limitation imposed by the Court upon the tort doctrine of foreseeability.***

When the loss is economic rather than physical, that the loss caused a breach of contract or denied an expectancy is of no moment. If a plaintiff connected to the damaged chattels by contract cannot recover, others more remotely situated are foreclosed *a fortiori*. Indisputably, the *Robins Dry Dock* principle is not as easily contained as plaintiff would have it. We turn to our application of the principle, its application in other circuits, and the tort law of our Gulf states before returning to the doctrine itself. ***

In *Union Oil,* vast quantities of raw crude were released when the defendant oil company negligently caused an oil spill. The oil was carried by wind, wave, and tidal currents over large stretches of the California coast disrupting, among other things, commercial fishing operations. While conceding that ordinarily there is no recovery for economic losses unaccompanied by physical damage, the court concluded that commercial fishermen were foreseeable plaintiffs whose interests the oil company had a duty to protect when conducting drilling operations. The opinion pointed out that the fishermen's losses were foreseeable and direct consequences of the spill, that fishermen have historically enjoyed a protected position under maritime law, and suggested that economic considerations also supported permitting recovery.

Yet *Union Oil's* holding was carefully limited to commercial fishermen, plaintiffs whose economic losses were characterized as "of a particular and special nature." *Union Oil,* 1975 AMC at 435, 501 F.2d at 570. The *Union Oil* panel expressly declined to "open the door to claims that may be asserted by . . . other[s] . . . whose economic or personal affairs were discommoded by the oil spill" and noted that the general rule denying recovery for pure economic loss had "a legitimate sphere within which to operate." *Id.* 10.

In sum, the decisions of courts in other circuits convince us that *Robins Dry Dock* is both a widely used and necessary limitation on recovery for economic losses. The holdings in *Kinsman* and *Union Oil* are not to the contrary. The courts in both those cases made plain that restrictions on the concept of foreseeability ought to be imposed where recovery is sought for pure economic losses.

6.

Jurisprudence developed in the Gulf states informs our maritime decisions. It supports the *Robins* rule. Courts applying the tort law of Texas, Georgia, Florida, Alabama, Mississippi and Louisiana have consistently denied recovery for economic losses negligently inflicted where there was no physical damage to a proprietary interest.***

V.

Plaintiffs urge that the requirement of physical injury to a proprietary interest is arbitrary, unfair, and illogical, as it denies recovery for foreseeable injury caused by negligent acts. At its bottom the argument is that questions of remoteness ought to be left to the trier of fact. Ultimately the question becomes who ought to decide--judge or jury--and whether there will be a rule beyond the jacket of a given case. The plaintiffs contend that the "problem" need not be separately addressed, but instead should be handled by "traditional" principles of tort law. Putting the problem of which doctrine is the traditional one aside, their rhetorical questions are flawed in several respects.

Those who would delete the requirement of physical damage have no rule or principle to substitute. Their approach fails to recognize limits upon the adjudicating ability of courts. We do not mean just the ability to supply a judgment; prerequisite to this adjudicatory function are preexisting rules, whether the creature of courts or legislatures. Courts can decide cases without preexisting normative guidance but the result becomes less judicial and more the product of a managerial, legislative or negotiated function.

Review of the foreseeable consequences of the collision of the *Sea Daniel* and *Testbank* demonstrates the wave upon wave of successive economic consequences and the managerial role plaintiffs would have us assume. The vessel delayed in St. Louis may be unable to fulfill its obligation to haul from Memphis, to the injury of the shipper, to the injury of the buyers, to the injury of their customers. Plaintiffs concede, as do all who attack the requirement of physical damage, that a line would need to be drawn--somewhere on the other side, each plaintiff would say in turn, of its recovery. Plaintiffs advocate not only that the lines be drawn elsewhere but also that they be drawn on an *ad hoc* and discrete basis. The result would be that no determinable measure of the limit of foreseeability would precede the decision on liability. We are told that when the claim is too remote, or too tenuous, recovery will be denied. Presumably then, as among all plaintiffs suffering foreseeable economic loss, recovery will turn on a judge or jury's decision. There will be no rationale for the differing results save the "judgment" of the trier of fact. Concededly, it can "decide" all the claims presented, and with comparative if not absolute ease. The point is not that such a process cannot be administered but rather that its judgments would be much less the products of a determinable rule of law. In this important sense, the resulting decisions would be judicial products only in their draw upon judicial resources.

The bright line rule of damage to a proprietary interest, at most, has the virtue of predictability with the vice of creating results in cases at its edge that are said to be "unjust" or "unfair." Plaintiffs point to seemingly perverse results, where claims the rule allows and those it disallows are juxtaposed--such as vessels striking a dock, causing minor but recoverable damage, then lurching athwart a channel causing great but unrecoverable economic loss. The answer is that when lines are drawn sufficiently sharp in their definitional edges to be reasonable and predictable, such differing results are the inevitable result--indeed, decisions are the desired product. But there is more. The line drawing sought by plaintiffs is no less arbitrary because the line drawing appears only in the outcome--as one claimant is found too remote and another is allowed to recover. The true difference is that plaintiffs' approach would mask the results. The present rule would be more candid, and in addition, by making results more predictable, serves a normative function. It operates as a rule of law and allows a court to adjudicate rather than manage.

V.

That the rule is identifiable and will predict outcomes in advance of the ultimate decision about recovery enables it to play additional roles. Here we agree with plaintiffs that economic analysis, even at the rudimentary level of jurists, is helpful both in the identification of such roles and the essaying of how the roles play. Thus it is suggested that placing all the consequence of its error on the maritime industry will enhance its incentive for safety. While correct, as far as such analysis goes, such *in terrorem* benefits have an optimal level. Presumably, when the cost of an unsafe condition exceeds its utility there is an incentive to change. As the costs of an accident become increasing multiples of its utility, however, there is a point at which greater accident costs lose meaning, and the incentive curve flattens. When the accident costs are added in large but unknowable amounts, the value of the exercise is diminished.

With a disaster inflicting large and reverberating injuries through the economy, as here, we believe the more important economic inquiry is that of relative cost of administration, and in maritime matters administration quickly involves insurance. Those economic losses not recoverable under the present rule for lack of physical damage to a proprietary interest are the subject of first party or loss insurance. The rule change would work a shift to the more costly liability system of third party insurance. For the same reasons that courts have imposed limits on the concept of foreseeability, liability insurance might not be readily obtainable for the types of losses asserted here. As Professor James has noted, "[s]erious practical problems face insurers in handling insurance against potentially wide, open-ended liability. From an insurer's point of view it is not practical to cover, without limit, a liability that may reach catastrophic proportions, or to fix a reasonable premium on a risk that does not lend itself to actuarial measurement." James, supra, at 53. By contrast, first party insurance is feasible for many of the economic losses claimed here. Each businessman who might be affected by a disruption of river traffic or by a halt in fishing activities can protect against that eventuality at a relatively low cost since his own potential losses are finite and readily discernible. Thus, to the extent that economic analysis informs our decision here, we think that it favors retention of the present rule.

VI.

Plaintiffs argue alternatively that their claims of economic losses are cognizable in maritime tort because the pollution from the collision constituted a public nuisance, and violated the Rivers and Harbors Appropriation Act of 1899 and Louisiana law. We look to each in turn.

1.

Plaintiffs seek to avoid the *Robins* rule by characterizing their claims as damages caused by a public nuisance. They suggest that when a defendant unreasonably interferes with public rights by obstructing navigation or negligently polluting a waterway he creates a public nuisance for which recovery is available to all who have sustained "particular damages." As defined at common law such damages are those which are substantially greater than the presumed-at-law damages suffered by the general public as a result of the nuisance. See generally *Restatement (Second) of Torts* secs. 821B, 821C (1977); Prosser, *Private Action For Public Nuisance,* 52 Va. L.Rev. 997 (1966).Characterizing the problem as one of public nuisance, however, does not immediately solve the problems with plaintiffs' damage claims for pure economic losses. As Dean Prosser has explained, "courts have not always found it at all easy to determine what is sufficient 'particular damage' to support [a] private action [for a public nuisance], and some rather fine lines have been drawn in the decisions." W. Prosser, *Law of Torts* sec. 88 (4th ed. 1971). In drawing such lines today we are unconvinced that we should abandon the physical damage limitation as a prerequisite to recovery for economic loss.

The problem in public nuisance theory of determining when private damages are sufficiently distinct from those suffered by the general public so as to justify recovery is as difficult, if not more so, as determining which foreseeable damages are too remote to justify recovery in negligence. In each case it is a matter of degree, and in each case lines must be drawn. With economic losses such as the ones claimed here the problem is to determine who among an entire community that has been commercially affected by an accident has sustained a pecuniary loss so great as to justify distinguishing his losses from similar losses suffered by others. Given the difficulty of this task, we see no jurisprudential advantage in permitting the use of nuisance theory to skirt the *Robins* rule.

Were we to allow plaintiffs recovery for their losses under a public nuisance theory we would permit recovery for injury to the type of interest that, as we have already explained, we have consistently declined to protect. Nuisance, as Dean Prosser has explained, is not a separate tort subject to rules of its own but, instead is a type of damage. W. Prosser, *Law of Torts* sec. 87 (4th ed. 1971). Our decisions under *Robins* have emphasized the nature of the interest harmed rather than the theory of recovery. As we noted in *Dick Meyers Towing,* "[r]ephrasing the claim as a public nuisance claim does not change its essential character." *Dick Meyers,* 1978 AMC at 2292, 577 F.2d at 1025, n.4. Thus we conclude that plaintiffs may not recover for pure economic losses under a public nuisance theory in maritime tort.

2.

Plaintiffs' arguments that the Rivers and Harbors Appropriation Act affords them an avenue of relief are foreclosed by Supreme Court decision. Plaintiffs suggest that both Section 10 of the Act, which prohibits the obstruction of navigable waters, and Section 13 of the Act, which prohibits the deposit of refuse into navigable waters, have been violated, and that such violations provide a basis for civil liability. In *California v. Sierra Club,* 451 U.S. 287 (1981), the Court held that the Rivers and Harbors Appropriation Act did not authorize private actions to be brought for violation of its provisions. Accordingly, plaintiffs' claims under the Rivers and Harbors Act may not be maintained.

3.

Plaintiffs also urge that their economic losses are recoverable as state law claims in negligence, nuisance or under the Louisiana Environmental Affairs Act of 1980. Because established principles of general maritime law govern the issue of recovery in this case, we reject these state law theories.

The claims all involve a collision on a navigable waterway of the United States and the resulting damages, and hence are within the admiralty and maritime jurisdiction of the federal courts. See, e.g., *Foremost Insurance Co. v. Richardson,* 457 U.S. 668, 1982 AMC 2253 (1982). Under the Admiralty Extension Act our jurisdiction extends to the claims for shoreside damages as well as to those directly involving the waterway.

It is well-settled that the invocation of federal admiralty jurisdiction results in the application of federal admiralty law rather than state law. See, e.g., *Kossick v. United Fruit Co.,* 365 U.S. 731, 1961 AMC 833 (1961); *Freeport Sulphur Co. v. S/S Hermosa,* 1977 AMC 508, 509, 526 F.2d 300, 302 n.2 (5 Cir. 1976). While our maritime decisions are informed by common law developments in the state courts, there is no requirement, as in diversity cases, that state law be adopted. Indeed the federal interest in protecting maritime commerce is often best served by the establishment of uniform rules of conduct. We believe that such is the case here. The *Robins* rule has proved to be a workable and useful tool in our maritime jurisprudence. To permit recovery here on state law grounds would undermine the principles we seek to preserve today. Accordingly, we decline to adopt plaintiffs' state law claims as theories of recovery.

VII.

In conclusion, having reexamined the history and central purpose of the doctrine of *Robins Dry Dock* as developed in this circuit, we remain committed to its teaching. Denying recovery for pure economic losses is a pragmatic limitation on the doctrine of foreseeability, a limitation we find to be both workable and useful. Nor do we find persuasive plaintiffs' arguments that their economic losses are recoverable under a public nuisance theory, as damages for violation of federal statutes, or under state law. ***

Further reading:

***In re: Deepwater Horizon*, No. 17-30233, 741 F. App'x 185 (5th Cir. 2018)** (holding that claims of two service stations (operating under the BP name and logo) for economic losses from injury to the BP name and logo arising out of the Deepwater Horizon incident fell within the admiralty jurisdiction and were barred by the economic loss rule)

Chapter 4: Federal Environmental Legislation: Clean Water Act

Rivers and Harbors Act of 1899 (Refuse Act), 33 U.S.C. § 407

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: Provided, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: And provided further, That the Secretary of War [Secretary of the Army], whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

Clean Water Act (Federal Water Pollution Control Act Amendments of 1972)

33 U.S.C. § 1319

(c) Criminal penalties.

(1) Negligent violations. Any person who--

(A) negligently violates . . . [33 U.S.C. § 1321(b)(3)] . . .

shall be punished by a fine of not less than $ 2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $ 50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations. Any person who--

(A) knowingly violates violates . . . [33 U.S.C. § 1321(b)(3)] . . .shall be punished by a fine of not less than $ 5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $ 100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment.

(A) General rule. Any person who knowingly violates violates . . . [33 U.S.C. § 1321(b)(3)] . . . and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $ 250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $ 1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

33 U.S.C. § 1321

(a) Definitions. For the purpose of this section, the term--

(1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

(2) "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping, but excludes (A) discharges in compliance with a permit under section 402 of this Act [42 U.S.C. § 1342], (B) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of this Act, and subject to a condition in such permit, (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 402 of this Act [42 U.S.C. § 1342], which are caused by events occurring within the scope of relevant operating or treatment systems, and (D) discharges incidental to mechanical removal authorized by the President under subsection (c) of this section;

(3) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel; ***

(6) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment; ***

(9) "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone [15 U.S.T. 1606];

(10) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(11) "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel, and, for the purposes of applying subsections (b), (c), (e), and (o), any foreign offshore unit (as defined in section 1001 of the Oil Pollution Act [33 U.S.C. § 2701]) or any other facility located seaward of the exclusive economic zone;

(12) "act of God" means an act occasioned by an unanticipated grave natural disaster;

(13) "barrel" means 42 United States gallons at 60 degrees Fahrenheit;

(14) "hazardous substance" means any substance designated pursuant to subsection (b)(2) of this section;

(15) "inland oil barge" means a non-self-propelled vessel carrying oil in bulk as cargo and certificated to operate only in the inland waters of the United States, while operating in such waters;

(16) "inland waters of the United States" means those waters of the United States lying inside the baseline from which the territorial sea is measured and those waters outside such baseline which are a part of the Gulf Intracoastal Waterway;

(17) "otherwise subject to the jurisdiction of the United States" means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided for by international agreement to which the United States is a party; ***

(25) "removal costs" means--

> **(A)** the costs of removal of oil or a hazardous substance that are incurred after it is discharged; and
>
> **(B)** in any case in which there is a substantial threat of a discharge of oil or a hazardous substance, the costs to prevent, minimize, or mitigate that threat;
>
> **(26)** "nontank vessel" means a self-propelled vessel that--
>
> **(A)** is at least 400 gross tons as measured under section 14302 of title 46, United States Code [46 U.S.C. § 14302], or, for vessels not

measured under that section, as measured under section 14502 of that title [46 U.S.C. § 14502];
(B) is not a tank vessel;
(C) carries oil of any kind as fuel for main propulsion; and
(D) operates on the navigable waters of the United States, as defined in section 2101(17a) of that title [46 U.S.C. § 2101(17a)];***

(33) the term "Gulf Coast region" means--
(A) in the Gulf Coast States, the coastal zones (as that term is defined in section 304 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1453)), except that, in this section, the term "coastal zones" includes land within the coastal zones that is held in trust by, or the use of which is by law subject solely to the discretion of, the Federal Government or officers or agents of the Federal Government)) that border the Gulf of Mexico;
(B) any adjacent land, water, and watersheds, that are within 25 miles of the coastal zones described in subparagraph (A) of the Gulf Coast States; and
(C) all Federal waters in the Gulf of Mexico; ***

(b)

(1) The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management Act of 1976).

(2) (A) The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States . . . or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States . . . present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches. ***

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and

Management Act of 1976), in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited. . . . ***

(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. The Federal agency shall immediately notify the appropriate State agency of any State which is, or may reasonably be expected to be, affected by the discharge of oil or a hazardous substance. Any such person (A) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, or (B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of this subsection and who is otherwise subject to the jurisdiction of the United States at the time of the discharge, or (C) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge shall, upon conviction, be fined in accordance with title 18, United States Code, or imprisoned for not more than 5 years, or both. Notification received pursuant to this paragraph shall not be used against any such natural person in any criminal case, except a prosecution for perjury or for giving a false statement.

(6) Administrative penalties.

(A) Violations. Any owner, operator, or person in charge of any vessel, onshore facility, or offshore facility--

(i) from which oil or a hazardous substance is discharged in violation of paragraph (3), or

(ii) who fails or refuses to comply with any regulation issued under subsection (j) to which that owner, operator, or person in charge is subject,

may be assessed a class I or class II civil penalty by the Secretary of the department in which the Coast Guard is operating, the Secretary of Transportation, or the Administrator.

(B) Classes of penalties.

(i) Class I. The amount of a class I civil penalty under subparagraph (A) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before assessing a civil penalty under this clause, the Administrator or Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to assess the penalty and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed penalty . . . .

(ii) Class II. The amount of a class II civil penalty under subparagraph (A) may not exceed $ 10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $ 125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of title 5, United States Code. ***

(E) Effect of order. Action taken by the Administrator or Secretary, as the case may be, under this paragraph shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this Act [33 U.S.C. §§ 1251 et seq.]; except that any violation--

(i) with respect to which the Administrator or Secretary has commenced and is diligently prosecut-ing an action to assess a class II civil penalty under this paragraph, or

(ii) for which the Administrator or Secretary has issued a final order assessing a class II civil penalty not subject to further judicial review and the violator has paid a penalty assessed under this paragraph, shall not be the subject of a civil penalty action under section 309(d), 309(g), or 505 of this Act [33 U.S.C. §§ 1319(d), (g), 1365] or under paragraph (7). ***

(G) Judicial review. Any person against whom a civil penalty is assessed under this paragraph or who commented on the proposed assessment of such penalty in accordance with subparagraph (C) may obtain review of such assessment--

(i) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(ii) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business, by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or Secretary, . . . and the Attorney General. ***

(7) Civil penalty action.

(A) Discharge, generally. Any person who is the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3), shall be subject to a civil penalty in an amount up to $25,000 per day of violation or an amount up to $1,000 per barrel of oil or unit of reportable quantity of hazardous substances discharged.

(B) Failure to remove or comply. Any person described in subparagraph (A) who, without sufficient cause--

(i) fails to properly carry out removal of the discharge under an order of the President pursuant to subsection (c); or

(ii) fails to comply with an order pursuant to subsection (e)(1)(B);

shall be subject to a civil penalty in an amount up to $25,000 per day of violation or an amount up to 3 times the costs incurred by the Oil Spill Liability Trust Fund as a result of such failure.

(C) Failure to comply with regulation. Any person who fails or refuses to comply with any regulation issued under subsection (j) shall be subject to a civil penalty in an amount up to $ 25,000 per day of violation.

(D) Gross negligence. In any case in which a violation of paragraph (3) was the result of gross negligence or willful misconduct of a person described in subparagraph (A), the person shall be subject to a civil penalty of not less than $ 100,000, and not more than $ 3,000 per barrel of oil or unit of reportable quantity of hazardous substance discharged.

(E) Jurisdiction. An action to impose a civil penalty under this paragraph may be brought in the district court of the United States for the district in which the defendant is located, resides, or is doing business, and such court shall have jurisdiction to assess such penalty.

(F) Limitation. A person is not liable for a civil penalty under this paragraph for a discharge if the person has been assessed a civil penalty under paragraph (6) for the discharge.

(8) Determination of amount. In determining the amount of a civil penalty under paragraphs (6) and (7), the Administrator, Secretary, or the court, as the case may be, shall consider the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

(9) Mitigation of damage. In addition to establishing a penalty for the discharge of oil or a hazardous substance, the Administrator or the Secretary of the department in which the Coast Guard is operating may act to mitigate the damage to the public health or welfare caused by such discharge. The cost of such mitigation shall be deemed a cost incurred under subsection (c) of this section for the removal of such substance by the United States Government.

(10) Recovery of removal costs. Any costs of removal incurred in connection with a discharge excluded by subsection (a)(2)(C) of this section shall be recoverable from the owner or operator of the source of the discharge in an action brought under section 309(b) of this Act [33 U.S.C. § 1319(b)].

(11) Limitation. Civil penalties shall not be assessed under both this section and section 309 [33 U.S.C. § 1319] for the same discharge. ***

(c) Federal removal authority.

(1) General removal requirement.

(A) The President shall, in accordance with the National Contingency Plan and any appropriate Area Contingency Plan, ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or a hazardous substance--

(i) into or on the navigable waters;

(ii) on the adjoining shorelines to the navigable waters;

(iii) into or on the waters of the exclusive economic zone; or

(iv) that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States. ***

(4) Exemption from liability.

(A) A person is not liable for removal costs or damages which result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the President relating to a discharge or a substantial threat of a discharge of oil or a hazardous substance.

(B) Subparagraph (A) does not apply--

(i) to a responsible party;

(ii) to a response under the Comprehensive Environ-mental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);

(iii) with respect to personal injury or wrongful death; or

(iv) if the person is grossly negligent or engages in willful misconduct.

(C) A responsible party is liable for any removal costs and damages that another person is relieved of under subparagraph (A). ***

(6) Responsible party defined. For purposes of this subsection, the term "responsible party" has the meaning given that term under section 1001 of the Oil Pollution Act of 1990 [33 U.S.C. § 2701]. ***

(f) Liability for actual costs of removal.

(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, [notwithstanding] any other provision of law, be liable to the United States Government for the

actual costs incurred under subsection (c) for the removal of such oil or substance by the United States Government in an amount not to exceed in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.
(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) for the removal of such oil or substance by the United States Government in an amount not to exceed $ 50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Administrator is authorized, by regulation, after consulta-tion with the Secretary of Commerce and the Small Business Admini-stration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type, and location do not present a substantial risk of the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.
(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous

substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000 except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

(4) The costs of removal of oil or a hazardous substance for which the owner or operator of a vessel or onshore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance in violation of subsection (b) of this section.

(5) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

(g) Third party liability. Where the owner or operator of a vessel (other than an inland oil barge) carrying oil or hazardous substances as cargo or an onshore or offshore facility which handles or stores oil or hazardous substances in bulk, from which oil or a hazardous substance is discharged in violation of subsection (b) of this section, alleges that such discharge was caused solely by an act or omission of a third party, such owner or operator shall pay to the United States Government the actual costs incurred under subsection (c) for removal of such oil or substance and shall be entitled by subrogation to all rights of the United States Government to recover such costs from such third party under this subsection. In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsection shall not exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $ 150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

(h) Rights against third parties who caused or contributed to discharge. The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) The United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance.

(i) Recovery of removal costs. In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Claims Court [United States Court of Federal Claims], that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing causes. ***

(o) Obligation for damages unaffected; local authority not preempted; existing Federal authority not modified or affected.

> **(1)** Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned

property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any require-ment or liability with respect to the discharge of oil or hazardous substance into any waters within such State, or with respect to any removal activities related to such discharge.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this Act or any other provision of law, or to affect any State or local law not in conflict with this section. ***

(q) Establishment of maximum limit of liability with respect to onshore or offshore facilities. The President is authorized to establish, with respect to any class or category of onshore or offshore facilities, a maximum limit of liability under subsections (f)(2) and (3) of this section of less than $50,000,000, but not less than $8,000,000.

(r) Liability limitations not to limit liability under other legislation. Nothing in this section shall be construed to impose, or authorize the imposition of, any limitation on liability under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974. ***

28 U.S.C. § 1362

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(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) " sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 312 of this Act [33 U.S.C. § 1322]; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone [15 U.S.T. § 1606].
(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.
(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.
(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.
(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.
(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.
(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.
(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants. ***
(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water. ***

33 U.S.C. § 1370

Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate

> agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

***Rapanos v. United States*, 547 U.S. 715 (2006)**

Justice Scalia announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Thomas and Justice Alito join. ***

The Corps' current regulations interpret "the waters of the United States" to include, in addition to traditional interstate navigable waters, 33 CFR § 328.3(a)(1) (2004), "[a]ll interstate waters including interstate wetlands," § 328.3(a)(2); "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce," § 328.3(a)(3); "[t]ributaries of [such] waters," § 328.3(a)(5); and "[w]etlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands)," § 328.3(a)(7). The regulation defines "adjacent" wetlands as those "bordering, contiguous [to], or neighboring" waters of the United States. § 328.3(c). It specifically provides that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" *Ibid.* ***

The Corps' expansive approach might be arguable if the CWA defined "navigable waters" as "water of the United States." But "the waters of the United States" is something else. The use of the definite article ("the") and the plural number ("waters") shows plainly that § 1362(7) does not refer to water in general. In this form, "the waters" refers more narrowly to water "[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or bodies." Webster's New International Dictionary 2882 (2d ed. 1954) (hereinafter Webster's Second). On this definition, "the waters of the United States" include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in "streams," "oceans," "rivers," "lakes," and "bodies" of water "forming geographical features." *Ibid.* All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition's terms, namely, "streams," connotes a continuous flow of water in a permanent channel--especially when used in company with other terms such as “rivers,” “lakes,” and “oceans.” None of these terms encompasses transitory puddles or ephemeral flows of water.

The restriction of “the waters of the United States” to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term. In applying the definition to “ephemeral streams,” “wet meadows,” storm sewers and culverts, “directional sheet flow during storm events,” drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term “waters of the United States” beyond parody. The plain language of the statute simply does not authorize this “Land Is Waters” approach to federal jurisdiction.

In addition, the Act’s use of the traditional phrase “navigable waters” (the defined term) further confirms that it confers jurisdiction only over relatively *permanent* bodies of water. The Act adopted that traditional term from its predecessor statutes. See *SWANCC*, 531 U.S., at 180, 121 S. Ct. 675, 148 L. Ed. 2d 576 (Stevens, J., dissenting). On the traditional understanding, “navigable waters” included only discrete *bodies* of water. For example, in *The Daniel Ball*, we used the terms “waters” and “rivers” interchangeably. 77 U.S., at 563, 10 Wall., at 563, 19 L. Ed. 999 . And in *Appalachian Electric*, we consistently referred to the "navigable waters” as “waterways.” 311 U.S., at 407-409, 61 S. Ct. 291, 85 L. Ed. 243. Plainly, because such “waters" had to be navigable in fact or susceptible of being rendered so, the term did not include ephemeral flows. As we noted in *SWANCC*, the traditional term “navigable waters”--even though defined as “the waters of the United States”--carries *some* of its original substance: “[I]t is one thing to give a word limited effect and quite another to give it no effect whatever.” 531 U.S., at 172, 121 S. Ct. 675, 148 L. Ed. 2d 576. That limited effect includes, at bare minimum, the ordinary presence of water.

Our subsequent interpretation of the phrase “the waters of the United States” in the CWA likewise confirms this limitation of its scope. In *Riverside Bayview*, we stated that the phrase in the Act referred primarily to “rivers, streams, and other *hydrographic features more conventionally identifiable as ‘waters’*” than the wetlands adjacent to such features. 474 U.S., at 131, 106 S. Ct. 455, 88 L. Ed. 2d 419 (emphasis added). We thus echoed the dictionary definition of "waters" as referring to "streams and bodies *forming geographical features* such as oceans, rivers, [and] lakes." Webster's Second 2882 (emphasis added). Though we upheld in that case the inclusion of wetlands abutting such a “hydrographic featur[e]”—principally due to the difficulty of drawing any clear boundary between the two, see 474 U.S., at 132, 106 S. Ct. 455, 88 L. Ed. 2d 419; Part IV, *infra*--nowhere did we suggest that "the waters of the United States" should be expanded to include, in their own right, entities other than "hydrographic features more conventionally identifiable as 'waters,'" *Id.* at 131. Likewise, in both *Riverside Bayview* and *SWANCC*, we repeatedly described the "navigable waters" covered by the Act as "open water" and "open waters." See *Riverside Bayview*, *supra,* at 132, and n. 8, 134, 106 S. Ct. 455, 88 L. Ed. 2d 419; *SWANCC*, *supra,* at 167, 172, 121 S. Ct. 675, 148 L. Ed. 2d 576. Under no rational interpretation are typically dry channels described as "*open* waters."

Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from "navigable waters," by including them in the definition of "'point source.'" The Act defines "'point source'" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). It also defines "'discharge of a pollutant'" as "any addition of any pollutant *to* navigable waters *from* any point source." § 1362(12)(A) (emphasis added). The definitions thus conceive of "point sources" and "navigable waters" as separate and distinct categories. The definition of "discharge" would make little sense if the two categories were significantly overlapping. The separate classification of "ditch[es], channel[s], and conduit[s]"—which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow—shows that these are, by and large, *not* "waters of the United States."

Moreover, only the foregoing definition of "waters" is consistent with the CWA's stated "policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ." § 1251(b). This statement of policy was included in the Act as enacted in 1972, see 86 Stat. 816, prior to the addition of the optional state administration program in the 1977 amendments, see 91 Stat. 1601. Thus the policy plainly referred to something beyond the subsequently added state administration program of 33 U.S.C. § 1344(g)-(*l*). But the expansive theory advanced by the Corps, rather than "preserv[ing] the primary rights and responsibilities of the States," would have brought virtually all "plan[ning of] the development and use . . . of land and water resources" by the States under federal control. It is therefore an unlikely reading of the phrase "the waters of the United States."

Even if the phrase "the waters of the United States" were ambiguous as applied to intermittent flows, our own canons of construction would establish that the Corps' interpretation of the statute is impermissible. As we noted in *SWANCC*, the Government's expansive interpretation would "result in a significant impingement of the States' traditional and primary power over land and water use." 531 U.S., at 174, 121 S. Ct. 675, 148 L. Ed. 2d 576. Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power. See *FERC* v. *Mississippi*, 456 U.S. 742, 767-768, n. 30, 102 S. Ct. 2126, 72 L. Ed. 2d 532 (1982); *Hess* v. *Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994). The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land--an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board. See 33 CFR § 320.4(a)(1) (2004). We ordinarily expect a "clear and manifest" statement from Congress to authorize an unprecedented intrusion into traditional state authority. See *BFP* v. *Resolution Trust Corporation*, 511 U.S. 531, 544, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994). The phrase "the waters of the United States" hardly qualifies.

Likewise, just as we noted in *SWANCC*, the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power. See 531 U.S., at 173, 121 S. Ct. 675, 148 L. Ed. 2d 576. (In developing the current regulations, the Corps consciously sought to extend its authority to the farthest reaches of the commerce power. See 42 Fed. Reg. 37127 (1977).) Even if the term "the waters of the United States" were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988).

In sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the "the waters of the United States" is thus not "based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). ***

Justice Kennedy, concurring in the judgment. ***

Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term "navigable" some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and it pursued that objective by restricting dumping and filling in "navigable waters," §§ 1311(a), 1362(12). With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage. 33 CFR § 320.4(b)(2). Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters." ***

40 C.F.R § 120.2

For the purposes of this part, the following terms shall have the meanings indicated:

Navigable waters means waters of the United States, including the territorial seas.

Waters of the United States means: [Effective June 22, 2020]

(**1)** Jurisdictional waters. For purposes of the Clean Water Act, 33 U.S.C. 1251 et seq. and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term "waters of the United States" means:

(i) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide;

(ii) Tributaries;

(iii) Lakes and ponds, and impoundments of jurisdictional waters; and

(iv) Adjacent wetlands.

(2) Non-jurisdictional waters. The following are not "waters of the United States":

(i) Waters or water features that are not identified in paragraph (1)(i), (ii), (iii), or (iv) of this definition;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools;

(iv) Diffuse stormwater run-off and directional sheet flow over upland;

(v) Ditches that are not waters identified in paragraph (1)(i) or (ii) of this definition, and those portions of ditches constructed in waters identified in paragraph (1)(iv) of this definition that do not satisfy the conditions of paragraph (3)(i) of this definition;

(vi) Prior converted cropland;

(vii) Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease;

(viii) Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (3)(vi) of this definition;

(ix) Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;

(x) Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off;

(xi) Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters; and

(xii) Waste treatment systems.

(3) Definitions. In this section, the following definitions apply:

(i) Adjacent wetlands. The term adjacent wetlands means wetlands that:

(A) Abut, meaning to touch at least at one point or side of, a water identified in paragraph (1)(i), (ii), or (iii) of this definition;

(B) Are inundated by flooding from a water identified in paragraph (1)(i), (ii), or (iii) of this definition in a typical year;

(C) Are physically separated from a water identified in paragraph (1)(i), (ii), or (iii) of this definition only by a natural berm, bank, dune, or similar natural feature; or

(D) Are physically separated from a water identified in paragraph (1)(i), (ii), or (iii) of this definition only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the water identified in paragraph (1)(i), (ii), or (iii) of this definition in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

(ii) Ditch. The term ditch means a constructed or excavated channel used to convey water.

(iii) Ephemeral. The term ephemeral means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

(iv) High tide line. The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

(v) Intermittent. The term intermittent means surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

(vi) Lakes and ponds, and impoundments of jurisdictional waters. The term lakes and ponds, and impoundments of jurisdictional waters means standing bodies of open water that contribute surface water flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or through one or more waters identified in paragraph (1)(ii), (iii), or (iv) of this definition. A lake, pond, or impoundment of a jurisdictional water does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. A lake or pond, or impoundment of a jurisdictional water is also jurisdictional if it is inundated by flooding from a water identified in paragraph (1)(i), (ii), or (iii) of this definition in a typical year.

(vii) Ordinary high water mark. The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(viii) Perennial. The term perennial means surface water flowing continuously year-round.

(ix) Prior converted cropland. The term prior converted cropland means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered prior converted cropland for purposes of the Clean Water Act when the area is abandoned and has reverted to wetlands, as defined in paragraph (3)(xvi) of this definition. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(x) Snowpack. The term snowpack means layers of snow that accumulate over extended periods of time in certain geographic regions or at high elevation (e.g., in northern climes or mountainous regions).

(xi) Tidal waters and waters subject to the ebb and flow of the tide. The terms tidal waters and waters subject to the ebb and flow of the tide mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xii) Tributary. The term tributary means a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or through one or more waters identified in paragraph (1)(ii), (iii), or (iv) of this definition. A tributary must be perennial or intermittent in a typical year. The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of this definition. A tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. The term tributary includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of this definition.

(xiii) Typical year. The term typical year means when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.

(xiv) Upland. The term upland means any land area that under normal circumstances does not satisfy all three wetland factors (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xvi) of this definition, and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water.

(xv) Waste treatment system. The term waste treatment system includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xvi) Wetlands. The term wetlands means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

***Pepperell Assocs. v. United States EPA*, 246 F.3d 15 (1st Cir. 2001)**

Lynche, *Circuit Judge.*

This case illustrates the perils facing a small business that does not determine whether it is subject to regulation under *33 U.S.C. § 1321*, the oil spill provision of the Clean Water Act. Pepperell Associates operates a business out of an old textile mill building in Lewiston, Maine. In October 1996, a rupture in a gasket on a boiler caused an oil spill in the boiler room of the building. Some three- to four-hundred gallons of the oil ultimately worked its way into Gully Brook and from there to the Androscoggin River, both navigable waters of the United States. The spill was largely contained with the help of cleanup experts sent in by the state of Maine.

The Environmental Protection Agency responded with a three count administrative penalty action against Pepperell. That complaint was heard by an administrative law judge and the results were appealed by both sides to the Environmental Appeals Board ("EAB"). Pepperell ended up with an order that it had violated its obligation to have a spill control plan, that it was not excused from having such a plan during a limited period by the installation of a new oil storage tank, and that it must pay a total penalty of $43,643 for the three counts of the complaint. Pepperell has sought judicial review of that order in this court. See 33 U.S.C. § 1321(b)(6)(G)(ii). We deny the petition for review.

I.

The facts are undisputed. The case instead concerns what conclusions may rationally be drawn from those facts. Pepperell Associates is the owner and operator of the historic Pepperell textile mill, located in an industrialized section of downtown Lewiston. In June 1985, after its use as a mill had been discontinued, Pepperell purchased the facility and used the building as light industrial and warehouse rental space. At the time of the spill, the mill complex had three underground heating oil storage tanks, each with a capacity of 30,000 gallons. The tanks were located next to the facility's boiler room, and only two were still connected to the boiler. About 500 feet from the facility is Gully Brook, a tributary of the Androscoggin River. Both are navigable waters of the United States.

A spill occurred early in the morning on October 17, 1996, when a gasket ruptured on the facility's boiler, spilling oil onto the boiler room floor. That oil then flowed down a stairwell, through a condensate pipe tunnel, and into the city sewer conduit and box culvert. Ordinarily the city sewer conduit and box culvert discharge municipal solid waste and storm water from Lewiston to the Lewiston-Auburn Treatment Plant. However, during times of high water, the box culvert also operates as a combined sewage and storm water overflow ("CSO"), which periodically discharges into Gully Brook. In this case, the oil not only spilled into the sewer line but also discharged through the culvert into Gully Brook.

As a result of the spill, some of the oil entered the Androscoggin River from its tributary. The spill caused a noticeable sheen on the surface of both Gully Brook and the Androscoggin River, with the sheen on the Androscoggin extending for approximately one mile from their confluence. The remainder of the oil entered the city treatment facility, which lacks the capacity to treat such industrial wastes.

On the morning of the spill, one of the owners of Pepperell contacted the Maine Department of Environmental Protection ("MDEP"). The MDEP and the EPA, along with the Coast Guard and the fire department, assisted Pepperell in responding to the spill. The MDEP arranged for cleanup of the spill, spending a total of $23,643.82 for cleanup of the boiler room, Gully Brook, the Androscoggin River, and the treatment plant. In all, between 350 and 400 gallons of oil reached Gully Brook and the Androscoggin River, of which 300 gallons were recovered. As provided by Maine law, Pepperell partially reimbursed the state for the costs of cleanup. ***

II.

Following the oil spill, the EPA filed an administrative complaint against Pepperell alleging that it had failed to prepare and implement a Spill Prevention Control and Countermeasures Plan as required by the Clean Water Act, see 33 U.S.C. § 1321(j)(1); 40 C.F.R. Part 112, and that it had discharged oil into a navigable waterway in violation of that Act, see 33 U.S.C. § 1321 (b)(3).

On September 29, 1998, the complaint was amended to include three counts. The EPA charged in Count One of the complaint that Pepperell had operated a facility regulated under the Oil Pollution Prevention regulations throughout the period when the three tanks had been in the ground—from December 1985 to July 14, 1997—and had failed to prepare and implement an SPCC plan. Count Two charged that from the completion of the above-ground tank in October 16, 1997, until the submission of an SPCC plan on April 14, 1998, Pepperell had operated a facility regulated under the Act, and had both failed to prepare an amended SPCC plan as required and failed to implement such a plan within six months of the completion of the modification. Count Three alleged that on October 17, 1996, Pepperell discharged oil in harmful quantities into a navigable water of the United States in violation of 33 U.S.C. § 1321(b)(3). For these three violations, the EPA sought a total penalty of $47,930. ***

The Clean Water Act provides that it is the policy of this country "that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States [or their] adjoining shorelines . . ." 33 U.S.C. § 1321(b)(1). The Act authorizes the promulgation of regulations to define which discharges are harmful and are therefore regulated. 33 U.S.C. § 1321(b)(4). Those EPA regulations provide that discharges of oil are harmful if, inter alia, the discharge causes "a film or sheen upon or discoloration of the surface of the water or adjoining shorelines." 40 C.F.R. § 110.3. Because the oil spill here caused a sheen, the EAB determined that that criterion was met.

Pepperell does not challenge the EAB's finding that it discharged a harmful quantity of oil into navigable waters (Count Three of the Complaint), but raises four other issues regarding the EAB's conclusions. First, Pepperell challenges the

EAB's determination that it was subject to SPCC regulation, arguing that because of the location of the facility, it could not be reasonably expected to discharge oil into or upon navigable waters. In any case, Pepperell says, the EAB erred in finding it subject to SPCC regulation between November 1, 1996, and July 14, 1997, as its underground oil storage capacity was less than the jurisdictional threshold for SPCC regulation. Pepperell also argues that the EAB erred in finding the construction of the new 20,000-gallon above-ground storage tank was a modification of an existing facility rather than a new facility, and therefore holding it liable for not properly preparing and implementing an amended SPCC plan. Finally, Pepperell challenges the EAB's calculation of the penalty. We take these arguments in turn, and affirm the EAB's conclusion on each.

A. The Failure to Have an SPCC Plan

Pepperell contests the initial finding that it was subject to the Spill Prevention Control and Countermeasure regulations for the original three underground storage tanks. At issue here is the scope of coverage of the SPCC regulations. Those regulations apply to:

Owners or operators of non-transportation-related onshore and offshore facilities engaged in . . . storing . . . oil and oil products, and which, due to their location, could reasonably be expected to discharge oil in harmful quantities . . . into or upon the navigable waters of the United States or adjoining shorelines.

40 C.F.R. § 112.1(b). In turn, the regulations exclude:

Onshore and offshore facilities which, due to their location, could not reasonably be expected to discharge oil into or upon the navigable waters . . . This determination shall be based solely upon a consideration of the geographical, locational aspects of the facility (such as proximity to navigable waters or adjoining shorelines, land contour, draining, etc.) . . .

40 C.F.R. § 112.1(d)(1)(i). An owner or operator subject to the regulations must prepare an SPCC plan in accord with certain requirements.

The dispute is over whether Pepperell is an included or excluded facility; that is, applying the test under the regulations, whether "due to [its] location," the discharge of a harmful quantity of oil into navigable waters from the facility was "reasonably foreseeable." Pepperell advances three lines of argument that such a discharge of oil was not reasonably foreseeable: (1) that considering the location of the facility in relation to Gully Brook alone, the discharge of oil into a navigable water could not be reasonably expected; (2) that the actual path taken by the oil could not be reasonably foreseen; and (3) that the unfortunate coincidence of the spill with high waters—a necessary condition for the oil reaching Gully Brook through the overflow—also could not have been reasonably foreseen.

As to the locational test, Pepperell says that, under the regulations, one considers only the “geographical” and “locational” aspects of the facility in assessing whether such a discharge is foreseeable. Pepperell claims that based on its location alone, there was no reason to expect a discharge from the facility into navigable waters. The mill facility is located in a dense industrial and urban area of downtown Lewiston, it says, out of sight of any navigable waters. Moreover, Pepperell points out, the building is more than a hundred yards from the Gully Brook, the nearest navigable waters, and there is no downward slope from the facility to the waters. Indeed, it says, a major road separates the mill facility from Gully Brook.

However, these facts, taken alone, do not compel the EAB to agree with Pepperell that, under the regulations, the discharge into navigable waters was not reasonably foreseeable upon consideration of the “locational aspects” of the site. Pepperell oversimplifies the “locational” test; the inquiry is not limited to stark description of surrounding terrain. The test’s requirements are met so long as the EAB concludes that in light of the particular features of the site, a discharge into navigable waters was reasonably foreseeable. As the EAB notes, man-made features of a location that influence drainage patterns are highly relevant to any inquiry into the foreseeability of a harmful discharge. Upon consideration of the evidence about the site here, the EAB concluded that such a discharge was foreseeable. Of more concern are Pepperell's next two arguments, which challenge the support for this conclusion by the EAB.

Pepperell’s next argument challenges the application of the SPCC regulations because the path actually taken by the oil to navigable waters was not, it says, foreseeable. Pepperell correctly argues that the EAB had doubts that one could reasonably predict the actual path taken by the oil spilled in October 1996 as it worked its way to Gully Brook. The actual path taken by the oil is unclear, but it appears that the oil reached a condensate pipe tunnel at the mill, and from there somehow made its way into a sewer pipe, from which it overflowed into the Gully Brook. Because the path the oil took was not foreseeable, Pepperell says, it should not face liability under the SPCC regulations; the EAB, it says, was wrong to rely on a different theory involving an alternate pathway that oil might take, but which this oil spill apparently did not take.

The EAB agreed with Pepperell that a discharge into Gully Brook by the particular route taken in this case might not have been within Pepperell’s reasonable anticipation. Nevertheless, the EAB determined that a discharge from the facility in general to navigable waters was reasonably foreseeable, and therefore Pepperell was liable for its failure to prepare and implement an SPCC plan. The EAB found that there was a floor drain in the boiler room, and that the drain directly connected with the sewer conduit, as is common. Thus, the EAB concluded, since it was reasonably predictable that oil which found its way into the floor drain would work its way to navigable waters, it was reasonably foreseeable that an oil spill in the boiler room of the facility might lead to such a discharge.

We cannot say that the EAB addressed itself to the wrong question or that its conclusion is not supported by substantial evidence. The regulations impose a duty to have an SPCC plan whether there is an oil spill or not. The point of the SPCC is to be prophylactic—to prevent oil discharges to navigable waters. The fortuity that the oil spill here did not follow the predicted route does not mean there was no obligation to have a plan. Rather, the EAB's conclusion that the facility in general exhibited locational and geographical characteristics that made a discharge to a navigable water foreseeable brings the facility within the jurisdiction of the SPCC regulations, and therefore the EAB was correct to impose liability on Pepperell for its failure to prepare and implement an SPCC plan.

Pepperell's third argument is that even if a discharge into the sewer conduit were reasonably foreseeable, as a general matter there was no reason to expect such a discharge to reach navigable waters. Only an accident of timing and of weather resulted in the discharge to navigable waters that occurred in this spill, it says, and such a coincidence was not reasonably foreseeable. Pepperell is correct that the city sewage system only overflows into Gully Brook during times of high water, such as heavy rain or storms, and otherwise carries its contents to Lewiston's sewage treatment facility. Indeed, Lewiston was in the midst of upgrading its sewer system, and was permitted by the EPA to discharge sewage to Gully Brook in the interim. It was Pepperell's ill fortune that its oil spill happened during one of these periods of high water.

The EAB did not overlook this concern and presume foreseeability once it found that there was a foreseeable pathway for the oil to reach the sewage system. Rather, the EAB also concluded that such overflow events occurred on a regular basis, and that a reasonably alert oil facility owner in Lewiston should have been aware that these overflows from the city sewage system into navigable waters occurred regularly. Overflows occurred whenever there were heavy rains or storms. In addition, the evidence showed that, regardless of weather, sewage overflows also occurred regularly in the morning hours, when the sewer flow typically runs high. Moreover, in this case, the owners of the oil storage facility not only should have known of the potential for overflow, but were in fact aware of it. Ralph Sawyer, one of Pepperell’s owners, testified that he had seen overflow conditions from the sewage system into Gully Brook “generally early in the morning hours,” and therefore he was aware of the routineness of such events. The mill owners’ awareness of the potential overflow is further corroborated by the fact that on the morning of the spill they checked the overflow to see if the oil had reached Gully Brook.

While the EAB could rationally have found that Lewiston's failure to have completed an upgraded sewer system should render the risk that sewage would overflow into navigable waters unforeseeable to those hooked up to its sewer lines, nothing compelled the EPA to reach such a result. There is sufficient evidence that a reasonably alert owner would be aware of the possibility of an overflow, and it is reasonable under those circumstances to view the objective of preventing oil spills as best served by requiring such foresight on the part of the owners and operators of oil storage facilities.***

***County of Maui v. Hawaii Wildlife Fund*, No. 18-260 (U.S. Apr. 23, 2020).**

Justice Breyer delivered the opinion of the Court.

The Clean Water Act forbids the "addition" of any pollutant from a "point source" to "navigable waters" without the appropriate permit from the Environmental Protection Agency (EPA). Federal Water Pollution Control Act, §§301(a), 502(12)(A), as amended by the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) §2, 86 Stat. 844, 886, 33 U. S. C. §§1311(a), 1362(12)(A). The question presented here is whether the Act "requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source," here, "groundwater." Pet. for Cert. i. Suppose, for example, that a sewage treatment plant discharges polluted water into the ground where it mixes with groundwater, which, in turn, flows into a navigable river, or perhaps the ocean. Must the plant's owner seek an EPA permit before emitting the pollutant? We conclude that the statutory provisions at issue require a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters.

I

A

Congress' purpose as reflected in the language of the Clean Water Act is to "'restore and maintain the . . . integrity of the Nation's waters,'" §101(a), 86 Stat. 816. Prior to the Act, Federal and State Governments regulated water pollution in large part by setting water quality standards. See *EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U. S. 200, 202-203, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976). The Act restructures federal regulation by insisting that a person wishing to discharge *any* pollution into navigable waters first obtain EPA's permission to do so. See *id.,* at 203-205, 96 S. Ct. 2022, 48 L. Ed. 2d 578; *Milwaukee* v. *Illinois*, 451 U. S. 304, 310-311, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981).

The Act's provisions use specific definitional language to achieve this result. First, the Act defines "pollutant" broadly, including in its definition, for example, any solid waste, incinerator residue, "'heat,'" "'discarded equipment,'" or sand (among many other things). §502(6), 86 Stat. 886. Second, the Act defines a "point source" as "'any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged,'" including, for example, any "'container,'" "'pipe, ditch, channel, tunnel, conduit,'" or "'well.'" §502(14), *id.,* at 887. Third, it defines the term "discharge of a pollutant" as "'any addition of any pollutant to navigable waters [including navigable streams, rivers, the ocean, or coastal waters] from any point source.'" §502(12), *id.,* at 886.

The Act then sets forth a statutory provision that, using these terms, broadly states that (with certain exceptions) "'the discharge of any pollutant by any person'" without an appropriate permit "'shall be unlawful.'" §301, *id.,* at 844. The question here, as we have said, is whether, or how, this statutory language applies to a pollutant that reaches navigable waters only after it leaves a "point source" and then travels through groundwater before reaching navigable waters. In such an instance, has there been a "discharge of a pollutant," that is, has there been "any addition of any pollutant to navigable waters from any point source? "

B

The petitioner, the County of Maui, operates a wastewater reclamation facility on the island of Maui, Hawaii. The facility collects sewage from the surrounding area, partially treats it, and pumps the treated water through four wells hundreds of feet underground. This effluent, amounting to about 4 million gallons each day, then travels a further half mile or so, through groundwater, to the ocean.

In 2012, several environmental groups, the respondents here, brought this citizens' Clean Water Act lawsuit against Maui. See §505(a), *id.,* at 888. They claimed that Maui was "discharg[ing]" a "pollutant" to "navigable waters," namely, the Pacific Ocean, without the permit required by the Clean Water Act. The District Court, relying in part upon a detailed study of the discharges, found that a considerable amount of effluent from the wells ended up in the ocean (a navigable water). It wrote that, because the "path to the ocean is clearly ascertainable," the discharge from Maui's wells into the nearby groundwater was "functionally one into navigable water." 24 F. Supp. 3d 980, 998 (Haw. 2014). And it granted summary judgment in favor of the environmental groups. See *id.,* at 1005.

The Ninth Circuit affirmed the District Court, but it described the relevant statutory standard somewhat differently. The appeals court wrote that a permit is required when "the pollutants are *fairly traceable* from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water." 886 F. 3d 737, 749 (2018) (emphasis added). The court left “for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability . . . .” *Ibid.*

Maui petitioned for certiorari. In light of the differences in the standards adopted by the different Courts of Appeals, we granted the petition. Compare, *e.g.,* 886 F. 3d, at 749 (“fairly traceable”), with *Upstate Forever* v. *Kinder Morgan Energy Partners, L. P.*, 887 F. 3d 637, 651 (CA4 2018) (“direct hydrological connection”), and *Kentucky Waterways Alliance* v. *Kentucky Util. Co.*, 905 F. 3d 925, 932-938 (CA6 2018) (discharges through groundwater are excluded from the Act’s permitting requirements).

II

The linguistic question here concerns the statutory word “from.” Is pollution that reaches navigable waters only through groundwater pollution that is “from” a point source, as the statute uses the word? The word “from” is broad in scope, but context often imposes limitations. “Finland,” for example, is often not the right kind of answer to the question, “Where have you come from?” even if long ago you were born there.

The parties here disagree dramatically about the scope of the word “from” in the present context. The environmental groups, the respondents, basically adopt the Ninth Circuit’s view—that the permitting requirement applies so long as the pollutant is “fairly traceable” to a point source even if it traveled long and far (through groundwater) before it reached navigable waters. They add that the release from the point source must be “a proximate cause of the addition of pollutants to navigable waters.” Brief for Respondents 20.

Maui, on the other hand, argues that the statute creates a “bright-line test.” Brief for Petitioner 27-28. A point source or series of point sources must be “the *means of delivering* pollutants to navigable waters.” *Id.,* at 28. They add that, if “at least one nonpoint source (*e.g.,* unconfined rainwater runoff or groundwater)” lies “between the point source and the navigable water,” then the permit requirement “does not apply.” *Id.,* at 54. A pollutant is “from” a point source only if a point source is the last “conveyance” that conducted the pollutant to navigable waters.

The Solicitor General, as *amicus curiae*, supports Maui, at least in respect to groundwater. Reiterating the position taken in a recent EPA “Interpretive Statement,” see 84 Fed. Reg. 16810 (2019), he argues that, given the Act’s structure and history, “a release of pollutants to groundwater is not subject to” the Act’s permitting requirement “even if the pollutants subsequently migrate to jurisdictional surface waters," such as the ocean. Brief for United States as *Amicus Curiae* 12 (capitalization omitted).

We agree that statutory context limits the reach of the statutory phrase "from any point source" to a range of circumstances narrower than that which the Ninth Circuit's interpretation suggests. At the same time, it is significantly broader than the total exclusion of all discharges through groundwater described by Maui and the Solicitor General.

III

Virtually all water, polluted or not, eventually makes its way to navigable water. This is just as true for groundwater. See generally 2 Van Nostrand's Scientific Encyclopedia 2600 (10th ed. 2008) (defining "Hydrology"). Given the power of modern science, the Ninth Circuit's limitation, "fairly traceable," may well allow EPA to assert permitting authority over the release of pollutants that reach navigable waters many years after their release (say, from a well or pipe or compost heap) and in highly diluted forms. See, *e.g.,* Brief for Aquatic Scientists et al. as *Amici Curiae* 13-28.

The respondents suggest that the standard can be narrowed by adding a "proximate cause" requirement. That is, to fall within the permitting provision, the discharge from a point source must "proximately cause" the pollutants' eventual addition to navigable waters. But the term "proximate cause" derives from general tort law, and it takes on its specific content based primarily on "policy" considerations. See *CSX Transp., Inc.* v. *McBride*, 564 U. S. 685, 701, 131 S. Ct. 2630, 180 L. Ed. 2d 637 (2011) (plurality opinion). In the context of water pollution, we do not see how it significantly narrows the statute beyond the words "fairly traceable" themselves.

Our view is that Congress did not intend the point source-permitting requirement to provide EPA with such broad authority as the Ninth Circuit's narrow focus on traceability would allow. First, to interpret the word "from" in this literal way would require a permit in surprising, even bizarre, circumstances, such as for pollutants carried to navigable waters on a bird's feathers, or, to mention more mundane instances, the 100-year migration of pollutants through 250 miles of groundwater to a river.

Second, and perhaps most important, the structure of the statute indicates that, as to groundwater pollution and nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States. See, *e.g.,* §101(b), 86 Stat. 816 (stating Congress' purpose in this regard). Much water pollution does not come from a readily identifiable source. See 3 Van Nostrand's Scientific

Encyclopedia, at 5801 (defining "Water Pollution"). Rainwater, for example, can carry pollutants (say, as might otherwise collect on a roadway); it can pollute groundwater, and pollution collected by unchanneled rainwater runoff is not ordinarily considered point source pollution. Over many decades, and with federal encouragement, the States have developed methods of regulating nonpoint source pollution through water quality standards, and otherwise. See, *e.g.,* Nonpoint Source Program, Annual Report (California) 6 (2016-2017) (discussing state timberland management programs to address addition of sediment-pollutants to navigable waters); *id.,* at 10-11 (discussing regulations of vineyards to control water pollution); *id.* at 17-19 (discussing livestock grazing management, including utilization ratios and time restrictions); Nonpoint Source Management Program, Annual Report (Maine) 8-10 (2018) (discussing installation of livestock fencing and planting of vegetation to reduce nonpoint source pollution); Oklahoma's Nonpoint Source Management Program, Annual Report 5, 14 (2017) (discussing program to encourage voluntary no-till farming to reduce sediment pollution).

The Act envisions EPA's role in managing nonpoint source pollution and groundwater pollution as limited to studying the issue, sharing information with and collecting information from the States, and issuing monetary grants. See §§105, 208, 86 Stat. 825, 839; see also Water Quality Act of 1987, §316, 101 Stat. 52 (establishing Nonpoint Source Management Programs). Although the Act grants EPA specific authority to regulate certain point source pollution (it can also delegate some of this authority to the States acting under EPA supervision, see §402(b), 86 Stat. 880), these permitting provisions refer to "point sources" and "navigable waters," and say nothing at all about nonpoint source regulation or groundwater regulation. We must doubt that Congress intended to give EPA the authority to apply the word "from" in a way that could interfere as seriously with States' traditional regulatory authority—authority the Act preserves and promotes—as the Ninth Circuit's "fairly traceable" test would.

Third, those who look to legislative history to help interpret a statute will find that this Act's history strongly supports our conclusion that the permitting provision does not extend so far. Fifty years ago, when Congress was considering the bills that became the Clean Water Act, William Ruckelshaus, the first EPA Administrator, asked Congress to grant EPA authority over "ground waters" to "assure that we have control over the water table . . . so we can . . . maintai[n] a control over all the sources of pollution, be they discharged directly into any stream or through the ground water table." Water Pollution Control Legislation-1971 (Proposed Amendments to Existing Legislation): Hearings before the House Committee on Public Works, 92d Cong., 1st Sess., 230 (1971). Representative Les Aspin similarly pointed out that there were "conspicuou[s]" references to groundwater in all sections of the bill *except* the permitting section at issue here. Water Pollution Control Legislation-1971: Hearings before the House Committee on Public Works on H. R. 11896 and H. R. 11895, 92d Cong., 1st Sess., 727 (1972).

The Senate Committee on Public Works "recognize[d] the essential link between ground and surface waters." S. Rep. No. 92-414, p. 73 (1971).

But Congress did not accept these requests for general EPA authority over groundwater. It rejected Representative Aspin's amendment that would have extended the permitting provision to groundwater. Instead, Congress provided a set of more specific groundwater-related measures such as those requiring *States* to maintain "affirmative controls over the injection or placement in wells" of "any pollutants that may affect ground water." *Ibid*. These *specific* state-related programs were, in the words of the Senate Public Works Committee, "designed to protect ground waters and eliminate the use of deep well disposal as an uncontrolled alternative to toxic and pollution control." *Ibid*. The upshot is that Congress was fully aware of the need to address groundwater pollution, but it satisfied that need through a variety of state-specific controls. Congress left general groundwater regulatory authority to the States; its failure to include groundwater in the general EPA permitting provision was deliberate.

Finally, longstanding regulatory practice undermines the Ninth Circuit's broad interpretation of the statute. EPA itself for many years has applied the permitting provision to pollution discharges from point sources that reached navigable waters only after traveling through groundwater. See, *e.g.*, *United States Steel Corp*. v. *Train*, 556 F. 2d 822, 832 (CA7 1977) (permit for "deep waste-injection well" on the shore of navigable waters). But, in doing so, EPA followed a narrower interpretation than that of the Ninth Circuit. See, *e.g.*, *In re Bethlehem Steel Corp*., 2 E. A. D. 715, 718 (EAB 1989) (Act's permitting requirement applies only to injection wells "that inject into ground water with a physically and temporally direct hydrologic connection to surface water"). EPA has opposed applying the Act's permitting requirements to discharges that reach groundwater only after lengthy periods. See *McClellan Ecological Seepage Situation (MESS)* v. *Cheney*, 763 F. Supp. 431, 437 (ED Cal. 1989) (United States argued that permitting provisions do not apply when it would take "literally dozens, and perhaps hundreds, of years for any pollutants" to reach navigable waters); *Greater Yellowstone Coalition* v. *Larson*, 641 F. Supp. 2d 1120, 1139 (Idaho 2009) (same in respect to instances where it would take "between 60 and 420 years" for pollutants to travel "one to four miles" through groundwater before reaching navigable waters). Indeed, in this very case (prior to its recent Interpretive Statement, see *infra*, at 12-13), EPA asked the Ninth Circuit to apply a more limited "direct hydrological connection" test. See Brief for United States as *Amicus Curiae* in No. 15-17447 (CA9), pp. 13-20. The Ninth Circuit did not accept this suggestion.

We do not defer here to EPA's interpretation of the statute embodied in this practice. Indeed, EPA itself has changed its mind about the meaning of the statutory provision. See *infra,* at 12-14. But this history, by showing that a comparatively narrow view of the statute is administratively workable, offers some additional support for the view that Congress did not intend as broad a delegation of regulatory authority as the Ninth Circuit test would allow.

As we have said, the specific meaning of the word "from" necessarily draws its meaning from context. The apparent breadth of the Ninth Circuit's "fairly traceable" approach is inconsistent with the context we have just described.

IV

A

Maui and the Solicitor General argue that the statute's permitting requirement does not apply if a pollutant, having emerged from a "point source," must travel through any amount of groundwater before reaching navigable waters. That interpretation is too narrow, for it would risk serious interference with EPA's ability to regulate ordinary point source discharges.

Consider a pipe that spews pollution directly into coastal waters. There is an "addition of " a "pollutant to navigable waters from [a] point source." Hence, a permit is required. But Maui and the Government read the permitting requirement *not* to apply if there is *any* amount of groundwater between the end of the pipe and the edge of the navigable water. See Tr. of Oral Arg. 5-6, 24-25. If that is the correct interpretation of the statute, then why could not the pipe's owner, seeking to avoid the permit requirement, simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching the sea? Cf. Brief for State of Maryland et al. as *Amici Curiae* 9, n. 4. We do not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations of the Clean Water Act. Cf. *California ex rel. State Water Resources Control Bd.*, 426 U. S., at 202-204, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (basic purpose of Clean Water Act is to regulate pollution at its source); *The Emily*, 22 U.S. 381, 9 Wheat. 381, 390, 6 L. Ed. 116 (1824) (rejecting an interpretation that would facilitate "evasion of the law").

B

Maui argues that the statute's language requires its reading. That language requires a permit for a "discharge." A "discharge" is "any addition" of a pollutant to navigable waters "*from any point source*." And a "point source" is "any discernible, confined and discrete *conveyance*" (such as a pipe, ditch, well, etc.).

Reading "from" and "conveyance" together, Maui argues that the statutory meaning of "from any point source" is not about *where* the pollution originated, but about *how* it got there. Under what Maui calls the means-of-delivery test, a permit is required only if a point source itself ultimately delivers the pollutant to navigable waters. Under this view, if the pollutant must travel through groundwater to reach navigable waters, then it is the groundwater, not the pipe, that is the conveyance.

Congress sometimes adopts less common meanings of common words, but this esoteric definition of "from," as connoting a means, does not remotely fit in this context. The statute couples the word "from" with the word "to"—strong evidence that Congress was referring to a destination ("navigable waters") and an origin ("any point source"). Further underscoring that Congress intended this every day meaning is that the object of "from" is a "point *source*"—a source, again, connoting an origin. That Maui's proffered interpretation would also create a serious loophole in the permitting regime also indicates it is an unreasonable one.

C

The Solicitor General agrees that, as a general matter, the permitting requirement applies to at least some additions of pollutants to navigable waters that come indirectly from point sources. See Brief for United States as *Amicus Curiae* 33-35. But the Solicitor General argues that the proper interpretation of the statute is the one reflected in EPA's recent Interpretive Statement. After receiving more than 50,000 comments from the public, and after the Ninth Circuit released its opinion in this case, EPA wrote that "the best, if not the only, reading" of the statutory provisions is that "*all* releases of pollutants to groundwater" are excluded from the scope of the permitting program, "even where pollutants are conveyed to jurisdictional surface waters via groundwater." 84 Fed. Reg. 16810, 16811.

Neither the Solicitor General nor any party has asked us to give what the Court has referred to as *Chevron* deference to EPA's interpretation of the statute. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Even so, we often pay particular attention to an agency's views in light of the agency's expertise in a given area, its knowledge gained through practical experience, and its familiarity with the interpretive demands of administrative need. See *United States* v. *Mead Corp.*, 533 U. S. 218, 234-235, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139-140, 65 S. Ct. 161, 89 L. Ed. 124 (1944). But here, as we have explained, to follow EPA's reading would open a loophole allowing easy evasion of the statutory provision's basic purposes. Such an interpretation is neither persuasive nor reasonable.

EPA correctly points out that Congress did not require a permit for *all* discharges to groundwater; rather, Congress authorized study and funding related to groundwater pollution. See Brief for United States as *Amicus Curiae* 15-19. But there is quite a gap between "not all" and "none." The statutory text itself alludes to no exception for discharges through groundwater. These separate provisions for study and funding that EPA points to would be a "surprisingly indirect route" to convey "an important and easily expressed message"—that the permit requirement simply does not apply if the pollutants travel through groundwater. *Landgraf* v. *USI Film Products*, 511 U. S. 244, 262, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). In truth, the most these provisions show is that Congress thought that the problem of groundwater pollution, as distinct from navigable water pollution, would primarily be addressed by the States or perhaps by other federal statutes.

EPA's new interpretation is also difficult to reconcile with the statute's reference to "*any* addition" of a pollutant to navigable waters. Cf. *Milwaukee*, 451 U. S., at 318, 101 S. Ct. 1784, 68 L. Ed. 2d 114 ("*Every* point source discharge is prohibited unless covered by a permit" (footnote omitted)). It is difficult to reconcile EPA's interpretation with the statute's inclusion of "wells" in the definition of "point source," for wells most ordinarily would discharge pollutants through groundwater. And it is difficult to reconcile EPA's interpretation with the statutory provisions that allow EPA to delegate its permitting authority to a State *only if* the State (among other things) provides "'adequate authority'" to "'control the disposal of pollutants into wells.'" §402(b), 86 Stat. 881. What need would there be for such a proviso if the federal permitting program the State replaces did not include such discharges (from wells through groundwater) in the first place?

In short, EPA's oblique argument about the statute's references to groundwater cannot overcome the statute's structure, its purposes, or the text of the provisions that actually govern. ***

For the reasons set forth in Part III and in this Part, we conclude that, in light of the statute's language, structure, and purposes, the interpretations offered by the parties, the Government, and the dissents are too extreme.

V

Over the years, courts and EPA have tried to find general language that will reflect a middle ground between these extremes. The statute's words reflect Congress' basic aim to provide federal regulation of identifiable sources of pollutants entering navigable waters without undermining the States' longstanding regulatory authority over land and groundwater. We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*. We think this phrase best captures, in broad terms, those circumstances in which Congress intended to require a federal permit. That is, an addition falls within the statutory requirement that it be "from any point source" when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.

Time and distance are obviously important. Where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies. If the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply.

The object in a given scenario will be to advance, in a manner consistent with the statute's language, the statutory purposes that Congress sought to achieve. As we have said (repeatedly), the word "from" seeks a "point source" origin, and context imposes natural limits as to when a point source can properly be considered the origin of pollution that travels through groundwater. That context includes the need, reflected in the statute, to preserve state regulation of groundwater and other nonpoint sources of pollution. Whether pollutants that arrive at navigable waters after traveling through groundwater are "from" a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge.

The difficulty with this approach, we recognize, is that it does not, on its own, clearly explain how to deal with middle instances. But there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language. Consider, for example, just some of the factors that may prove relevant (depending upon the circumstances of a particular case): (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity. Time and distance will be the most important factors in most cases, but not necessarily every case.

At the same time, courts can provide guidance through decisions in individual cases. The Circuits have tried to do so, often using general language somewhat similar to the language we have used. And the traditional common-law method, making decisions that provide examples that in turn lead to ever more refined principles, is sometimes useful, even in an era of statutes.

The underlying statutory objectives also provide guidance. Decisions should not create serious risks either of undermining state regulation of groundwater or of creating loopholes that undermine the statute's basic federal regulatory objectives.

EPA, too, can provide administrative guidance (within statutory boundaries) in numerous ways, including through, for example, grants of individual permits, promulgation of general permits, or the development of general rules. Indeed, over the years, EPA and the States have often considered the Act's application to discharges through groundwater.

Both Maui and the Government object that to subject discharges to navigable waters through groundwater to the statute's permitting requirements, as our interpretation will sometimes do, would vastly expand the scope of the statute, perhaps requiring permits for each of the 650,000 wells like petitioner's or for each of the over 20 million septic systems used in many Americans' homes. Brief for Petitioner 44-48; Brief for United States as *Amicus Curiae* 24-25. Cf. *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014).

But EPA has applied the permitting provision to some (but not to all) discharges through groundwater for over 30 years. See *supra*, at 8-9. In that time we have seen no evidence of unmanageable expansion. EPA and the States also have tools to mitigate those harms, should they arise, by (for example) developing general permits for recurring situations or by issuing permits based on best practices where appropriate. See, *e.g.*, 40 CFR §122.44(k) (2019). Judges, too, can mitigate any hardship or injustice when they apply the statute's penalty provision. That provision vests courts with broad discretion to set a penalty that takes account of many factors, including "any good-faith efforts to comply" with the Act, the "seriousness of the violation," the "economic impact of the penalty on the violator," and "such other matters as justice may require." See 33 U. S. C. §1319(d). We expect that district judges will exercise their discretion mindful, as we are, of the complexities inherent to the context of indirect discharges through groundwater, so as to calibrate the Act's penalties when, for example, a party could reasonably have thought that a permit was not required.

In sum, we recognize that a more absolute position, such as the means-of-delivery test or that of the Government or that of the Ninth Circuit, may be easier to administer. But, as we have said, those positions have consequences that are inconsistent with major congressional objectives, as revealed by the statute's language, structure, and purposes. We consequently understand the permitting requirement, §301, as applicable to a discharge (from a point source) of pollutants that reach navigable waters after traveling through groundwater if that discharge is the functional equivalent of a direct discharge from the point source into navigable waters.

VI

Because the Ninth Circuit applied a different standard, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

United States v. B.P. Exploration and Production, Inc., 753 F.3d 570 (5th Cir. 2014)

Benavides, Circuit Judge:

Before the Court is the federal government's civil enforcement action for Clean Water Act violations associated with the 2010 *Deepwater Horizon* oil spill in the Gulf of Mexico. Defendants BP Exploration & Production, Inc. ("BP") and Anadarko Petroleum Corporation ("Anadarko") appeal summary judgment in favor of the government on the question of their liability for civil penalties under 33 U.S.C. § 1321 (b)(7)(A) (2006), which imposes mandatory penalties upon the owners of facilities "from which oil or a hazardous substance is discharged." The district court held that discharge is the point where "uncontrolled movement" begins. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010,* 2013 AMC 531, 549-50, 844 F. Supp.2d 746, 758 (E.D. La. 2012).

Applying this standard, the court concluded that oil flowing from the well through the *Deepwater Horizon*'s riser was a discharge from the well. 2013 AMC at 553, 844 F. Supp.2d at 761. The court then entered summary judgment on the issue of BP's and Anadarko's liability as co-owners of that well. 2013 AMC at 554-55, 844 F. Supp.2d at 762. Because we agree that there is no dispute of material fact regarding the discharge of oil from the well, we affirm.

I.

The Macondo Well ("the well") was an exploratory well located about fifty miles off the Louisiana coast in the Gulf of Mexico. Anadarko and BP (together, "the defendants" or "the well owners") were co-owners of the well and co-lessees of the continental shelf block in which the well was located. The well itself was drilled by the *Deepwater Horizon*, a mobile offshore drilling vessel owned and operated by several Transocean entities. The *Deepwater Horizon* was connected to the well by a riser. At the junction of the well and the riser was a blowout preventer that could be used automatically or manually to interrupt an impending blowout. Both the blowout preventer and riser were appurtenances of the *Deepwater Horizon*.

The blowout occurred on April 20, 2010, while the *Deepwater Horizon* was preparing to depart from the site in anticipation of the permanent extraction operation. As part of this preparation, the well had been lined and sealed with cement. Before the *Deepwater Horizon* departed, this cement failed, resulting in the high-pressure release of gas, oil, and other fluids. The blowout preventer also failed, thus allowing these fluids to burst from the well, flowing up through the riser and onto the deck of the *Deepwater Horizon*. The oil and gas subsequently caught fire, and the ensuing blaze capsized the *Deepwater Horizon*, which was still connected to the well via the riser. The strain from the sinking vessel severed the riser, and for nearly three months oil flowed continuously through the broken riser and into the Gulf of Mexico. Authorities eventually installed a cap over what remained of the riser, and oil continued to leak for two days, with the well finally sealed on July 15, 2010.

Following the incident, the federal government filed the present action, seeking civil penalties under § 311 of the Clean Water Act, which mandates the assessment of fines on the owners or operators of any vessel or facility "from which oil or a hazardous substance is discharged." The government then moved for summary judgment on several issues, including the well owners' civil-penalty liability for any "subsurface" discharge of oil. Anadarko filed a cross-motion for summary judgment on the same issue, arguing that the subsurface discharge emanated from the riser owned by Transocean, and thus that the oil was not discharged from any facility owned or operated by Anadarko or BP. Holding that discharge is the point where "uncontrolled movement" begins, the court concluded that the oil released from the well via the third party's broken riser was a discharge from the well. *In re Oil Spill,* 2013 AMC at 549-50, 553, 844 F. Supp.2d at 758, 761. Because Anadarko and BP did not contest their ownership of the well, the district court then entered summary judgment in favor of the *Government*. 2013 AMC at 554-55, 844 F. Supp.2d at 762. Anadarko and BP filed a timely appeal.

II.

We review summary judgment *de novo*, applying the same standard as the district court. *Bd. of Miss. Levee Comm'rs v. United States EPA,* 674 F.3d 409, 417 (5 Cir. 2012)*; see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). Summary judgment is proper when the pleadings and other materials on file indicate that "there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). We are not bound by the district court's analysis, and are free to affirm on any basis raised below and supported by the record. *United States v. Ho,* 311 F.3d 589, 602 n.12 (5 Cir. 2002).

III.

The Clean Water Act is "not a model of clarity." In its current form, the Act is the result of over a century of successive statutory schemes and amendments. Yet it is, in some respects, not overly complex. The legislation attempts to eliminate the introduction of any kind of pollutant--everything from paint and pesticides to rocks and dirt—into the waters of the United States. 33 U.S.C. §§ 1251(a), 1362(6). The Act does so by creating a regulatory framework and then prohibiting any discharge in violation of the regulations. *See* 33 U.S.C. §§ 1252, 1311-1313, 1316-17, 1319, 1329, 1342. Because of the heightened potential for "environmental disaster" resulting from the release of oil or hazardous waste, 33 U.S.C. § 1321 establishes increased fines for the discharge of these pollutants. *See* S.Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3732 (referring to possible disaster).

Specifically, the section prohibits the "discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone . . . in such quantities as may be harmful," except under circumstances not implicated by the present case. 33 U.S.C. § 1321(b)(3). The section further provides that:

> Any person who is the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of [33 U.S.C. § 1321(b)(3)] shall be subject to a civil penalty in an amount up to $ 25,000 per day of violation or an amount up to $ 1,000 per barrel of oil or unit of reportable quantity of hazardous substances discharged.

Id. § 1321(b)(7)(A); *see also* 33 C.F.R. § 27.3 (2006) (indicating dollar amounts as increased by regulation). In the instant case, no one denies that there has been a discharge of harmful quantities of oil into navigable waters. Anadarko and BP further stipulate that the well is an offshore facility, and that they are the owners of that facility. The only question, then, is whether it is beyond factual dispute that the well is a facility "from which" the harmful quantity of oil was discharged. We find no dispute as to the question.

Discharge is not defined for the purposes of this section, but is instead illustrated by a list of examples. Discharge "includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping[.]" 33 U.S.C. § 1321(a)(2). Each of these statutory examples denotes the loss of controlled confinement. Similarly, the ordinary use of "discharge" refers to a fluid "flow[ing] out from where it has been confined." 7 Accordingly, a vessel or facility is a point "from which oil or a hazardous substance is discharged" if it is a point at which controlled confinement is lost. Turning to the facts, we find no dispute as to whether the well is such a facility. The parties stipulate that cement had been deposited at the well. There is no genuine dispute that controlled confinement was lost when this cement failed—the defendants do not contest the cement's failure, and they concede that oil then "escaped" and "flowed freely" from the well and ultimately into navigable waters. And although the defendants argue that the blowout preventer should have engaged and prevented the progression of the blowout, the need for this intervention only underscores the extent to which the oil was already unconfined and flowing freely. Accordingly, we find that the well is a facility from which oil was discharged in violation of 33 U.S.C. § 1321(b)(3).

It is immaterial that the oil flowed through parts of the vessel before entering the Gulf of Mexico. Anadarko argues that discharge is the point at which oil "enters the marine environment." Yet Anadarko provides no relevant legal authority in support of the proffered interpretation. Nor does our research reveal any. On the contrary, it seems well settled that the section proscribes any discharge of oil that ultimately flows "into or upon . . . . navigable waters," irrespective of the path traversed by the discharged oil. For example, a discharge of oil violates the section even where the oil flows over a rail yard or hillside before reaching water. *See generally Union Petroleum Corp. v. United States,* 228 Ct. Cl. 54, 651 F.2d 734 (Ct.Cl. 1981); *Pryor Oil Co., Inc. v. United States,* 299 F. Supp.2d 804 (E.D. Tenn. 2003). Similarly, the Environmental Protection Agency fined a factory owner for oil that spilled from a boiler gasket, into an industrial drain, through a conduit, and eventually into a creek. *See generally Pepperell Assocs. v. United States EPA,* 246 F.3d 15 (1 Cir. 2001). The First Circuit ultimately denied review of the case, finding the agency's decision reasonable. *Id.* at 30. So oil need not flow from a facility directly into navigable waters to give rise to civil-penalty liability under 33 U.S.C. § 1321.

Nor is liability precluded by the fact that the property traversed by the oil was owned by a third party. The *Pepperell* factory owner was held liable for his facility's discharge even though the oil had traveled through a third party's conduit before reaching water. *Id.* at 20. Likewise, when spilled oil subsequently traverses municipal sewers or ditches, liability is imposed upon the owner of the facility where the oil was first discharged, and not on the owner of the municipal facilities. *See generally In re D&L Energy, Inc.*, V-W-13 C-006 (EPA ALJ Feb. 27, 2013) (unpublished). In one recent incident, EPA authorities discovered that oil and brine were being released from an oil exploration site. *In re D&L Energy, Inc.*, V-W-13 C-006, at 2. Authorities found that a nearby river was polluted with oil and that a tributary was "impacted with oil at least a foot deep." *Id.* Upon further investigation, they realized that fluids from the drilling site were flowing through a municipal sewer, into a creek, and eventually to the Mahoning River. *Id.* The agency found the drilling site's owner liable, notwithstanding the fact that the oil flowed through third party facilities before reaching water. *Id.* Indeed, we are aware of no case in which a court or administrative agency exempted a defendant from liability on account of the path traversed by discharged oil. The well owners' liability is thus unaffected by the fact that the oil traversed part of Transocean's vessel before entering the Gulf of Mexico.

We recognize that the aforementioned incidents involved blameless third parties, whereas here the owner or operator of the *Deepwater Horizon* might have contributed to the discharge. By all accounts, if the vessel's blowout preventer had functioned properly, the oil would not have entered navigable waters in violation of the Clean Water Act. The defendants therefore reason that liability is properly imposed upon the owner or operator of the *Deepwater Horizon*. Yet it is well established that this section of the Clean Water Act leaves no room for civil-penalty defendants to shift liability via allegations of third-party fault. *See United States v. Tex-Tow, Inc.,* 1980 AMC 2936, 2942, 589 F.2d 1310, 1314 (7 Cir. 1978) (holding defendant liable for penalty notwithstanding fault of a third party). Early in the implementation of the Act's regulatory framework, there was some uncertainty as to where and how the law should apply. It was not uncommon for defendants to argue that the statute should not apply where a pollutant is accidentally discharged, or where a third party causes the discharge. *See Sierra Club v. Abston Const. Co., Inc.,* 620 F.2d 41, 45 (5 Cir. 1980) (summarizing early cases). Courts, however, now acknowledge that civil-penalty liability under 33 U.S.C. § 1321 arises irrespective of knowledge, intent, or fault. In fact, courts have consistently rejected attempts to shift liability on the basis of shared fault, instead choosing to consider any contributing cause as a mitigating factor at penalty calculation. This Court, in particular, recognizes the section as “an absolute liability system with limited exceptions, which are to be narrowly construed.” *United States v. W. of Eng. Ship Owner's Mut. Prot. & Indem.,* 1989 AMC 1497, 1509, 872 F.2d 1192, 1196 (5 Cir. 1989). And although 33 U.S.C. § 1321 includes a third-party-fault exception for removal-cost liability, it includes no such exception for civil penalty liability. That being the case, any culpability on the part of the *Deepwater Horizon's* operators does not exempt the well owners from the liability at issue here.

After reviewing the record and the law, we find no genuine dispute as to the defendants’ liability for civil penalties pursuant to § 311 of the Clean Water Act. As explained herein, it is undisputed that the well’s cement failed, resulting in the loss of controlled confinement of oil such that the oil ultimately entered navigable waters. The well is therefore a facility “from which oil or a hazardous substance was discharged” “into or upon the navigable waters of the United States.” 33 U.S.C. §§ 1321(a)(2), (b)(3), (b)(7)(A). Anadarko and BP do not dispute their ownership of the well. Therefore, by the express terms of the statute, Anadarko and BP “shall be subject to a civil penalty” calculated in accordance with statutory and regulatory guidelines. *Id.* § 1321(b)(7)(A). This liability is unaffected by the path traversed by the discharged oil. Nor is liability precluded by any culpability on the part of the vessel’s owner or operator.

IV.

For the reasons stated, we affirm the grant of partial summary judgment with respect to the well owners' liability for civil penalties pursuant to 33 U.S.C. § 1321(b)(7)(A).

Burgess v. M/V Tamano, **564 F. 2d 964 (1st Cir. 1977)**

Aldrich, Senior Circuit Judge:

This appeal is from a finding of the district court for the District of Maine imposing upon the United States sole liability for a supertanker's striking a submerged ledge, and a consequent oil spill. The government denies fault, or, at the least, asserts that the fault was not its alone, and contends that the district court's contrary findings are clearly erroneous.

On July 22, 1972, at 0120 A.M., on a clear night, the Norwegian supertanker M/V TAMANO struck Buoy 6, a lighted buoy marking Soldier Ledge in Hussey Sound, Casco Bay, Maine, and seconds later grazed the ledge, holing her hull, and losing 100,000 gallons of heavy oil into the Bay. The TAMANO is a single screw vessel, 810 feet long, 128 foot beam, and was drawing 44 feet. In the modern style, her bridge is aft; the helmsman stands 650 feet from the bow. Her command was Captain Bjonnes, and she was being piloted by Captain Charles Dunbar, of Portland Pilots, Inc. Although the occurrence resulted in numerous lawsuits, in the present appeal appellees ship, and her owners, and the Pilots, are principally plaintiffs, and will be referred to as such, and appellant United States, charged with having caused the accident by mislocating the buoy, is the defendant. ***

The Government's Claim for Cleanup Costs.

The court's finding the government solely responsible for the oil spill defeated the government's counterclaim under 33 U.S.C. § 1321 (f)(1), formerly section 1161 (f)(1), for certain cleanup costs that it had incurred pursuant to *section* 1321(d). Our reversal establishes this claim, unless Captain Dunbar, as a compulsory pilot, is to be regarded as a "third party."

Within specified monetary limits a vessel discharging oil in violation of section 1321(b)(3) and her owners are liable without fault for the government's cleanup costs, with certain exceptions, the last being the act of a "third party." While, in collision cases, any pilot is an agent of the ship, The *China,* 1869, 7 Wall. (74 U.S.) 53, 19 L. Ed. 67, a distinction exempting the owners has been drawn in the case of compulsory pilots. *Homer Ramsdell Trans. Co. v. La Compagnie Generale Transatlantique,* 1900, 182 U.S. 406, 21 S. Ct. 831, 45 L. Ed. 1155; *People of California v. Italian Motorship Ilice,* 9 Cir., 1976, 534 F.2d 836. The owners here, accordingly, urge that even though Captain Dunbar was not a third party as to the ship, he was with respect to them. We do not so construe the statute.

There appears to be no specifically significant legislative history, other than a change from a House version based on fault to a Senate version in the direction of strict liability. H.R.Rep. No. 127, 91st Cong., 1st Sess. (1969); S.Rep. No. 351, 91st Cong., 1st Sess. (1969); Conf. Rep. No. 940, 91st Cong., 2d Sess. (1970), but this change itself indicates that unless the exceptions are narrowly construed, the legislative purpose would be largely vitiated. The first three exceptions, "(A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government," (which, individually or collectively, must be "solely" responsible) are manifestly addressed to actions entirely outside the ship, or in the case of actors, to strangers. We read the final exception, "(D) an act or omission of a third party without regard to whether such an act or omission was or was not negligent," correspondingly. To take a simple example, if a vandal opened a ship's valve, this would be an act of a third party. However, if the valve failed because of an act of the installer, the owners should not be permitted to avoid liability by claiming that the installer was a third party because he was an independent contractor rather than an employee. The installer acts for the ship shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs."

Equally, though a compulsory pilot might be regarded as an independent contractor, he is at all times subject to the ultimate control of the ship's master. The *China, ante,* at 67-68. The owners lament that they were legally forced to take Captain Dunbar (although it is clear on the evidence that they would have taken a pilot in any event). So, too, they may have been forced by practical necessities to hire the particular shipyard that installed the defective valve. We agree with the government that they must take the ports they select as they find them.

Rather than indicating a desire to recognize a distinction between the ship and her owners, section 1321 (f)(1), providing for liability of the owners, in no way indicates a desire to recognize any distinction between the ship and her owners. If they were not coextensive, we would have the singular result that if a spill were caused by a state-licensed pilot who was voluntarily taken, the owners must pay their cleanup costs, and the government's, sections 1321 (i)(1), 1321 (f)(1). If the state, however, in addition to licensing, made pilotage compulsory, and the pilot, as against the owners, were a "third party," the government would have to pay both costs, *id*., but, at the same time, under section 1321 (f)(1) would appear to have a lien against the ship.

We can not believe that Congress had any such intent. Nor, under the circumstances, need we consider the government's claim that Captain Dunbar was not, in fact, a compulsory pilot. *The Merrimac,* 1872, 14 Wall. (81 U.S.) 199, 20 L. Ed. 873; Me.Rev.Stat., Tit. 38, § 82 (1964); 1927 Me.Act. Ch. 24, § 10. That such great consequences should turn upon the obligation to pay a pilotage fee, unaccompanied by any obligation to accept the services, would seem to us anomalous, at best. The owners must be held accountable.***

***United States v. LeBeouf Bros. Towing Co.*, 629 F.2d 1350 (5th Cir. 1980)**

Thornberry, Circuit Judge:

In this appeal from judgment against the Government in its suit to recover clean-up costs under 33 U.S.C., sec. 1321 (1976) for an oil spill from appellee's tanker barge, we must interpret the clause in section 1321(f)(1) that establishes a third-party defense for the owners of the discharging vessel. Because we conclude that the tugboat hired by the appellees in this case does not constitute a "third party" under section 1321 (f)(1), we reverse the judgment and remand the case to the court below.

I. *Facts*.

The parties stipulated the facts as follows. LeBeouf is in the business of transporting petroleum products in tanker barges. In 1974 LeBeouf contracted with Bayou Marine Corporation to obtain a tug and crew that would tow the nonselfpropelled tanker barge *LBT #4* on an itinerary specified by LeBeouf. Bayou secured the M/V *Harding R,* a tug owned by Barracuda Marine Corporation. The tug crew loaded and unloaded LeBeouf's cargo at the places and times designated in LeBeouf's itinerary. LeBeouf engaged in no other supervision over the crew. In March 1974 the tug crew unloaded oil from the *LBT #4* at Westwego, Louisiana. A tug crewman who was working as a tankerman without a license, in violation of 33 C.F.R. sec. 155.710(a)(2) (1979), accidentally opened the wrong valve and discharged sixty barrels of crude oil onto the Mississippi River.

Neither LeBeouf, Bayou, nor Barracuda cleaned up the oil spill. Finally the Coast Guard contracted to clean up the spill at a total cost of $38,689. The Government sued to recover this cleanup cost under the Federal Water Pollution Control Act, 33 U.S.C., sec. 1321, in March 1977. The district court dismissed the Government's suit against LeBeouf because it concluded that the oil spill was caused by a "third party" under section 1321(f)(1).

II. *Third-Party Defense under Section 1321 (f)(1)*.

Under section 1321(f)(1) the owner or operator of the discharging vessel is liable to the Government for the costs of cleaning up an oil spill

> "[e]xcept where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of

> a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses . . .”

In cases involving inland oil spills, section 1321(g) requires the Government to sue the owner or operator of the discharging vessel for clean-up costs before it can sue a “third party” who may have caused the spill. The statute does not define what constitutes such a “third party.”

LeBeouf contends that the term “third party” in section 1321(f)(1) should be interpreted broadly to include all parties—such as the tugboat in this case—over whom the owner-operator has no direct control or supervision. As authority for this interpretation, LeBeouf relies upon the district court opinion in *Tug Ocean Prince, Inc. v. United States,* 1978 AMC 1806, 1827-30, 436 F. Supp. 907, 923-24 (SDNY 1977), *aff'd in part and rev'd in part on other grounds,* 1978 AMC 1786, 584 F.2d 1151 (2 Cir. 1978), *cert. denied,* 440 U.S. 959, 1979 AMC 2019 (1979). In *Tug Ocean Prince* a tug towed a tanker barge into submerged rocks, which caused the barge to spill oil onto the Hudson River. The tug owner sued to limit its liability as a “third party” under section 1321(g) so that damages would be calculated with reference to the weight of the tug alone, not with reference to the combined weight of the tug and barge together. The district court did not discuss section 1321(f)(1), but it treated the tug as a “third party” for purposes of section 1321(g), and construed that statute so that the tug's liability would be limited to damages calculated only with reference to the weight of the tug alone.

A broad interpretation of the term “third party” was rejected by the First Circuit in *Burgess v. M/V Tamano,* 1977 AMC 1892, 1918-21, 564 F.2d 964, 981-82 (1 Cir. 1977), *cert. denied*, 435 U.S. 941, 1978 AMC 1895 (1978), in which the court expressly discussed what constitutes a “third party” under section 1321(f)(1). In *Burgess* the court held that a supertanker’s temporary local pilot did not constitute a “third party” under section 1321(f)(1). As a result, the owners of the supertanker were held liable for an oil spill that occurred because the local pilot negligently ran the supertanker into a submerged ledge in a Maine harbor. The court concluded that the legislative purpose in drafting section 1321 as a strict liability statute would be undermined unless the third-party defense was narrowly interpreted. Even though the local pilot might be regarded as an independent contractor, he could not constitute a “third party” because the pilot acted for the ship and was subject to its ultimate control. In dicta the court reasoned that a shipyard that installed a defective valve would likewise not constitute a “third party” for the purpose of protecting the shipowner from liability for an oil spill caused by the defect in the valve. If a vandal opened the valve and caused the spill, however, the court said that the third-party defense would apply.

Following the reasoning of the First Circuit in *Burgess,* we conclude that the third-party defense in section 1321(f)(1) must be narrowly interpreted. The statute's comprehensive scheme for preventing and cleaning up oil spills would be undermined if barge owners like LeBeouf could escape strict liability merely by hiring out their operations to tugs and independent contractors. A narrow interpretation of the third-party defense would make it consistent with the other section 1321(f)(1) defenses, which include only narrow exceptions such as acts of God, acts of war, and instances in which the Government's own negligence is the sole cause of the spill. The only significant legislative history relating to the third-party defense also suggests that a narrow interpretation is proper; a committee report indicates that the drafters' primary purpose for including the third party defense was to cover situations in which a third-party ship collided with an unrelated, oil carrying vessel and caused a spill. S.Rep.No.91-351, 91st Cong., 1st Sess. 6 (1969).

Under the analysis used in *Burgess,* the tug in this case does not constitute a "third party" that would protect LeBeouf from liability for clean-up costs under section 1321. LeBeouf hired the tug to act in its place. Although the tug operated as an independent contractor, LeBeouf held ultimate control over it by hiring it in the first place, specifying its itinerary, and retaining it throughout the job. Our narrow interpretation of the third-party defense promotes the goals of the statute and of traditional tort policy because it will encourage barge owners like LeBeouf to select tugs carefully and to insure against potential losses. LeBeouf can also require a tug to indemnify it for losses caused by the tug's conduct alone.

Because the tug does not constitute a “third party” for the purpose of protecting LeBeouf from liability under section 1321, we reverse the judgment and remand the case to the court below.

United States v. Citgo Petroleum Corp., 723 F.3d 547 (5th Cir. 2013)

Southwick, Circuit Judge:

The United States brought suit against CITGO Petroleum Corporation, seeking civil penalties and injunctive relief under the Clean Water Act (“CWA”). ***

FACTS AND PROCEDURAL HISTORY

In 2006, a severe rainstorm caused two wastewater storage tanks at CITGO’s Lake Charles, Louisiana refinery to fail. Over two million gallons of oil flooded into the surrounding waterways. The spill forced the closure of a nearby navigation channel for ten days, disrupting local businesses. Recreational activities on the impacted waterways were restricted for weeks following the spill. The spill also damaged over 100 acres of marsh habitat. Fish and other aquatic life were adversely impacted, and several birds were killed. ***

CITGO conceded liability. The district court held a two week bench trial solely on the issue of damages. The court found that CITGO had failed to maintain its wastewater storage tanks properly and had allowed sludge and waste oil to accumulate in the tanks, lessening their capacity to accommodate storm water. The court noted that CITGO violated its own standard operating procedures by allowing the tanks to become overburdened. Additionally, CITGO was forced to make several unauthorized discharges of oily wastewater, totaling over 30 million gallons, into a surge pond to prevent the wastewater storage tanks from overflowing.

The district court concluded that CITGO's numerous failures amounted to ordinary negligence, rejecting the government's argument for a finding of gross negligence. The court noted that at the time of the spill, CITGO had designed a plan to address its overloaded storage tanks. Additionally, CITGO had taken steps to improve the plant, including the addition of a third wastewater storage tank, which was under construction at the time of the spill. Finally, the court recognized that an "exceptional amount of rain"— approximately 11 inches—had fallen on the day of the spill. The court reasoned that had the rainstorm not been so massive, the tanks likely would not have overflowed.

The court then considered the penalty factors of the CWA. See 33 U.S.C. § 1321(b)(8). It determined that CITGO should be penalized on a per-barrel basis under 33 U.S.C. § 1321(b)(7)(A). The court found that under "the totality of the circumstances," a per-barrel. 1 The district court awarded Louisiana $3 million in damages for CITGO's violation of state law. Louisiana is not a party in this appeal, and CITGO does not challenge the award penalty of $111 was reasonable. It accepted CITGO's estimate that approximately 54,000 barrels of oil had spilled into the waterways and assessed a civil penalty of $6 million. The court also ordered extensive injunctive relief, which included the requirement that CITGO build a fourth storage tank.

DISCUSSION

****II. Civil Penalty*

The district court imposed a $6 million civil penalty on CITGO for its violation of the CWA. The United States had recommended a penalty of $247 million. On appeal, the United States argues the penalty is unreasonably low and inconsistent with the court's findings on the penalty factors. The United States also argues the district court failed to make necessary fact findings on the amount of economic benefit to CITGO and erred in some of its other findings. Finally, it argues the district court should have found CITGO's inactions and delays in managing its wastewater system to be gross negligence.

The factors to be considered in awarding a civil penalty are identified in the CWA. A district court's analysis of those factors is highly discretionary. Despite this discretion, we conclude that the district court's failure to quantify the economic benefit to CITGO of deferring for nearly a decade its response to the known deficiencies at its Lake Charles plant requires reversal. As we will explain, because economic benefit serves as the starting point for calculating the civil penalty and is adjusted based on the remaining statutory factors, on remand the district court should consider its analysis of the factors afresh after making a reasonable approximation of economic benefit.

A. Penalty Factors

The assessment of civil penalties under the CWA is left to the district court's discretion. The exercise of that discretion is guided by consideration of the following factors:

the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

33 U.S.C. § 1321(b)(8). The Supreme Court has described the process of weighing the penalty factors as "highly discretionary." *Tull v. United States,* 481 U.S. 412, 427, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987). We review factual findings in support of a district court's penalty calculation for clear error. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.,* 73 F.3d 546, 573 (5th Cir. 1996). A court's determination of the amount of a penalty to be assessed is reviewed under the highly deferential abuse-of-discretion standard. *Id.*

We find particularly instructive one of our precedents in which we reversed a district court's "highly discretionary" award of a civil penalty under the CWA. *See United States v. Marine Shale Processors,* 81 F.3d 1329 (5th Cir. 1996). We started with the observation that "calculation of discretionary penalties is not an exact science, and few courts could comply with [the defendant's] request that the importance of each factor be precisely delineated." *Id.* at 1338. We found an error in fact finding, then held that because the district court had failed to articulate with some precision how it had relied on different facts to compute the penalty, we needed to vacate and remand for the district court to calculate the fine again. *Id.* at 1339. We will explain why we find ourselves in an analogous position.

The economic benefit to CITGO that resulted "from the violation" is the critical factor in this appeal, critical in part because the district court made no finding on it. Though the "violation" in its most limited sense was the oil spill from which

CITGO obtained no economic benefit, such a narrow reading of this statutory factor is inconsistent with the manner in which other courts have interpreted the requirement. Generally, courts consider the financial benefit to the offender of delaying capital expenditures and maintenance costs on pollution-control equipment. *See United States v. Smithfield Foods, Inc.,* 191 F.3d 516, 530 (4th Cir. 1999); *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.,* 897 F.2d 1128, 1141 (11th Cir. 1990).

One court concluded that there are two general approaches to calculate economic benefit: "(1) the cost of capital, i.e., what it would cost the polluter to obtain the funds necessary to install the equipment necessary to correct the violation; and (2) the actual return on capital, i.e., what the polluter earned on the capital that it declined to divert for installation of the equipment." *United States v. Allegheny Ludlum Corp.,* 366 F.3d 164, 169 (3d Cir. 2004); *see also United States v. Mun. Auth. of Union Twp. (Dean Dairy)*, 150 F.3d 259, 266 (3d Cir. 1998) (noting that "methods other than the delayed or avoided capital expenditure for ascertaining economic benefit" have been used).

Besides the choices to make in calculating economic benefit, courts must also choose how to set the amount of the penalty:

> The CWA does not prescribe a specific method for determining appropriate civil penalties for violations. In *Dean Dairy*, we noted that some courts use the "top down" approach in which the maximum penalty is set ($25,000 per day of violation at the times relevant here), and reduced as appropriate considering the six enumerated elements of § 1319(d) as mitigating factors, while other courts employ the "bottom up" approach, in which economic benefit is established, and the remaining five elements of § 1319(d) are used to adjust the figure upward or downward. *Dean Dairy,* 150 F.3d at 265.

Allegheny Ludlum, 366 F.3d at 178 n.6. This circuit has never held that a particular approach must be followed, and we do not decide otherwise today. Regardless of the mathematics, we conclude that a district court generally must "make a 'reasonable approximation' of economic benefit when calculating a penalty under the CWA." *Cedar Point Oil,* 73 F.3d at 576.

We now examine what the district court decided here. It stated that the purpose of this penalty factor is to recoup any benefit gained by the polluter in failing to comply with the law, which indicates the court was defining the factor as do we. The court found that CITGO had decided to forgo certain maintenance projects that would have prevented the spill in an effort to minimize costs and increase profits. The court found, though, that the exact amount of cost savings was "almost impossible to determine" given the numerous and conflicting estimations of economic benefit presented by the parties at trial. Therefore, instead of quantifying the economic benefit, the court provided a range and found "the amount of [economic] gain to CITGO was less than the $83 million argued by the government, but more than the $719.00 asserted by CITGO."

We interpret these findings to have left economic benefit as a non-factor. Overall, the district court's failure to quantify economic benefit has made our review more difficult. Proper consideration of economic benefit is integral to arriving at an appropriate damage award. Whether the economic benefit is a floor, adjusted by a court's analysis of the other factors, or helps determine how much to lower the ceiling established in other ways, it should not be ignored. In this case, based on CITGO's history of avoiding corrective actions for years, we find it particularly inappropriate not to have made an estimate, though admittedly difficult, of the economic benefit.

The remaining factors include the "seriousness of the violation." The district court found the spill was "massive," "excessive," and a "tragedy." Both parties agree with this assessment, as do we. The district court considered CITGO's "degree of culpability" and found that it was "fully at fault" for the spill and was negligent. The government points out that the CWA's penalty provision is a strict-liability provision and allows for the imposition of penalties up to $1,100/barrel even in the absence of negligence. *See* 33 U.S.C. § 1321(b)(7)(A) and 40 C.F.R. § 19.4 (adjusting civil penalties under CWA for inflation). Because CITGO was found to be negligent —a higher degree of culpability than strict liability—the United States argues that the district court's penalty of $111/barrel is unreasonable given that up to $1,100/barrel was authorized.

With respect to the fifth factor, "history of prior violations," the court found that CITGO had made unauthorized discharges of oily wastewater on at least six occasions prior to the spill and had been in violation of its permits for over 950 days. CITGO's history of violations, the district court found, reflected a lack of environmental responsibility and a general disregard of its duty to operate its business safely. According to the government, the district court's penalty of $111/barrel is clearly contrary to these findings. In light of our discussion of gross negligence below, the findings regarding this factor need to be re-evaluated on remand.

The United States claims the district court erred in relying on CITGO's efforts to minimize or mitigate the spill's effects—factor six—as a basis for imposing a lower penalty. CITGO estimated that it spent approximately $65 million in clean-up and response costs. At the height of its response, CITGO had deployed 1,500 people; 60 miles of boom; vacuum trucks; skimmers; portable barges; and other clean-up equipment. The district court acknowledged these efforts, but still found CITGO's first response to the spill "lacking." There was evidence that CITGO, at least initially, failed to contain the spill and did not fully inform the Coast Guard of the severity of the spill. Though there are different findings that could have been made, we do not discern any clear error in the facts found here or abuse of discretion in weighing this factor as the district court did.

The government also argues that the court placed too much emphasis on the eighth factor, which permits consideration of "any other matters as justice may require." In analyzing this factor, the court noted that CITGO was a major employer in the Lake Charles community. Additionally, as one of the largest refineries in the nation, the Lake Charles facility had a positive impact on the state's economy. The court recognized the obvious negative impact the spill had on the community but concluded that it was only fair to view CITGO's role in the community as a whole, rather than limit its view to a single, extremely negative event. According to the government, the fact that a polluter operates a large facility that benefits the local and state economies is not a basis for assessing a low penalty and contravenes the purpose of civil penalties under the CWA—punishment and deterrence. We conclude that the district court's analysis of this factor was not clear error.

Finally, the government takes issue with the court's consideration of the injunctive relief ordered in assessing the penalty. While not addressed under its analysis of the factors, the court explained in the penalty section of its order that it had taken into account the injunctive relief ordered in determining that $111/barrel was an appropriate penalty. As stated, the district court ordered CITGO to construct a fourth wastewater storage tank. The court also ordered CITGO to perform sediment sampling, to conduct a stormwater drainage calibration study, to repair and properly use the tanks' oil-skimming equipment, and to install other equipment designed to prevent future spills. Evidently, the court reduced the civil penalty an unspecified amount based on the award of injunctive relief. The district court's consideration of the cost of the injunctive relief does not strike us as clear error.

The district court needed to have made a finding on the amount of economic benefit. We conclude such a finding is central to the ability of a district court to assess the statutory factors and for an appellate court to review that assessment. We therefore vacate the civil penalty award and remand for reevaluation. Regardless of how the district court then exercises its discretion, within a top-down, a bottom-up, or some other analytical framework, the economic benefit factor creates a nearly indispensable reference point. We have upheld some of the findings on various factors, and found error in others. On remand, the district court may take a renewed look at all factors in light of the new findings on some.

B. Gross Negligence

Under the CWA, a court may impose a higher per-barrel civil penalty if the violation was "the result of gross negligence or willful misconduct." 33 U.S.C. § 1321(b)(7)(D). According to the government, there was ample evidence presented at trial in support of CITGO's gross negligence. Further, the government argues that the district court erroneously applied the state-law definition of gross negligence rather than the definition supplied by the CWA.

The district court began its analysis of gross negligence by stating "[u]nder Louisiana law, gross negligence is willful, wanton, and reckless conduct that falls between intent to do wrong and ordinary negligence." This statement, the government argues, creates uncertainty as to whether the district court applied the proper legal standard. The government points out that the state-law definition equates gross negligence with willful misconduct, whereas the CWA uses those terms in the disjunctive.

"Gross negligence" is a label that straddles the divide between intentional and accidental actions. The Louisiana Supreme Court has said that "often [there is] no clear distinction between such willful, wanton, or reckless conduct and 'gross' negligence, and the two have tended to merge and take on the same meaning." *Brown v. ANA Ins. Grp.,* 994 So. 2d 1265, 1269 n.7 (La. 2008) (quotations omitted). We see no error in the district court's articulation of its understanding of this term that is neither fish nor fowl. It does not appear that the district court relied on the state-law definition anyway. After it offered the state-law definition of gross negligence, the district court stated that "it does not find that CITGO's actions or inactions rise to the level of gross negligence or willful Misconduct" and "the Court finds no gross negligence or willful misconduct on the part of CITGO." Given these subsequent statements, we conclude the district court applied the correct legal standard.

The government also contends that the district court's failure to find gross negligence is contrary to the overwhelming evidence of such negligence. CITGO completed construction on a multi-million dollar wastewater treatment facility at its Lake Charles refinery in 1994. According to CITGO, the facility was designed to withstand a "25-year/24-hour" storm (a storm of a strength seen only once in 25 years, lasting 24 hours). By 1996, just two years after the facility's completion, a supervisor requested the construction of an additional storage tank, citing the inadequacy of the two existing storage tanks to accommodate stormwater. The following year, a CITGO engineer warned: "Since the system is already marginal for stormwater capacity, it is imperative that excess oil and solids be removed so that this capacity can be used to store stormwater." Despite this warning, CITGO failed to repair the oil skimming system designed to remove floating waste oil. While CITGO employed other methods to remove waste oil from the tanks, such as using portable pumps, it had abandoned those methods by 2000. As a result, sludge and waste oil continued to accumulate in the tanks for years, causing the tank levels to rise and lessening their ability to accommodate stormwater.

In 2002, CITGO employed an environmental consulting firm to evaluate the facility's stormwater capacity. The results of that study again called for the addition of a third storage tank. CITGO points out that it acted on this recommendation and constructed a third tank. It did not begin construction until 2005—three years after receiving the recommendation—and it did not complete construction until 2007, which unfortunately was after the spill.

CITGO's own investigation of the spill revealed it had several "root causes." First, CITGO's wastewater treatment facility was inadequate to handle stormwater, a fact identified by the 2002 study. Second, CITGO did not have a procedure in place to monitor the amount of waste oil accumulating in the tanks. Third, CITGO failed to remove waste oil and sludge from the tanks on a regular basis.

Despite the above facts, all of which were put before the district court during a two-week bench trial through testimony from numerous witnesses and the introduction of hundreds of exhibits, the district court concluded in less than one page of analysis that CITGO was not grossly negligent. Not illogically, the district court credited CITGO for having undertaken, prior to the storm, the construction of the third storage tank. That tank, though, was not completed until more than a year after the storm. The district court found that prior to the completion of the third storage tank, CITGO had made other improvements to the plant's functionality and capacity, including paving a dike around the storage tanks to contain overflows. The court also referred to evidence that CITGO was working on a plan to remove the excess sludge from the tanks shortly before the spill; though it is unclear from the record what steps if any had been taken to implement the plan. Finally, the court reasoned that even though the tanks were overburdened, it was unlikely that they would have overflowed had it not been for the excessive amount of rain that fell on the day of the spill.

A district court's "finding that a party is negligent or grossly negligent is a finding of fact and must stand unless clearly erroneous." *Houston Exploration Co. v. Halliburton Energy Servs., Inc.,* 269 F.3d 528, 531 (5th Cir. 2001). "A finding of fact is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id*. In this case there is some evidence of CITGO's efforts to address the inadequacies of its wastewater storage tanks. By finding nothing more than simple negligence, the district court discounted the seriousness of CITGO's multi-year wait before it began taking the corrective measures required at this plant. In our view, though, almost winning a highly risky gamble with the environment does not much affect the egregiousness of having been gambling in the first place.

We have acknowledged the need to uphold the district court's findings unless clearly erroneous. We make no ruling on this question now. The category of negligence into which CITGO's conduct is placed is part of the overall analysis underlying the setting of the appropriate penalty. Because of the conclusions we have already set out, the district court will have the obligation on remand to re-analyze the civil penalty award. At that time, the district court should reconsider all its findings with respect to CITGO's conduct, giving special attention to what CITGO knew prior to the oil spill and its delays in addressing recognized deficiencies. ***

***In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 21 F. Supp. 3d 657 (E.D. La. 2014) (Findings of Fact and Conclusions of Law)**

Barbier, District Judge:

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i. Legal Standard Re: "Gross Negligence" and "Willful Misconduct"

481. Formulating the standard for gross negligence or willful misconduct is an issue of law. Determining whether or not BPXP's conduct amounted to negligence, gross negligence, or willful misconduct is an issue of fact.

482. The CWA does not define "gross negligence or willful misconduct." The United States and BP disagree over the meaning of "gross negligence," but more or less agree over the meaning of "willful misconduct."

483. The Government urges that gross negligence, like ordinary negligence, requires only objective, not subjective, proof. While ordinary negligence is a failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstances, gross negligence is an extreme departure from the care required under the circumstances or a failure to exercise even slight care. Thus, the United States contends that gross negligence differs from ordinary negligence only in degree, not in kind.

484. BP urges that gross negligence has objective and subjective elements. Like the United States, BP contends that gross negligence requires an extreme departure from the ordinary standard of care (objective element). However, BP also claims that the actor must have what BP calls a "culpable mental state" (subjective element). According to BP, the subjective element requires that the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed with conscious indifference to the rights, safety, or welfare of others.

485. The United States and BP generally agree over the meaning of "willful misconduct."

486. According to the Government, willful misconduct is

> an act, intentionally done, with knowledge that the performance will probably result in injury, or done in such a way as to allow an inference of a reckless disregard of the probable consequences. If the harm results from an omission, the omission must be intentional, and the actor must either know the omission will result in damage or the circumstances surrounding the failure to act must allow an implication of a reckless disregard of the probable consequences.

487. BP claims that willful misconduct, like gross negligence, requires a culpable state of mind; however, willful misconduct "entails an even more culpable state of mind than 'gross negligence.'" BP states that "[w]illful misconduct includes the defendant actually intending to cause injury (actual intent), as well as the defendant knowing that its conduct will naturally or probably cause injury (constructive intent or recklessness)."

488. Restating the parties' positions in terms of "recklessness" helps frame the issue. Courts often use "reckless" to refer to conduct that "is not intentional or malicious, nor is it necessarily callous toward the risk of harming others, as opposed to unheedful of it. Under BP's proposed rubric, "gross negligence" and "recklessness" are treated as synonyms; BP's definition of "willful misconduct" also includes reckless conduct, but extends to intentional misconduct as well. Thus, BP places reckless conduct in both "gross negligence" and "willful misconduct." The United States avoids this overlap by confining "reckless" to "willful misconduct" (which, like BP's definition, also extends to intentional conduct).

489. Turning to the statutory language, the Court notes that the phrase "gross negligence or willful misconduct" is disjunctive, which suggests that these terms have distinct meanings under the statute. This tends to support the United States' position.

490. OPA's text makes clear that "gross negligence" and "willful misconduct" are distinct forms of conduct. One section of OPA states that "gross negligence or willful misconduct" will lift the limits of liability. Another section of OPA states that "willful misconduct" by a responsible party will provide the responsible party's guarantor with a defense to liability, without reference to "gross negligence." Because only "willful misconduct" creates this defense, OPA treats "willful misconduct" as distinct from, and more egregious than, "gross negligence."

491. "Gross negligence" and "willful misconduct" have the same meanings under OPA and the CWA. Thus, the CWA also treats "willful misconduct" as conduct distinct from, and more egregious than, "gross negligence."

492. Because “gross negligence” and “willful misconduct” are distinct under the CWA, “reckless” conduct cannot be included in both terms. Given that the United States and BP agree that reckless conduct is included in “willful misconduct,” reckless conduct cannot be included in “gross negligence.” Therefore, the United States' definitions must be correct.

493. The “cluster of ideas” surrounding gross negligence also supports this conclusion. When Congress inserts a legal term of art into a statute, “it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.” A related idea is that courts:

> . . . generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide and at times on the fact that the federal program would be impaired if state law were to control.

Because the CWA is a federal statute that applies uniformly across all states, interpreting the statutory terms “gross negligence” and “willful misconduct” is a matter of federal law and should be based on a uniform interpretation of the terms, as opposed to, for example, the tort law of the state where the conduct or spill occurred. A court may look generally to states' laws in an effort to divine the “cluster of ideas” surrounding a term like “gross negligence,” but it should not cherry-pick the law of a particular state.

494. Both BP and the United States find cases that support their proposed definitions of “gross negligence.” This is unsurprising considering that “‘[g]ross negligence’ is a nebulous term that is defined in a multitude of ways, depending on the legal context and the jurisdiction.” However, when the “cluster of ideas” surrounding “gross negligence” is considered, the prevailing notion is that gross negligence differs from ordinary negligence in terms of degree, and both are different in kind from reckless, wanton, and willful misconduct.

495. Additional support comes from the fact that the pre-OPA version of the CWA used “***willful*** negligence or willful misconduct” as the standard for enhanced civil penalties. The Fourth Circuit interpreted “willful negligence” to mean “reckless disregard for the probable consequences of a voluntary act or omissions." The fact that OPA replaced “willful negligence” with “gross negligence” suggests that Congress intended a different and lower standard to apply—particularly when considered with the fact that one purpose of OPA was to increase the deterrent effect civil penalties would have on oil spills.

496. BP attempts to find support in the congressional debates over OPA. BP quotes Representative Synar, who remarked, "'[G]ross negligence and willful misconduct . . . is conduct that is intended to injure or is reckless, showing the wanton disregard for the harm to others which is the likely result of a certain course of action or activity. . . . The[se] are extraordinarily difficult to prove.'" However, BP omits language that supports the Government's position. *** Nor does BP mention Representative Gejdenson's statement, "[T]he definition of gross negligence that this legislation uses to determine whether the liability caps are broken is: 'A. The failure to exercise a standard of care which even a careless person would exercise.'" When considered as a whole, the most BP could fairly state about these debates is that they provide conflicting views on how gross negligence is defined.

497. After post-trial briefing was complete, the Fifth Circuit issued its opinion in *United States v. Citgo Petroleum Corp*. There the question of how "gross negligence" is defined under the CWA was presented. However, *Citgo*'s answer is vague, as explained in the margin.

498. For the reasons stated, the Court believes that the United States provides the correct definitions of "gross negligence" and "willful misconduct" for purposes of the CWA. However, because it is unclear what standard *Citgo* may have applied, the Court will also assume that "gross negligence" is equivalent to "recklessness" and analyze the facts under that standard as well. ***

iv. Attribution

522. BP asserts that BPXP cannot be held liable for enhanced penalties under the CWA when the gross negligence or willful misconduct was committed by its employees; instead, BPXP must have authorized or ratified this misconduct. BP contends this is the "traditional common-law rule" that applies to punitive damages, which, absent contrary statutory language, should also apply to the CWA. BP supports its position by pointing out that OPA explicitly attributes an agent's or employee's gross negligence or willful misconduct to the corporate principal or employer for purposes of removing liability caps, but similar language does not appear in the CWA. BP claims that this shows that Congress deliberately chose not to deviate from the "traditional common-law rule" in the CWA.

523. The Court does not agree.

524. The CWA states, in pertinent part, "In any case in which a [discharge of oil] was the result of gross negligence or willful misconduct of a person described in subparagraph (A), the person shall be subject to [higher maximum civil penalties]." Subparagraph (A) is the strict-liability penalty provision for non-negligent and negligent conduct. It states, "Any person who is the owner, operator, or person in charge of any vessel . . . or offshore facility from which oil . . . is discharged . . . shall be subject to a civil penalty in an amount up to . . . [$1,100]."

525. "Person" is defined under the CWA to include "corporations" and contains no requirement to identify corporate management, officers, etc. The enhanced penalty provision, § 1321(b)(7)(D), also does not require any specific level of corporate management; it merely refers back to the entities that can be held strictly liable under the CWA.

526. Congress could have added a requirement that corporate management, etc., be involved in order to obtain enhanced penalties, but it did not. In fact, Congress actually removed similar requirements from the CWA when it passed OPA.

527. Prior to OPA, the CWA's provision governing civil penalty actions established a two-tier penalty structure, similar in some respects to the one in effect today. Like the lower, strict-liability penalty in the current version, the pre-OPA CWA stated that "[a]ny owner, operator, or person in charge of any . . . offshore facility . . . [or] vessel from which oil . . . is discharged" was liable for a civil penalty not exceeding $50,000. However, in order to access the higher maximum civil penalty of $250,000, the pre-OPA CWA required the Government to not only show that the discharge "was the result of willful negligence or willful misconduct," but also that this conduct was "***within the privity and knowledge*** of the owner, operator or person in charge." When OPA rewrote the CWA's civil penalty provisions, it removed the "privity and knowledge" language.

528. "Privity and knowledge" under the former version of the CWA meant the same as it does under the Limitation of Liability Act. Courts applying the Limitation Act to corporate owners interpret "privity and knowledge" to mean "the privity and knowledge of a managing agent, officer, or supervising employee, including shoreside personnel." Consequently, one of the most difficult issues that arise under the Limitation Act is whether the person responsible for the error is sufficiently high up in the corporate hierarchy that her acts or omissions will be deemed within the owner's "privity and knowledge."

529. Thus, when OPA deleted "privity and knowledge" from the CWA, it removed a significant hurdle to accessing higher maximum penalties:

> no longer was the Government required to show that the extra-negligent conduct was committed by an employee of a certain rank or an agent with the requisite level of authority.230 BP's argument would replace the hurdle Congress deliberately removed with one even higher.

530. Additionally, while the common-law rule regarding a corporation's punitive liability may have been clear over a century ago, that was certainly not the case when Congress enacted the current version of the CWA's civil penalty provision, nor is it so today. In fact, BP cites no cases that have applied its interpretation to

the CWA, nor has the Court found any. BP relies heavily on the Fifth Circuit's decision in *In re: P&E Boat Rentals, Inc.*, which concerned punitive damages under maritime law. As explained above, however, maritime law does not necessarily supply a standard for the CWA, which may not always overlap with admiralty jurisdiction. Furthermore, other maritime circuits disagree with *P&E Boats*, and the Supreme Court was equally divided on this issue, which lends further supports to the point that by 1990, the general common law, and perhaps general maritime law as well, had changed considerably from the "traditional" rule.

531. For these reasons, the Court concludes that a corporation is vicariously liable under the CWA's enhanced penalty provision for the gross negligence and/or willful misconduct of its employees. Consequently, the Court need not determine whether BPXP authorized or ratified the conduct, or whether Vidrine and Hafle (or any other BP employee) were "managerial agents," or any other attribution standard that may apply under general maritime law, "traditional" common law, or any other law or jurisdiction. ***

Further Reading:

In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, 148 F. Supp. 3d 563 (E.D. La. 2015) (Findings of Fact and Conclusions of Law, Penalty Phase) (applying the factors from 33 U.S.C. § 1321(b)(8) to assess a penalty of $159.5 million against Anadarko under the Clean Water Act)

Chapter 5: Federal Environmental Legislation: Oil Pollution Act of 1990

33 U.S.C. § 2701 Definitions

For the purposes of this Act, the term--

(1) "act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight;

(2) "barrel" means 42 United States gallons at 60 degrees fahrenheit;

(3) "claim" means a request, made in writing for a sum certain, for compensation for damages or removal costs resulting from an incident;

(4) "claimant" means any person or government who presents a claim for compensation under this title;

(5) "damages" means damages specified in section 1002(b) of this Act [33 U.S.C. § 2702(b)], and includes the cost of assessing these damages;

(6) "deepwater port" is a facility licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524);

(7) "discharge" means any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping;

(8) "exclusive economic zone" means the zone established by Presidential Proclamation Numbered 5030, dated March 10, 1983, including the ocean waters of the areas referred to as "eastern special areas" in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990;

(9) "facility" means any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes;

(10) "foreign offshore unit" means a facility which is located, in whole or in part, in the territorial sea or on the continental shelf of a foreign country and which is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the seabed beneath the foreign country's territorial sea or from the foreign country's continental shelf;

(11) "Fund" means the Oil Spill Liability Trust Fund, established by section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509);

(12) "gross ton" has the meaning given that term by the Secretary under part J of title 46, United States Code [46 U.S.C. §§ 14101 et seq.];

(13) "guarantor" means any person, other than the responsible party, who provides evidence of financial responsibility for a responsible party under this Act;

(14) "incident" means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil; ***

(16) "lessee" means a person holding a leasehold interest in an oil or gas lease on lands beneath navigable waters (as that term is defined in section 2(a) of the Submerged Lands Act (43 U.S.C. 1301(a))) or on submerged lands of the Outer Continental Shelf, granted or maintained under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.);

(17) "liable" or "liability" shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321);

(18) "mobile offshore drilling unit" means a vessel (other than a self-elevating lift vessel) capable of use as an offshore facility;

(19) "National Contingency Plan" means the National Contingency Plan prepared and published under section 311(d) of the Federal Water Pollution Control Act [33 U.S.C. § 1321(d)], as amended by this Act, or revised under section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9605);

(20) "natural resources" includes 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;

(21) "navigable waters" means the waters of the United States, including the territorial sea;

(22) "offshore facility" means any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

(23) "oil" means oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act;

(24) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(25) the term "Outer Continental Shelf facility" means an offshore facility which is located, in whole or in part, on the Outer Continental Shelf and is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the Outer Continental Shelf;

(26) "owner or operator"--

(A) means--

(i) in the case of a vessel, any person owning, operating, or chartering by demise, the vessel;

(ii) in the case of an onshore facility, offshore facility, or foreign offshore unit or other facility located seaward of the exclusive economic zone, any person or entity owning or operating such facility; ***

(27) "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body;

(28) "permittee" means a person holding an authorization, license, or permit for geological exploration issued under section 11 of the Outer Continental Shelf Lands Act (43 U.S.C. 1340) or applicable State law; ***

(30) "remove" or "removal" means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(31) "removal costs" means the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident;

(32) "responsible party" means the following:

(A) Vessels. In the case of a vessel, any person owning, operating, or demise chartering the vessel. In the case of a vessel, the term "responsible party" also includes the owner of oil being transported in a tank vessel with a single hull after December 31, 2010 (other than a vessel described in section 3703a(b)(3) of title 46, United States Code).

(B) Onshore facilities. In the case of an onshore facility (other than a pipeline), any person owning or operating the facility, except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as the owner transfers possession and right to use the property to another person by lease, assignment, or permit.

(C) Offshore facilities. In the case of an offshore facility (other than a pipeline or a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.)), the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee), except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit.

(D) Foreign facilities. In the case of a foreign offshore unit or other facility located seaward of the exclusive economic zone, any person or other entity owning or operating the facility, and any leaseholder, permit holder, assignee, or holder of a right of use and easement granted under applicable foreign law for the area in which the facility is located.

(E) Deepwater ports. In the case of a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524), the licensee.

(F) Pipelines. In the case of a pipeline, any person owning or operating the pipeline. ***

(33) "Secretary" means the Secretary of the department in which the Coast Guard is operating;

(34) "tank vessel" means a vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue, and that--

(A) is a vessel of the United States;

(B) operates on the navigable waters; or

(C) transfers oil or hazardous material in a place subject to the jurisdiction of the United States;

(35) "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of 3 miles;

(36) "United States" and "State" mean the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession of the United States;

(37) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, other than a public vessel; ***

33 U.S.C. § 2702 Elements of Liability

(a) In general. Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.

(b) Covered removal costs and damages.

(1) Removal costs. The removal costs referred to in subsection (a) are--

(A) all removal costs incurred by the United States, a State, or an Indian tribe under subsection (c), (d), (e), or (l) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, under the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.), or under State law; and

(B) any removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan.

(2) Damages. The damages referred to in subsection (a) are the following:

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

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

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

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

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

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

(d) Liability of third parties.

(1) In general.

(A) Third party treated as responsible party. Except as provided in subparagraph (B), in any case in which a responsible party establishes that a discharge or threat of a discharge and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties described in section 1003(a)(3) [33 U.S.C. § 2703(a)(3)] (or solely by such an act or omission in combination with an act of God or an act of war), the third party or parties shall be treated as the responsible party or parties for purposes of determining liability under this title.

(B) Subrogation of responsible party. If the responsible party alleges that the discharge or threat of a discharge was caused solely by an act or omission of a third party, the responsible party--

(i) in accordance with section 1013 [33 U.S.C. § 2713], shall pay removal costs and damages to any claimant; and

(ii) shall be entitled by subrogation to all rights of the United States Government and the claimant to recover removal costs or damages from the third party or the Fund paid under this subsection.

(2) Limitation applied.

(A) Owner or operator of vessel or facility. If the act or omission of a third party that causes an incident occurs in connection with a vessel or facility owned or operated by the third party, the liability of the third party shall be subject to the limits provided in section 1004 [33 U.S.C. § 2704] as applied with respect to the vessel or facility.

(B) Other cases. In any other case, the liability of a third party or parties shall not exceed the limitation which would have been applicable to the responsible party of the vessel or facility from which the discharge actually occurred if the responsible party were liable.

33 U.S.C. § 2703 Defenses to Liability

(a) Complete defenses. A responsible party is not liable for removal costs or damages under section 1002 [33 U.S.C. § 2702] if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by--

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail), if the responsible party establishes, by a preponderance of the evidence, that the responsible party--

(A) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and

(B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions; or

(4) any combination of paragraphs (1), (2), and (3).

(b) Defenses as to particular claimants. A responsible party is not liable under section 1002 [33 U.S.C. § 2702] to a claimant, to the extent that the incident is caused by the gross negligence or willful misconduct of the claimant.

(c) Limitation on complete defense. Subsection (a) does not apply with respect to a responsible party who fails or refuses--

(1) to report the incident as required by law if the responsible party knows or has reason to know of the incident;

(2) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or

(3) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).

(d) Definition of contractual relationship.

(1) In general. For purposes of subsection (a)(3) the term "contractual relationship" includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless--

(A) the real property on which the facility concerned is located was acquired by the responsible party after the placement of the oil on, in, or at the real property on which the facility concerned is located;

(B) one or more of the circumstances described in subparagraph (A), (B), or (C) of paragraph (2) is established by the responsible party by a preponderance of the evidence; and

(C) the responsible party complies with paragraph (3).

(2) Required circumstance. The circumstances referred to in paragraph (1)(B) are the following:

(A) At the time the responsible party acquired the real property on which the facility is located the responsible party did not know and had no reason to know that oil that is the subject of the discharge or substantial threat of discharge was located on, in, or at the facility.

(B) The responsible party is a government entity that acquired the facility--

(i) by escheat;

(ii) through any other involuntary transfer or acquisition; or

(iii) through the exercise of eminent domain authority by purchase or condemnation.

(C) The responsible party acquired the facility by inheritance or bequest.

(3) Additional requirements. For purposes of paragraph (1)(C), the responsible party must establish by a preponderance of the evidence that the responsible party--

(A) has satisfied the requirements of section 1003(a)(3)(A) and (B) [subsec. (a)(3)(A) and (B) of this section];

(B) has provided full cooperation, assistance, and facility access to the persons that are authorized to conduct removal actions, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial removal action;

(C) is in compliance with any land use restrictions established or relied on in connection with the removal action; and

(D) has not impeded the effectiveness or integrity of any institutional control employed in connection with the removal action. ***

(5) Previous owner or operator. Nothing in this paragraph or in section 1003(a)(3) [subsec. (a)(3) of this section] shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this Act. Notwithstanding this paragraph, if a responsible party obtained actual knowledge of the discharge or substantial threat of discharge of oil at such facility when the responsible party owned the facility and then subsequently transferred ownership of the facility or the real property on which the facility is located to another person without disclosing such knowledge, the responsible party shall be treated as liable under [section] 1002(a) [33 U.S.C. § 2702(a)] and no defense under section 1003(a) [subsec. (a) of this section] shall be available to such responsible party.

(6) Limitation on defense. Nothing in this paragraph shall affect the liability under this Act of a responsible party who, by any act or omission, caused or contributed to the discharge or substantial threat of discharge of oil which is the subject of the action relating to the facility.

33 U.S.C. § 2704 Limits on Liability

(a) General rule. Except as otherwise provided in this section, the total of the liability of a responsible party under section 1002 [33 U.S.C. § 2702] and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed--

(1) for a tank vessel, the greater of--

(A) with respect to a single-hull vessel, including a single-hull vessel fitted with double sides only or a double bottom only, $ 3,000 per gross ton;

(B) with respect to a vessel other than a vessel referred to in subparagraph (A), $ 1,900 per gross ton; or

(C) (i) with respect to a vessel greater than 3,000 gross tons that is--

(I) a vessel described in subparagraph (A), $ 22,000,000; or

(II) a vessel described in subparagraph (B), $ 16,000,000; or

(ii) with respect to a vessel of 3,000 gross tons or less that is--

(I) a vessel described in subparagraph (A), $ 6,000,000; or

(II) a vessel described in subparagraph (B), $ 4,000,000;

(2) for any other vessel, $ 950 per gross ton or $ 800,000, whichever is greater;

(3) for an offshore facility except a deepwater port, the total of all removal costs plus $ 75,000,000; and

(4) for any onshore facility and a deepwater port, $ 350,000,000.

(b) Division of liability for mobile offshore drilling units.

(1) Treated first as tank vessel. For purposes of determining the responsible party and applying this Act and except as provided in paragraph (2), a mobile offshore drilling unit which is being used as an offshore facility is deemed to be a tank vessel with respect to the discharge, or the substantial threat of a discharge, of oil on or above the surface of the water.

(2) Treated as facility for excess liability. To the extent that removal costs and damages from any incident described in paragraph (1) exceed the amount for which a responsible party is liable (as that amount may be limited under subsection (a)(1)), the mobile offshore drilling unit is deemed to be an offshore facility. For purposes of applying subsection (a)(3), the amount specified in that subsection shall be reduced by the amount for which the responsible party is liable under paragraph (1).

(c) Exceptions.

(1) Acts of responsible party. Subsection (a) does not apply if the incident was proximately caused by--

(A) gross negligence or willful misconduct of, or

(B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).

(2) Failure or refusal of responsible party. Subsection (a) does not apply if the responsible party fails or refuses--

(A) to report the incident as required by law and the responsible party knows or has reason to know of the incident;

(B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or

(C) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).

(3) OCS facility or vessel. Notwithstanding the limitations established under subsection (a) and the defenses of section 1003 [33 U.S.C. § 2703], all removal costs incurred by the United States Government or any State or local official or agency in connection with a discharge or substantial threat of a discharge of oil from any Outer Continental Shelf facility or a vessel carrying oil as cargo from such a facility shall be borne by the owner or operator of such facility or vessel.

(4) Certain tank vessels. Subsection (a)(1) shall not apply to--

(A) a tank vessel on which the only oil carried as cargo is an animal fat or vegetable oil, as those terms are used in section 2 of the Edible Oil Regulatory Reform Act [33 U.S.C. § 2720]; and

(B) a tank vessel that is designated in its certificate of inspection as an oil spill response vessel (as that term is defined in section 2101 of title 46, United States Code) and that is used solely for removal. ***

(4) Adjustment to reflect Consumer Price Index. The President, by regulations issued not later than 3 years after the date of enactment of the Delaware River Protection Act of 2006 [enacted July 11, 2006] and not less than every 3 years thereafter, shall adjust the limits on liability specified in subsection (a) to reflect significant increases in the Consumer Price Index. ***

33 U.S.C. § 2706 Natural Resource Damages

(a) Liability. In the case of natural resource damages under section 1002(b)(2)(A) [33 U.S.C. § 2702(b)(2)(A)], liability shall be--

(1) to the United States Government for natural resources belonging to, managed by, controlled by, or appertaining to the United States;

(2) to any State for natural resources belonging to, managed by, controlled by, or appertaining to such State or political subdivision thereof;

(3) to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such Indian tribe; and

(4) in any case in which section 1007 [33 U.S.C. § 2707] applies, to the government of a foreign country for natural resources belonging to, managed by, controlled by, or appertaining to such country. ***

(d) Measure of damages.

(1) In general. The measure of natural resource damages under section 1002(b)(2)(A) [33 U.S.C. § 2702(b)(2)(A)] is--

(A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;

(B) the diminution in value of those natural resources pending restoration; plus

(C) the reasonable cost of assessing those damages.

(2) Determine costs with respect to plans. Costs shall be determined under paragraph (1) with respect to plans adopted under subsection (c).

(3) No double recovery. There shall be no double recovery under this Act for natural resource damages, including with respect to the costs of damage assessment or restoration, rehabilitation, replacement, or acquisition for the same incident and natural resource.***

33 U.S.C. § 2707 Recovery by Foreign Claimants

(a) Required showing by foreign claimants.

(1) In general. In addition to satisfying the other requirements of this Act, to recover removal costs or damages resulting from an incident a foreign claimant shall demonstrate that--

(A) the claimant has not been otherwise compensated for the removal costs or damages; and

(B) recovery is authorized by a treaty or executive agreement between the United States and the claimant's country, or the Secretary of State, in consultation with the Attorney General and other appropriate officials, has certified that the claimant's country provides a comparable remedy for United States claimants.

(2) Exceptions. Paragraph (1)(B) shall not apply with respect to recovery by a resident of Canada in the case of an incident described in subsection (b)(4).

(b) Discharges in foreign countries. A foreign claimant may make a claim for removal costs and damages resulting from a discharge, or substantial threat of a discharge, of oil in or on the territorial sea, internal waters, or adjacent shoreline of a foreign country, only if the discharge is from--

(1) an Outer Continental Shelf facility or a deepwater port;

(2) a vessel in the navigable waters;

(3) a vessel carrying oil as cargo between 2 places in the United States; or

(4) a tanker that received the oil at the terminal of the pipeline constructed under the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.), for transportation to a place in the United States, and the discharge or threat occurs prior to delivery of the oil to that place.

(c) "Foreign claimant" defined. In this section, the term "foreign claimant" means--

(1) a person residing in a foreign country;

(2) the government of a foreign country; and

(3) an agency or political subdivision of a foreign country.

33 U.S.C. § 2708 Recovery by Responsible Party

(a) In general. The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 1013 [33 U.S.C. § 2713] only if the responsible party demonstrates that--

(1) the responsible party is entitled to a defense to liability under section 1003 [33 U.S.C. § 2703]; or

(2) the responsible party is entitled to a limitation of liability under section 1004 [33 U.S.C. § 2704].

(b) Extent of recovery. A responsible party who is entitled to a limitation of liability may assert a claim under section 1013 [33 U.S.C. § 2713] only to the extent that the sum of the removal costs and damages incurred by the responsible party plus the amounts paid by the responsible party, or by the guarantor on behalf of the responsible party, for claims asserted under section 1013 [33 U.S.C. § 2713] exceeds the amount to which the total of the liability under section 1002 [33 U.S.C. § 2702] and removal costs and damages incurred by, or on behalf of, the responsible party is limited under section 1004 [33 U.S.C. § 2704].

33 U.S.C. § 2709 Contribution

A person may bring a civil action for contribution against any other person who is liable or potentially liable under this Act or another law. The action shall be brought in accordance with section 1017 [33 U.S.C. § 2717].

33 U.S.C. § 2710 Indemnification agreements

(a) Agreements not prohibited. Nothing in this Act prohibits any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this Act.

(b) Liability not transferred. No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer liability imposed under this Act from a responsible party or from any person who may be liable for an incident under this Act to any other person.

(c) Relationship to other causes of action. Nothing in this Act, including the provisions of subsection (b), bars a cause of action that a responsible party subject to liability under this Act, or a guarantor, has or would have, by reason of subrogation or otherwise, against any person.

33 U.S.C. § 2712 Uses of the Fund

(a) Uses generally. The Fund shall be available to the President for--

(1) the payment of removal costs, including the costs of monitoring removal actions, determined by the President to be consistent with the National Contingency Plan--

(A) by Federal authorities; or

(B) by a Governor or designated State official under subsection (d);

(2) the payment of costs incurred by Federal, State, or Indian tribe trustees in carrying out their functions under section 1006 [33 U.S.C. § 2706] for assessing natural resource damages and for developing and implementing plans for the restoration, rehabilitation, replacement, or acquisition of the equivalent of damaged resources determined by the President to be consistent with the National Contingency Plan;

(3) the payment of removal costs determined by the President to be consistent with the National Contingency Plan as a result of, and damages resulting from, a discharge, or a substantial threat of a discharge, of oil from a foreign offshore unit;

(4) the payment of claims in accordance with section 1013 [33 U.S.C. § 2713] for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages;

(5) the payment of Federal administrative, operational, and personnel costs and expenses reasonably necessary for and incidental to the implementation, administration, and enforcement of this Act. ***

(b) Defense to liability for Fund. The Fund shall not be available to pay any claim for removal costs or damages to a particular claimant, to the extent that the incident, removal costs, or damages are caused by the gross negligence or willful misconduct of that claimant. ***

(f) Rights of subrogation. Payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party. ***

(h) Period of limitations for claims.

(1) Removal costs. No claim may be presented under this title for recovery of removal costs for an incident unless the claim is presented within 6 years after the date of completion of all removal actions for that incident.

(2) Damages. No claim may be presented under this section for recovery of damages unless the claim is presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care, or in the case of natural resource damages under section 1002(b)(2)(A) [33 U.S.C. § 2702(b)(2)(A)], if later, the date of completion of the natural resources damage assessment under section 1006(e) [33 U.S.C. § 2706(e)]. ***

33 U.S.C. § 2713 Claims Procedure

(a) Presentation. Except as provided in subsection (b), all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source designated under section 1014(a) [33 U.S.C. § 2714(a)].

(b) Presentation to Fund.

(1) In general. Claims for removal costs or damages may be presented first to the Fund--

(A) if the President has advertised or otherwise notified claimants in accordance with section 1014(c) [33 U.S.C. § 2714(c)];

(B) by a responsible party who may assert a claim under section 1008 [33 U.S.C. § 2708];

(C) by the Governor of a State for removal costs incurred by that State; or

(D) by a United States claimant in a case where a foreign offshore unit has discharged oil causing damage for which the Fund is liable under section 1012(a) [33 U.S.C. § 2712(a)].

(2) Limitation on presenting claim. No claim of a person against the Fund may be approved or certified during the pendency of an action by the person in court to recover costs which are the subject of the claim.

(c) Election. If a claim is presented in accordance with subsection (a) and--

(1) each person to whom the claim is presented denies all liability for the claim, or

(2) the claim is not settled by any person by payment within 90 days after the date upon which (A) the claim was presented, or (B) advertising was begun pursuant to section 1014(b) [33 U.S.C. § 2714(b)],whichever is later, the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.

(d) Uncompensated damages. If a claim is presented in accordance with this section, including a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund. ***

(f) Loan program.

(1) In general. The President shall establish a loan program under the Fund to provide interim assistance to fishermen and aquaculture producer claimants during the claims procedure. ***

33 U.S.C. § 2715 Subrogation

(a) In general. Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law.

(b) Interim damages.

(1) In general. If a responsible party, a guarantor, or the Fund has made payment to a claimant for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, subrogation under subsection (a) shall apply only with respect to the portion of the claim reflected in the paid interim claim.

(2) Final damages. Payment of such a claim shall not foreclose a claimant's right to recovery of all damages to which the claimant otherwise is entitled under this Act or under any other law.

(c) Actions on behalf of Fund. At the request of the Secretary, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this Act, and all costs incurred by the Fund by reason of the claim, including interest (including prejudgment interest), administrative and adjudicative costs, and attorney's fees. Such an action may be commenced against any responsible party or (subject to section 1016 [33 U.S.C. § 2716]) guarantor, or against any other person who is liable, pursuant to any law, to the compensated claimant or to the Fund, for the cost or damages for which the compensation was paid. Such an action shall be commenced against the responsible foreign government or other responsible party to recover any removal costs or damages paid from the Fund as the result of the discharge, or substantial threat of discharge, of oil from a foreign offshore unit or other facility located seaward of the exclusive economic zone. ***

33 U.S.C. § 2716 Financial Responsibility

(a) Requirement. The responsible party for--

(1) any vessel over 300 gross tons (except a non-self-propelled vessel that does not carry oil as cargo or fuel) using any place subject to the jurisdiction of the United States;

(2) any vessel using the waters of the exclusive economic zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States; or

(3) any tank vessel over 100 gross tons using any place subject to the jurisdiction of the United States;

shall establish and maintain, in accordance with regulations promulgated by the Secretary, evidence of financial responsibility sufficient to meet the maximum amount of liability to which the responsible party could be subjected under section 1004(a) or (d) of this Act [33 U.S.C. § 2704(a) or (d)], in a case where the responsible party would be entitled to limit liability under that section. If the responsible party owns or operates more than one vessel, evidence of financial responsibility need be established only to meet the amount of the maximum liability applicable to the vessel having the greatest maximum liability.

(b) Sanctions.

(1) Withholding clearance. The Secretary of the Treasury shall withhold or revoke the clearance required by section 4197 of the Revised Statutes of the United States [46 U.S.C. § 60105] of any vessel subject to this section that does not have the evidence of financial responsibility required for the vessel under this section.

(2) Denying entry to or detaining vessels. The Secretary may--

(A) deny entry to any vessel to any place in the United States, or to the navigable waters, or

(B) detain at the place, any vessel that, upon request, does not produce the evidence of financial responsibility required for the vessel under this section.

(3) Seizure of vessel. Any vessel subject to the requirements of this section which is found in the navigable waters without the necessary evidence of financial responsibility for the vessel shall be subject to seizure by and forfeiture to the United States.

(c) Offshore facilities.

(1) In general.

(A) Evidence of financial responsibility required. Except as provided in paragraph (2), a responsible party with respect to an offshore facility that--

(i)

(I) is located seaward of the line of ordinary low water along that portion of the coast that is in direct contact with the open sea and the line marking the seaward limit of inland waters; or

(II) is located in coastal inland waters, such as bays or estuaries, seaward of the line of ordinary low water along that portion of the coast that is not in direct contact with the open sea;

(ii) is used for exploring for, drilling for, producing, or transporting oil from facilities engaged in oil exploration, drilling, or production; and

(iii) has a worst-case oil spill discharge potential of more than 1,000 barrels of oil (or a lesser amount if the President determines that the risks posed by such facility justify it), shall establish and maintain evidence of financial responsibility in the amount required under subparagraph (B) or (C), as applicable.

(B) Amount required generally. Except as provided in subparagraph (C), the amount of financial responsibility for offshore facilities that meet the criteria of subparagraph (A) is--

(i) $ 35,000,000 for an offshore facility located seaward of the seaward boundary of a State; or

(ii) $ 10,000,000 for an offshore facility located landward of the seaward boundary of a State. ***

(E) Definition. For the purpose of this paragraph, the seaward boundary of a State shall be determined in accordance with section 2(b) of the Submerged Lands Act (43 U.S.C. 1301(b)).

(2) Deepwater ports. Each responsible party with respect to a deepwater port shall establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of liability to which the responsible party could be subjected under section 1004(a) of this Act [33 U.S.C. § 2704(a)] in a case where the responsible party would be entitled to limit liability under that section. If the Secretary exercises the authority under section 1004(d)(2) [33 U.S.C. § 2704(d)(2)] to lower the limit of liability for deepwater ports, the responsible party shall establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of liability so established. In a case in which a person is the responsible party for more than one deepwater port, evidence of financial responsibility need be established only to meet the maximum liability applicable to the deepwater port having the greatest maximum liability. ***

(f) Claims against guarantor.

(1) In general. Subject to paragraph (2), a claim for which liability may be established under section 1002 [33 U.S.C. § 2702] may be asserted directly against any guarantor providing evidence of financial responsibility for a responsible party liable under that section for removal costs and damages to which the claim pertains. In defending against such a claim, the guarantor may invoke--

(A) all rights and defenses which would be available to the responsible party under this Act;

(B) any defense authorized under subsection (e); and

(C) the defense that the incident was caused by the willful misconduct of the responsible party. The guarantor may not invoke any other defense that might be available in proceedings brought by the responsible party against the guarantor.

(2) Further requirement. A claim may be asserted pursuant to paragraph (1) directly against a guarantor providing evidence of financial responsibility under subsection (c)(1) with respect to an offshore facility only if--

(A) the responsible party for whom evidence of financial responsibility has been provided has denied or failed to pay a claim under this Act on the basis of being insolvent, as defined under section 101(32) of title 11, United States Code, and applying generally accepted accounting principles;

(B) the responsible party for whom evidence of financial responsibility has been provided has filed a petition for bankruptcy under title 11, United States Code; or

(C) the claim is asserted by the United States for removal costs and damages or for compensation paid by the Fund under this Act, including costs incurred by the Fund for processing compensation claims.

(3) Rulemaking authority. Not later than 1 year after the date of enactment of this paragraph [enacted Oct. 19, 1996], the President shall promulgate regulations to establish a process for implementing paragraph (2) in a manner that will allow for the orderly and expeditious presentation and resolution of claims and effectuate the purposes of this Act.

(g) Limitation on guarantor's liability. Nothing in this Act shall impose liability with respect to an incident on any guarantor for damages or removal costs which exceed, in the aggregate, the amount of financial responsibility which that guarantor has provided for a responsible party pursuant to this section. The total liability of the guarantor on direct action for claims brought under this Act with respect to an incident shall be limited to that amount. ***

33 U.S.C. § 2716a Financial Responsibility Civil Penalties

(a) Administrative. Any person who, after notice and an opportunity for a hearing, is found to have failed to comply with the requirements of section 1016 [33 U.S.C. § 2716] or the regulations issued under that section, or with a denial or detention order issued under subsection (c)(2) [(b)(2)] of that section, shall be liable to the United States for a civil penalty, not to exceed $ 25,000 per day of violation. ***

33 U.S.C. § 2717 Litigation, Jurisdiction, and Venue

***

(b) Jurisdiction. Except as provided in subsections (a) and (c), the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the discharge or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) State court jurisdiction. A State trial court of competent jurisdiction over claims for removal costs or damages, as defined under this Act, may consider claims under this Act or State law and any final judgment of such court (when no longer subject to ordinary forms of review) shall be recognized, valid, and enforceable for all purposes of this Act. ***

(f) Period of limitations.

(1) Damages. Except as provided in paragraphs (3) and (4), an action for damages under this Act shall be barred unless the action is brought within 3 years after--

(A) the date on which the loss and the connection of the loss with the discharge in question are reasonably discoverable with the exercise of due care, or

(B) in the case of natural resource damages under section 1002(b)(2)(A) [33 U.S.C. § 2702(b)(2)(A)], the date of completion of the natural resources damage assessment under section 1006(c) [33 U.S.C. § 2706(c)].

(2) Removal costs. An action for recovery of removal costs referred to in section 1002(b)(1) [33 U.S.C. § 2702(b)(1)] must be commenced within 3 years after completion of the removal action. In any such action described in this subsection, the court shall enter a declaratory judgment on liability for removal costs or damages that will be binding on any subsequent action or actions to recover further removal costs or damages. Except as otherwise provided in this paragraph, an action may be commenced under this title for recovery of removal costs at any time after such costs have been incurred.

(3) Contribution. No action for contribution for any removal costs or damages may be commenced more than 3 years after--

(A) the date of judgment in any action under this Act for recovery of such costs or damages, or

(B) the date of entry of a judicially approved settlement with respect to such costs or damages.

(4) Subrogation. No action based on rights subrogated pursuant to this Act by reason of payment of a claim may be commenced under this Act more than 3 years after the date of payment of such claim. ***

33 U.S.C. § 2718 Relationship to Other Law

(a) Preservation of State authorities; . . . Nothing in this Act or the Act of March 3, 1851 shall--

(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to--

(A) the discharge of oil or other pollution by oil within such State; or

(B) any removal activities in connection with such a discharge; ***

(b) Preservation of State funds. Nothing in this Act or in section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509) shall in any way affect, or be construed to affect, the authority of any State--

(1) to establish, or to continue in effect, a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or

(2) to require any person to contribute to such a fund.

(c) Additional requirements and liabilities; penalties. Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. [30501] et seq.), or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof--

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge, or substantial threat of a discharge, of oil. ***

33 U.S.C. § 2719 State Financial Responsibility

A State may enforce, on the navigable waters of the State, the requirements for evidence of financial responsibility under section 1016 [33 U.S.C. § 2716].

33 U.S.C. § 2751 Savings Provisions

***

(e) Admiralty and maritime law. Except as otherwise provided in this Act, this Act does not affect—

(1) admiralty and maritime law; or

(2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

In re Settoon Towing, L.L.C., 859 F.3d 340 (5th Cir. 2017)

Southwick, Circuit Judge:

One flotilla of barges encountered another on the lower Mississippi River. Both followed the usual protocol of entering an agreement by radio for how one was to overtake and pass the other. A collision nonetheless resulted, causing an oil spill that closed a portion of the river for two days. Cleanup was immediately undertaken. Who ultimately pays and how much are what this suit is about.

The litigation is governed by the federal Oil Pollution Act, or OPA. No one contests that Settoon Towing was properly charged by the Coast Guard with the initial cleanup and remediation, thus initially paying all expenses under the strict-liability statutory scheme. The district court, though, found both Settoon and Marquette Transportation to be negligent. Our principal issue is whether Settoon can receive contribution under the OPA from Marquette for its payment of purely economic damages, *i.e.*, for the cleanup costs. A hoary bit of maritime law has traditionally said, "no." We conclude that the OPA clearly says, "yes." Marquette's arguments to the contrary try to make the statutory question seem a whole lot harder than it really is. The district court allowed contribution and determined the percentage of fault of each party. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

On February 22, 2014, the M/V HANNAH C. SETTOON, towing two crude oil tank barges, and the M/V LINDSAY ANN ERICKSON, towing twenty-one loaded grain barges, were both heading downstream on the lower Mississippi River. The LINDSAY began to stop just after it passed the College Point bend near Convent, Louisiana. It was preparing to "top around" with the help of a towboat in order to drop off three of her barges and then head back upriver. At approximately 2:58 p.m., as the HANNAH was in the same bend and about 3,500 feet behind the LINDSAY, the vessels communicated by radio and entered into what the parties call a "one whistle overtaking agreement."

According to the agreement, the HANNAH would pass the LINDSAY on her stern while the LINDSAY would hold steady. Once the HANNAH was clear, the LINDSAY would begin her top around. The width of the river at the location of the overtaking and passing is about 3,000 feet. ***

At some point prior to the HANNAH completely passing the LINDSAY, the LINDSAY began reversing into the river to start her top-around. At 3:09 p.m., her stern collided with the portside bow of a crude-oil barge towed by the HANNAH. Approximately 750 barrels of light crude oil were discharged into the Mississippi River. As a result, a 70-mile stretch of the river was closed to vessels for approximately 48 hours for cleanup and recovery.

Settoon was named the strictly liable "Responsible Party" by the United States Coast Guard pursuant to the OPA. That phrase is a term of art central to this appeal and will be much discussed later. Settoon carried out its statutory responsibilities related to cleanup, remediation, and third-party claims for damages. Settoon subsequently filed Limitation of Liability proceedings pursuant to 46 U.S.C. §§ 30501-30512 in the Eastern District of Louisiana. Marquette also filed a claim. Settoon brought a counterclaim against Marquette seeking contribution under the OPA, the general maritime law, or both.

At the conclusion of a four-day bench trial on the issue of liability, the district court determined both parties were at fault and apportioned 65% of the fault for the collision to Marquette and 35% to Settoon. The district court also considered a question for which, surprisingly, there is little authority: Is a Responsible Party entitled to contribution for purely economic damages from a third party found to be partially liable? The district court answered that such contribution is permitted. Marquette timely filed its notice of appeal.

DISCUSSION

Marquette claims the district court erred in two ways: (A) the OPA does not allow a Responsible Party to obtain contribution from a partially liable third party, and even if it does, (B) the district court erred in its allocation of relative fault. ***

I. The Oil Pollution Act of 1990 ***

The OPA facilitates prompt cleanup and compensation by first requiring the President to "designate the source or sources of the discharge," who is called the "responsible party." 33 U.S.C. § 2714(a). In 1991, the President delegated that duty to the Coast Guard. The "responsible party" in the case of a vessel is "any person owning, operating, or demise chartering the vessel." 33 U.S.C. § 2701(32)(A). The OPA makes the responsible party "strictly liable for cleanup costs and damages and first in line to pay any claims for removal costs or damages that may arise under OPA." *United States v. Am. Commercial Lines, L.L.C.,* 759 F.3d 420, 422 n.2 (5th

Cir. 2014). "Notwithstanding any other provision or rule of law . . . each responsible party . . . is liable for the removal costs and damages specified in *subsection (b)* that result from such incident." 33 U.S.C. § 2702(a). There are three absolute defenses, but they are not relevant in this case.

Well before the enactment of the OPA, it was clear that general maritime law did not permit recovery of purely economic losses. *See Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 307-09, 48 S. Ct. 134, 72 L. Ed. 290 (1927). Since our decision in *Louisiana ex rel. Guste v. M/V TESTBANK,* 752 F.2d 1019, 1022 (5th Cir. 1985) (en banc), this circuit "has consistently applied the rule limiting recovery in maritime cases to plaintiffs who sustain physical damage to a proprietary interest." *In re Bertucci Contracting Co.,* 712 F.3d 245, 246-47 (5th Cir. 2013). Under the OPA, though, recovery of economic losses is allowed without physical damage to a proprietary interest. *See* 33 U.S.C. § 2702(b)(2)(E). The only restriction on such recovery is that the loss must be "due to the injury, destruction, or loss of real property, personal property, or natural resources[.]" *Id.*

Marquette's statutory argument is that the right to contribution Settoon claims here for reimbursement of a percentage of all its costs from a jointly negligent party does not arise under the OPA. Instead, it argues that any contribution it owes is based on general maritime law and therefore is subject to the *Robins Dry Dock* barto purely economic damages. If general maritime law is the sole source for the right to contribution, the total damages of about $4,265,000 would need to be reduced by the $1,450,000 in damages for purely economic-loss claims.

II. Marquette's Issues on Appeal

*A. Does the OPA Allow Contribution for Purely Economic Damages?****

One clear requirement of the OPA is that liability and damages are determined in a three-step process. First, the injured party must present its claim for damages to the designated Responsible Party. 33 U.S.C. § 2713(a). The Coast Guard identified Settoon as the Responsible Party, and that is not challenged. Second, if the Responsible Party rejects the claim or refuses to settle it within 90 days, the injured party has a statutory cause of action to sue the Responsible Party for its damages or to seek recovery from the government-created Oil Spill Liability Trust Fund. *Id.* § 2713(c). Third, once the Responsible Party pays compensation, it may seek partial or complete repayment from others by means of contribution or subrogation. *Id.* § 2709 (contribution); § 2715 (subrogation).

Six categories of damages are detailed in Section 2702(b)(2). One of them, Subsection (E), expressly allows for recovery of purely economic losses from the Responsible Party. *Id.* § 2702(b)(2)(E). Claimants must first directly assert claims against Settoon, the Responsible Party, and purely economic loss damages may be claimed. Our question, though, is whether a Responsible Party, after suffering purely economic losses, may seek an apportioned contribution for those losses from some other tortfeasor. We will examine two sections of the OPA as we consider this issue.

We begin with the first section of the OPA after the definitions are out of the way, which is Section 1002 or, as codified, 33 U.S.C. § 2702. Entitled "Elements of liability," it details the obligation of the Responsible Party for the cleanup and identifies which costs of the federal and state governments it must reimburse and the damages for which it must compensate. 33 U.S.C. §§ 2702(a), (b). Marquette argues that a particularly relevant subsection is Section 2702(d), entitled "Liability of third parties." What Marquette finds especially attractive is that it applies only when the entity the Coast Guard designated as the Responsible Party was in fact not at fault at all and others were solely responsible for the discharge of oil. In such a case, liability will shift and the other party or parties will become the equivalent of the Responsible Party under the OPA and thus obligated to pay all costs:

> (d) Liability of third parties
> (1) In general
> (A) Third party treated as responsible party
>
> > Except as provided in subparagraph (B), in anycase in which a responsible party establishes that a discharge or threat of a discharge and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties described in section 2703(a)(3) of this title (or solely by such an act or omission in combination with an act of God or an act of war), the third party or parties shall be treated as the responsible party or parties for purposes of determining liability under this subchapter.
>
> (B) Subrogation of responsible party
>
> If the responsible party alleges that the discharge or threat of a discharge was caused solely by an act or omission of a third party, the responsible party—
>
> > (i) in accordance with section 2713 of this title, shall pay removal costs and damages to any claimant; and
> >
> > (ii) shall be entitled by subrogation to all rights of the United States Government and the claimant to recover removal costs or damages from the third party or the Fund paid under this subsection.

Id. § 2702(d).

This section is inapplicable to our issue because Settoon's principal argument is not that it should be subrogated to the United States and any claimants in order to be reimbursed for all its payments. Instead, it seeks contribution toward what it paid based on the percentage of fault allocated to Marquette. A later section of the OPA addresses that concept. That later section's austerity of language is the opening for Marquette's argument:

> A person may bring a civil action for contribution against any other person who is liable or potentially liable under this Act or another law. The action shall be brought in accordance with section 2717 of this title.

Id. § 2709 (entitled "Contribution"). Marquette argues that the OPA itself does not establish a right to contribution but merely acknowledges it remains available under general maritime law with all that body of law's restrictions including, most relevant, no recovery for purely economic damages.

In Marquette's view, the OPA works like this. There is an initial designation by the Coast Guard of a Responsible Party. That party bears all initial costs. Because time is of the essence after a spill, the designation is straightforward—"the source or sources of the discharge" will be tagged. *Id.* § 2714(a). Here, Settoon's barge was carrying the oil that discharged. Thus, Settoon was in charge of the cleanup. Only later will the sorting out occur regarding who was actually at fault. When that time comes, the initially designated Responsible Party will be entitled to subrogation if it can show that another party was solely at fault. As to contribution, Marquette contends a Responsible Party will have no rights under the OPA but will be able to recover apportioned shares of the costs from others who are liable under other laws, namely, general maritime law. That means a Responsible Party must bear the entirety of what it paid for purely economic damages, though it may recover the allocated portions of payments it made for damages recognized under general maritime law.

We disagree with Marquette's key conclusion. Under the principle that we should apply the plain meaning of statutory language while considering its context in the overall enactment, we hold it to be plain that both subrogation and contribution are available "under this Act." That is what Sections 2702 and 2709 say. Marquette's argument would wholly eliminate contribution *under the Act* and restrict a Responsible Party to seek reimbursement for cleanup expenses only from a later-designated solely-at-fault entity.

Marquette insists the language is not that plain, and it cites allegedly supportive case law. It uses a Ninth Circuit decision that examined, under Section 2702(d)(1)(A), the shifting of fault from the initially designated Responsible Party to another participant in the accident; the court emphasized that no such shift occurs unless the other is solely at fault. *See Unocal Corp. v. United States,* 222

F.3d 528, 534 (9th Cir. 2000). In that case, though, the Responsible Party sued two other parties claiming they were solely responsible for the oil spill. *Id.* at 533. After a trial, a jury concluded that the two third parties were indeed liable and were the sole causes of the spill. *Id.* Fault was apportioned between the third parties, 80% and 20%, respectively. *Id.* The appellate court affirmed the jury's verdict. *Id. at 536*. That decision is a simple application of the OPA's rules on subrogation. We see nothing in the decision that even addresses how contribution works when the originally designated Responsible Party is partly but not entirely at fault.

Marquette also refers us to one of our unpublished decisions in which we, like the *Unocal* court, applied Section 2702(d)(1)(A). *See Gabarick v. Laurin Mar. (Am.), Inc.,* 406 F. App'x 883, 888 (5th Cir. 2010). In the course of doing so, we explained the next section of the OPA, which is entitled "Defenses to liability." *See* 33 U.S.C. § 2703. That section elaborates that a Responsible Party has a complete defense to any liability if it can show someone else was solely at fault. *Gabarick,* 406 F. App'x at 888 (citing 33 U.S.C. § 2703(a)(3)). Marquette's continuing point is that the only contribution Settoon is entitled to "under this Act" is under *Section 2702* when another is solely liable, which would mean Section 2709 adds nothing significant to the concept. Our continuing response is that Marquette is looking at one section in isolation.

We hold, therefore, that contribution is available under the OPA. That is not to say what the scope of contribution may be. The OPA does not define that term. When a common legal term is used but not specifically defined in a statute, we give that term its general legal meaning. *See Bradley v. United States,* 410 U.S. 605, 609, 93 S. Ct. 1151, 35 L. Ed. 2d 528 (1973). An apt definition for contribution is this: "One tortfeasor's right to collect from joint tortfeasors when, and to the extent that, the tortfeasor has paid more than his or her proportionate share . . . ." BLACK'S LAW DICTIONARY (10th ed. 2014). The related but distinct legal concept, "subrogation," is defined as a "substitution of one party for another whose debt the party pays . . . ." *Id.*

If any limitation is to be placed on the types of damages for which contribution may be recovered under the OPA, the limit must be in the statute. We do not perceive any limitation from the manner in which the separate concept of subrogation is explained. Perhaps, though, the word "liable" can do the work. The OPA explains that "'liable' or 'liability' shall be construed to be the standard of liability which obtains under section 1321 of this title," which is a section of the Clean Water Act ("CWA") entitled "Oil and hazardous substance liability." 33 U.S.C. § 2701(17); see also *id.* § 1321.

We thus examine how the CWA treats liability for oil pollution. As with the OPA, it provides (with certain exceptions) that the "owner or operator of any vessel from which oil or a hazardous substance is discharged" is initially liable for all the costs of removal of the pollution. *Id.* § 1321(f)(1). Also as under the OPA, if a discharge of oil "was caused solely by an act or omission of a third party," the third party is liable "for the full amount of such removal costs" which may be recovered by the initially responsible party through subrogation. *Id.* § 1321(g). In addition, in a subsection entitled "Rights against third parties who caused or contributed to discharge," the CWA provides that "liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge," nor does the section affect (2) the rights of the United States against such third parties. *Id.* § 1321(h).

We ask the same question of the CWA as we have of the OPA—does it create or just preserve a right of contribution? This court has already answered the question as to the CWA in a non-precedential opinion, where we held that Section 1321(h) does not create a right to contribution. *See Tetra Techs., Inc. v. Kan. City S. Ry. Co.,* 122 Fed. Appx. 99, 102 (5th Cir. 2005). We agree with that conclusion in light of the CWA's plain language—"liabilities established by this section shall in no way affect" any rights a vessel owner "may have" to contribution. *See* 33 U.S.C. § 1321(h). Section 1321(h) has been described as preserving the right of contribution without serving as its source. *Keller Transp., Inc. v. Wagner Enters., LLC,* 873 F. Supp. 2d 1342, 1352 (D. Mont. 2012). We perforce agree with that characterization in light of the CWA's clear statutory language.

Where are we? We know that liability under the OPA is determined under the same standard as for the CWA. The latter Act relies on other law to determine if a Responsible Party may seek contribution from another who was partially but not entirely responsible for the discharge. The OPA, though, has no similar reliance solely on other law to create a right to contribution. Instead, *Section 2709* is solely about contribution, from title through content. It must contemplate that one tortfeasor may sue another for less than complete reimbursement, else the section is a nullity.

Most importantly for us, Section 2709 is premised on there being liability for contribution *under the Act* when it says "a civil action for contribution [may be brought] against any other person who is liable or potentially liable under this Act . . . ." 33 U.S.C. § 2709. Yes, we elided the "or another law" that ends the sentence, but that is only to show that the section recognizes contribution among joint tortfeasors can arise under the Act. To interpret otherwise is to make superfluous the premise that contribution at times arises under the Act. "The rule against superfluities complements the principle that courts are to interpret the words of a statute in context." *Hibbs v. Winn,* 542 U.S. 88, 101, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004). This basic interpretive rule has been summarized as meaning that no provision of a statute should be "inoperative or superfluous, void or insignificant .

. . ." 2A N. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46.6 (7th ed. 2016).

Section 2709 identifies the set of parties who may be called on for contribution under the OPA by referring to those who are "potentially liable." That phrase also is not statutorily defined. Certainly if the party designated by the Coast Guard as responsible brought a civil action against another party and proved that the latter was solely the cause of a discharge, then that second party's potential liability would be shown to have arisen under the Act. We have already discussed that eventuality: the initially designated Responsible Party would be entitled to recover all its relevant costs through the Section 2702(d)(1)(B) right to be subrogated to the United States.

Our factual situation is different. This record does not support that Marquette was solely the cause of this accident. Marquette, though, was "potentially liable" even if "liable" means the entity responsible for the entire incident. Any tortfeasor allegedly contributing to the cause of the discharge is "potentially liable" under the Act until there are fact-findings that either confirm or reject complete liability. Factual determinations must be made, be appealed, and become final. Until then, there is a legal potential that any entity who had some role in causing the pollution is liable. Giving that broad meaning to "potentially liable" is logical considering the expansive reach of the OPA and the financial impact on strictly liable Responsible Parties of paying for damages that they did not factually cause.***

Even if it is correct to say that no provision in the OPA explicitly uses the word "liable" in relation to anyone other than the entity solely responsible for the damage, the phrase "potentially liable" completes the statutory scheme. The entity from whose vessel the oil was discharged must immediately turn to the cleanup without concerning itself with ultimate financial responsibility. Once done, that party may through contribution or subrogation seek payment from all others who were partially or completely at fault.***

Marquette also relies on two out-of-circuit district court decisions. The first involved a catastrophic oil spill in the Chicago Sanitary Ship Canal. *See United States v. Egan Marine Corp.,* 808 F. Supp. 2d 1065, 1071 (N.D. Ill. 2011). The Responsible Party sought contribution against a third party whose alleged negligence in loading oil on its barge "was the sole or partial cause of the explosion and spill." *Id.* at 1072. In resolving the third party's summary-judgment motion, the district court also focused its analysis only on Section 2702(d)(1)(A), which is the provision that governs when a third party is determined to be solely at fault. *Id.* at 1080. Because the Responsible Party failed to create a genuine issue of material fact that the third party "solely caused the oil spill," the court determined that "the OPA does not provide grounds for contribution." *Id.* at 1082. The court interpreted the OPA as providing contribution only when another entity is solely responsible, but the court never tried to explain why there would be one OPA section on subrogation and another on contribution. Respectfully, we disagree with *Egan*.

Marquette refers us to one more district court decision. *See Nat'l Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atl. Corp.,* 924 F. Supp. 1436, 1439 (E.D. Va. 1996), *aff'd sub nom. Nat'l Shipping Co. of Saudi Arabia v. Moran Trade Corp. of Delaware,* 122 F.3d 1062 (4th Cir. 1997). Highlighted is language that general maritime law controlled contribution. *Id.* at 1450. The reason, though, was that the third party from whom contribution was being sought had a defense to liability under the OPA, namely, that it was in a contractual relation with the Responsible Party. *Id.* at 1446 n.4 (citing 33 U.S.C. § 2703(a)(3)); *see also id.* at 1450. Thus contribution was limited to that under the "other law" portion of Section 2709. *Id.* at 1450.***

We also conclude that limiting Section 2709 liability to contribution only under general maritime law is inconsistent with the OPA's savings clause for admiralty and maritime law. One section provides: "*Except as otherwise provided in this Act*, this Act does not affect—(1) admiralty and maritime law; or (2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction . . . ." 33 U.S.C. § 2751(e) (emphasis added). The emphasized language shows that the admiralty claims that are preserved are those that are not addressed in the OPA. *See Moran,* 924 F. Supp. at 1447. The contribution that is being sought in this case is addressed in the OPA. Marquette's view of the interplay between Section 2709 and Section 2751 would transform the "savings clause" into a *supremacy clause* by advancing general maritime law over the express provisions of the OPA. In another context, we rejected a similar argument, saying that "courts cannot, without any textual warrant, expand the operation of savings clauses to modify the scope of displacement under OPA." *Am. Commercial Lines,* 759 F.3d at 426.

The OPA provides a procedure for submission, consideration, and payment of costs and damages associated with an oil spill. Responsible parties are also afforded a few absolute defenses from liability. *See* 33 U.S.C. § 2703(a). If no defense applies, "the responsible party will always bear first-level liability, but will be able to recover over against third parties either through contribution according to principles of comparative fault or by invoking a hold harmless or indemnification agreement, if applicable." *See* 2 THOMAS J. SCHOENBAUM, ADMIRALTY & MAR. LAW § 18-3 n.26 (5th ed. 2016).***

***BP Exploration & Production*, *v. Claimant ID 100281817*, 919 F.3d 284 (5th Cir. 2019)**

Oldham, Circuit Judge:

An NBA player named David West negotiated a contract with the New Orleans Hornets before the Deepwater Horizon oil spill. He received every penny specified in that contract both before and after the spill. Still, the Claims Administrator for the Deepwater Horizon Economic and Property Damages Settlement Agreement awarded West almost $1.5 million in "lost" earnings. The Settlement Appeal Panel affirmed, and the district court denied discretionary review. We reverse.

I.

The Deepwater Horizon oil rig exploded on April 20, 2010. At that time, David West played professional basketball for the New Orleans Hornets (now known as the New Orleans Pelicans). He was four years into a five-year contract. That contract paid West a total of $45 million. But it was "front-loaded," meaning West's annual salary decreased every year of the contract—including from 2009 to 2010. West received all $45 million owed to him under the contract.

Still, he submitted an "Individual Economic Loss Claim" under the Deepwater Horizon Economic and Property Damages Settlement Agreement ("Settlement"). These claims can be submitted only by individuals "who seek compensation for lost earnings from employment *due to or resulting from the [Deepwater Horizon] Spill*." Settlement Agreement Ex. 8A at 1 (emphasis added). And the Individual Economic Loss Claim form states, on its very first page, that it covers only "individuals who have experienced income losses *caused by the Spill*." Individual Economic Loss Claim Form 1 (emphasis added). It also required West to certify "that the information provided in [his] Claim Form [was] true and accurate to the best of [his] knowledge." *Id.* at 15. Based on that attestation, the Claims Administrator used West's tax forms to calculate his "lost earnings." The Claims Administrator determined West was entitled to $1,412,673.06. BP contested that determination because West "lost" nothing—he received all the money promised by the front-loaded terms of his pre-spill contract.

BP first sought reversal before the Appeal Panel. It argued West was not entitled to any award under the Agreement because (1) Individual Economic Loss Claimants can recover only if they experienced a loss caused by the spill, and (2) West cannot satisfy the Settlement's attestation requirements. The Appeal Panel affirmed West's award. It concluded West established causation because his employer—the Hornets—benefited from presumed causation under the Settlement. It therefore held West needed nothing more to claim "lost" earnings.

BP asked the district court to review the award decision. But the court denied discretionary review without explanation. BP timely appealed.

II. ***

A.

We start with the contractual provisions governing West's claim. West submitted a specific type of claim—an "Individual Economic Loss Claim." It is defined to include a claim brought by an individual [*5] described in Exhibit 8A. Exhibit 8A, in turn, provides the following description for Individual Economic Loss Claims:

> Individual economic loss claims are claims by **Individuals**, who shall be defined as (i) Natural Persons who (a) satisfy (or whose employers satisfy) the Class Definition and (b) whose *losses* are not excluded from the Class and (ii) who seek compensation for *lost earnings* from employment *due to or resulting from* the [Deepwater Horizon oil spill] . . . .

Settlement Agreement Ex. 8A at 1 (emphases added). The claim form that West submitted similarly stated: "The Individual Economic Loss Claim is for individuals who have experienced *income losses caused by the Spill*." Individual Economic Loss Claim Form 1 (emphasis added). Thus, these types of claims may be brought only by individuals who experienced losses and seek compensation for lost earnings caused by the oil spill. We've previously interpreted the Agreement as allowing "proof of loss as a substitute for proof of causation." *In re Deepwater* (*Deepwater Horizon III*), 744 F.3d 370, 375 (5th Cir. 2014). But what do "loss" and "lost earnings" mean?

They are undefined in the Settlement, so we look to their plain meaning. *See BP Expl. & Prod., Inc. v. Claimant ID 100094497*, 910 F.3d 797, 801 (5th Cir. 2018). "Loss" typically means "the disappearance or diminution of value . . . in an unexpected or relatively unpredictable way." *Loss*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also Economic Loss*, BLACK'S LAW DICTIONARY (10th ed. 2014) (explaining "economic loss" means "monetary loss such as lost wages or lost profits" and usually "refers to a type of damages recoverable in a lawsuit"). And "lost earnings" refers to "[w]ages, salary, or other income that a person could have earned if he or she had not lost a job, suffered a disabling injury, or died." *Earnings*, BLACK'S LAW DICTIONARY (10th ed. 2014). These definitions suggest "loss" or "lost earnings" are unexpected diminutions in wages or other income that could otherwise support a claim for civil damages.

West argues these plain meanings of "loss" and "lost earnings" do not apply. Instead, he says, his "loss" is proved by the seven-step mathematical equation that appears in Exhibit 8A. But that puts the cart before the horse. Only claimants who suffer unexpected damages can submit an Individual Economic Loss Claim; then they use Exhibit 8A's equation to determine the value of that claim. The defined terms in the seven-step equation make that clear. "**<u>Claimant Lost Earnings</u>**" is defined as "[t]he claimant's **Expected Earnings** from all **Claiming Jobs** minus the claimant's **Actual Earnings** from all **Claiming Jobs** during the

Compensation Period, minus any **Offsetting Earnings**." Settlement Agreement Ex. 8A at 4. "**<u>Expected Earnings</u>**" refers to the "[c]laimant's earnings in the **Compensation Period** in the **Claiming Job** *that would have been expected in the absence of the [Deepwater Horizon] Spill*." *Id.* at 5 (emphasis added). West expected to earn in the absence of the spill precisely what he did earn after it. He therefore did not suffer unexpected damages, and Exhibit 8A does not apply to him.***

B.

West did not suffer actual and unexpected "losses" or damages. In 2010, he earned exactly what he was entitled to receive under his contract. The fact that West received less money in 2010 than in 2009 does not mean he "lost" anything or was "damaged" in any way. It means only he agreed to a front-loaded contract. And he did so many years before the Deepwater Horizon catastrophe.***

The judgment of the district court is REVERSED.

Further reading:

***BP Exploration & Production, Inc. v. Claimant ID 100246928*, No. 18-30375 (5th Cir. March 29, 2019)** (declining to seal the courtroom for the oral argument in connection with the claim of the Tampa Bay Buccaneers to recover damages under OPA from BP pursuant to the Deepwater Horizon/Macondo settlement agreement)

Taira Lynn Marine Ltd. No. 5, LLC v. Jays Seafood, Inc., 444 F.3d 371 (5th Cir. 2006)

Stewart, Circuit Judge:

The primary issue on appeal is whether claimants who suffered no physical damage to a proprietary interest can recover for their economic losses as a result of a maritime allision. Fourteen businesses and business owners brought claims under the general maritime law, the Oil Pollution Act of 1990 (OPA), 33 U.S.C. §§ 2701-2761 (2000), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (2000), and state law. The appellants filed motions for partial summary judgment to dismiss these claims, which the district court denied. We reverse.

I.
FACTUAL AND PROCEDURAL BACKGROUND

On June 19, 2001, the M/V MR. BARRY and its tow, the T/B KIRBY 31801, allided with the Louisa Bridge in St. Mary Parish, Louisiana. Kirby Inland Marine, L.P. ("Kirby Inland") owned the barge; Taira Lynn Marine, Inc. ("Taira Lynn") owned and operated the tug; and the Louisiana Department of Transportation and

Development ("the State") owns the bridge. The cargo on the barge, a gaseous mixture of propylene/propane, discharged into the air as a result of the allision. Consequently, the Louisiana State Police ordered a mandatory evacuation of all businesses and residences within a certain radius of the Louisa Bridge.

Taira Lynn initiated the underlying litigation under the Limitation of Liability Act, 46 U.S.C. app. § 183 (2000), in which several hundred claims were filed. The original proceeding also consolidated two declaratory judgment actions involving insurance coverage issues. Fourteen businesses and business owners (collectively, "Claimants") that are parties to this appeal filed claims in the limitation action seeking to recover damages under the general maritime law, OPA, CERCLA, and state law.

Because of the complexity of the case, the district court referred discovery to the magistrate judge who limited the initial phase of discovery to the claims alleging solely economic loss. Taira Lynn, Kirby Inland and the State then filed motions for partial summary judgment on the grounds that Claimants' recovery for economic losses unaccompanied by damage to a proprietary interest is barred by *Louisiana ex. rel. Guste v. M/V TESTBANK,* 752 F.2d 1019, 1023 (5th Cir. 1985) (en banc). Those claims alleging direct property damage and/or personal injury as well as economic loss were not included in the motions.

The district court concluded that it was "foreseeable that an allision between a barge and the Louisa swing bridge would disrupt the only means of ingress and egress to Cypremore [sic] Point." *In re Taira Lynn Marine Limited No. 5,* 349 F. Supp. 2d 1026, 1032 (W.D. La. 2004). Reasoning that the claims were confined to a limited geographic region and that Claimants were making commercial use of the bridge, the court endorsed a "geographic exception" to the rule barring recovery for economic losses absent physical damage and concluded that the claimants alleging solely economic losses should have an opportunity to present their claims in court. *Id.* at 1035. The court concluded that not all of the claimants alleged purely economic losses and thus, those claims survived the motion for summary judgment. Accordingly, the court denied the motions for partial summary judgment as to each of the fourteen claimants. The court also concluded that the OPA and CERCLA claims were not ripe for summary judgment because they raised genuine issues of material fact and were outside of the scope of discovery. Taira Lynn, Kirby Inland, the State, and Water Quality Insurance Syndicate (collectively, "Appellants") appeal the district court's rulings. The district court certified the judgment as appealable pursuant to 28 U.S.C. § 1292(b) and this court granted permission to appeal.

Before we address the claims at issue, we find it necessary to emphasize what is *not* before us. Appellants' motion for summary judgment did not include claims involving personal injury, physical damage, or the claims of commercial fishermen. Thus, the only claims before this court are claims for purely economic losses. ***

III. CLAIMS PURSUANT TO GENERAL MARITIME LAW

A. Applicable Law

It is unmistakable that the law of this circuit does not allow recovery of purely economic claims absent physical injury to a proprietary interest in a maritime negligence suit. In *Robins Dry Dock & Repair v. Flint,* 275 U.S. 303, 309, 48 S. Ct. 134, 72 L. Ed. 290 (1927), the Supreme Court held that a tortfeasor is not liable for negligence to a third person based on his contract with the injured party. In *Louisiana ex. rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1023 (5th Cir. 1985) (en banc), this court concluded that *Robins* is a pragmatic limitation on the doctrine of foreseeability. We reasoned that "if a plaintiff connected to the damaged chattels by contract cannot recover, others more remotely situated are foreclosed *a fortiori*." 752 F.2d at 1024. Accordingly, we reaffirmed the rule that there can be no recovery for economic loss absent physical injury to a proprietary interest. *Id.*

B. Summary of the Claims

Because of the number of parties involved in this appeal, we find it helpful to briefly summarize the underlying claims. Cajun Wireline, Inc. ("Cajun"), a full service slick wireline provider, claims that three of its jack up boats could not perform their duties due to the allision and subsequent evacuation. Coastline Marine, Inc. ("Coastline"), a pile driving business, claims it was unable to perform work on its contracts as a result of the evacuations. Pam Dore, doing business as Cove Marina ("Cove Marina"), claims loss of revenues and sales from a convenience store as a result of the evacuation. Legnon Enterprises ("Legnon") claims lost charter revenues and lost sales and revenues due to the evacuation. Coy Reeks, doing business as Riverfront Seawalls and Bulkheads ("Riverfront"), claims he had to leave his equipment on the island during the evacuation and as a result could not work for one week. Twin Brothers Marine ("Twin Brothers"), a fabrication and dock facility, claims it was forced to halt work in progress for two construction projects. Marine Turbine Technologies ("MTT") claims that it suffered physical damage in the form of toxic gas permeation on its property. North American Salt Company/Carey Salt Company ("North American") claims it had to suspend operations due to the discharge of the gas into the air. Morton International ("Morton") claims it began to shut down operations before the evacuation order was issued and that its wholly owned subsidiary, CVD Incorporated d/b/a Rohm & Haas Advanced Materials ("Advanced Materials"), suffered physical damage. Advanced Materials is a chemical vapor deposition facility that manufactures material used to make specialty lenses for military equipment and other purposes. It claims that two of its manufacturing runs had to be prematurely terminated and the company lost the materials in those runs and could not sell the products. Big D's Seafood ("Big D's"), Blue Gulf Seafood, Inc. ("Blue Gulf"), and Bagala's Quality Oysters ("Bagala's") claim lost revenues from their wholesale fishing operations. Mason Seafood ("Mason") claims it lost eighty-eight boxes of dressed crabs that spoiled in a freezer when law enforcement officials shut off the electricity during the evacuation.

C. Analysis

1. *Claimants alleging no physical damage*

The district court concluded that Cajun, Coastline, Cove Marina, Legnon, Riverfront, and Twin Brothers suffered no physical damage; however, the court endorsed a geographic exception to the *TESTBANK* rule and concluded that the claimants should have the opportunity to prove that their damages were foreseeable and proximately caused by the allision. The court concluded that Blue Gulf, Big D's and Bagala's either suffered physical damage or satisfied the commercial fishermen exception[1] to *TESTBANK*, and denied summary judgment as to those claims as well. The district court concluded that MTT's and North American's claims of physical damage in the forms of the presence of gas on their properties satisfied *TESTBANK*; accordingly, it denied summary judgment. The court also concluded that Morton, along with Advanced Materials, satisfied the physical damage requirement. (Advanced Materials's claims are addressed below.)

Appellants' argue that the district court erred in denyingtheir motions for partial summary judgment because these claimants did not suffer physical damage to a proprietary interest, and thus, their claims for economic loss are barred by our decision in *TESTBANK*. Claimants make several arguments in support of the district court's denial of summary judgment. Cajun, Coastline, Cove Marina, Legnon, Riverfront and Twin Brothers argue that their claims should be subject to traditional foreseeability/proximate cause evaluations, asserting that their businesses are located in close proximity to the accident site and that they all worked and/or resided within the evacuated area. They also argue that this case is distinguishable from *TESTBANK* because that case involved forty-one lawsuits, whereas here, fourteen claims are the subject of these motions for summary judgment. Blue Gulf and Big D's argue they sustained physical impact and damage from the allision and that they had to destroy or decontaminate their products and

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[1] Relying, inter alia, on the Ninth Circuit's decision in *Union Oil Co. v. Oppen,* 501 F.2d 558 (9th Cir. 1974), the district court in *TESTBANK*, denied summary judgment as to the commercial fishermen who "were exercising their public right to make a commercial use of those waters." *Louisiana ex rel. Guste v. M/V TESTBANK,* 524 F. Supp. 1170, 1173-74 (E.D. La. 1981). On appeal, we recognized the argument in favor of an exception for commercial fishermen, but left the contours of such an exception for another day because the claims of the commercial fishermen were not before us. *See TESTBANK,* 752 F.2d at 1027 n.10.

equipment. North American and MTT allege they suffered physical damage because the gaseous cargo became physically present on their properties. North American and Morton claim that they shut down operations in order to prevent damage to their equipment and products.

Contrary to the district court's conclusion, twelve of the fourteen businesses that are parties to this appeal suffered no physical damage attributable to the allision and thus, their claims are barred by *TESTBANK*. There is no geographic exception to the *TESTBANK* rule and there is no exception based on the number of claimants.

The *TESTBANK* court expressly rejected the case-by-case approach urged by Claimants, and adopted by the district court in the case at bar. In *Reserve Mooring Inc. v. American Commercial Barge Line, LLC,* 251 F.3d 1069, 1071-72 (5th Cir. 2001), this court reversed the district court's conclusion that *TESTBANK* "is merely an application of the general requirement that damage be foreseeable to be recoverable in tort," and concluded that "physical injury to a proprietary interest is a prerequisite to recovery of economic damages in cases of unintentional maritime tort." Additionally, as we explained above, Bagala's, Big D's and Blue Gulf's claims, if any, as commercial fishermen were not included in the motions for partial summary judgment; only their claims as wholesale fishermen were included. Accordingly, the district court erred in concluding that these claimants satisfied the commercial fishermen exception to *TESTBANK*. Their claims are for economic losses from their wholesale operations, and thus, they are barred by *TESTBANK*. While other jurisdictions may have abandoned or relaxed the bright line rule of *Robins* and *TESTBANK*, this circuit "has not retreated from *TESTBANK*'s physical injury requirement," *Reserve Mooring,* 251 F.3d at 1071. Therefore, the district court erred in denying Appellants' motions for partial summary judgment as to Cajun, Coastline, Cove Marina, Legnon, Riverfront, Twin Brothers, Blue Gulf, Big D's and Bagala's. These claimants have not suffered physical damage; therefore, their claims are barred by our decision in *TESTBANK*.

Likewise, the district court erred in concluding that MTT, North American, and Morton suffered physical damage sufficient to satisfy *TESTBANK*. MTT's and North American's arguments that the physical presence of the gas on their property satisfies *TESTBANK*'s physical damage requirement are unpersuasive. These claimants have not raised an issue of fact as to whether the gas physically damaged their property nor caused any personal injury; indeed, as noted above, such claims were not subjects of Appellants' motions for partial summary judgment. Nor are we persuaded by North American's and Morton's arguments that they mitigated damages by shutting down their operations.

In *Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp.,* 71 F.3d 198 (5th Cir. 1995), an allision between a barge and a platform damaged a gas riser, owned by Houston Pipeline Company, which was connected to the platform owned by

Corpus Christi. Realizing the allision was about to occur, workers on the Corpus Christi platform shutdown operations to prevent fire or explosion. During the two weeks it took to repair Houston Pipeline's gas riser, Corpus Christi flared gas to prevent loss of its wells. This court concluded that "except for its acts in mitigation, Corpus Christi would have suffered great physical damages to its wells." *Id.* at 202. Accordingly, the court affirmed the district court's award of damages for the costs incurred in flaring the gas. *Id.* Nevertheless, the court disallowed Corpus Christi's damages resulting from the inability to produce and sell its gas during the repair period, reasoning that "the additional economic losses that Corpus Christi seeks to recover occurred solely and only because of the physical damage *that was done to Houston's property*," and that "Corpus Christi lost its gas sale profits because it could not use the pipeline, not because it was flaring its own gas." *Id.* Unlike the plaintiffs in *Corpus Christi*, North American and Morton did not lose any of the salt in their mines and they are not claiming costs of mitigation. Instead, their claims are for lost revenues caused by the inability to use their facilities; such claims are not recoverable. *See id.* at 202. Accordingly, the district court erred in denying Appellants' motions for partial summary judgment as to MTT, North American, and Morton.

Finally, we note that Claimants may not recover under state law. *See IMTT-Gretna v. Robert E. Lee SS,* 993 F.2d 1193, 1195 (5th Cir. 1993) ("Maritime law specifically denies recovery to non proprietors for economic damages. To allow state law to supply a remedy when one is denied in admiralty would serve only to circumvent the maritime law's jurisdiction."), *supplemented by*, 999 F.2d 105 (5th Cir. 1993).

These twelve claimants have simply not raised an issue of fact as to whether their economic losses resulted from physical damage to their proprietary interests. Accordingly, the district court erred in denying Appellants' motions for partial summary judgment.

2. *Claimants alleging physical damage*

As noted above, Mason and Advanced Materials claim to have suffered physical damage. Mason claims it lost eighty-eight boxes of dressed crabs that spoiled in a freezer when law enforcement officials shut off the electricity during the evacuation. Advanced Materials claims that two manufacturing runs had to be prematurely terminated and the company lost the materials in those runs and could not sell the products. The district court concluded that Mason's and Advanced Materials's damages met the physical damage requirement of *TESTBANK*. Appellants argue that even if Mason and Advanced Materials suffered damage, the damage was not directly caused by the allision and was unforeseeable. Accordingly, they contend the district court erred in denying their motions for summary judgment as to these claims as well. Mason and Advanced Materials argue that their damages were foreseeable and that foreseeability should not be determined on a motion for summary judgment.

Contrary to the district court's conclusion, neither of these claimants suffered physical damage as a result of the allision. Mason's crabs spoiled because the electricity was turned off during the evacuation, not because of contact with the barge, the bridge, or the gaseous cargo. Likewise, Advanced Materials claims losses from its inability to sell products that were in the process of being manufactured; it is not claiming that its property was damaged as a direct result of the allision. Claimants' reliance on *Consolidated Aluminum Corp. v. C.F. Bean Corp. (Consolidated I)*, 772 F.2d 1217 (5th Cir. 1985) is misplaced. There, a dredge struck and ruptured a pipeline, which caused a reduction in gas pressure and supply to Consolidated's power plant. We held that *TESTBANK* did not bar recovery because

Consolidated suffered physical damage to its equipment. *Id.* at 1222. Unlike the circumstances presented in *Consolidated I*, here, the allision did not physically cause the disruption in electrical power nor did it physically impact Advanced Materials's facilities. Accordingly, Advanced Materials and Morton have not raised a genuine issue of material fact as to whether they suffered physical damage to a proprietary interest as a result of the allision. ***

V.
CLAIMS PURSUANT TO OPA

OPA provides that "notwithstanding any other provision of law . . . each responsible party for a vessel or a facility from which oil is discharged . . . into or upon the navigable waters or adjoining shorelines . . . is liable for the removal costs and damages specified in subsection (b) of this section that result from such incident." 33 U.S.C. § 2702(a). Section 2702(b)(2)(B) allows recovery of "damages for injury to, or economic losses resulting from destruction of real or personal property, which shall be recoverable by a claimant who owns or leases that property." Section 2702(b)(2)(E) provides recovery of "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."

The district court concluded that the OPA claims were not ripe for summary judgment because the claims raised genuine issues of material fact and were outside the scope of discovery. Appellants argue that OPA is inapplicable. Further, they contend that if OPA were applicable, Claimants could not recover because they have sustained no physical damage to their property and their economic damages were not the direct result of property damaged by an OPA event. Claimants respond that OPA is applicable because the gaseous cargo was a propylene/propane mix and that OPA does not require that the injury result from direct contact with a hazardous substance.

In order to recover under § 2702(b)(2)(B) a plaintiff must show that her property was damaged as a result of a release or threatened release of oil. Claimants have not raised an issue of fact as to whether the gaseous cargo caused damage to their property; accordingly, they are not entitled to recover under § 2702(b)(2)(B). This, however, does not end our inquiry because § 2702(b)(2)(E) allows a plaintiff to recover for economic losses resulting from damage to another's property. *See Ballard Shipping Co. v. Beach Shellfish,* 32 F.3d 623, 631 (1st Cir. 1994) ("The House Conference Report makes clear that, under section 2702(b)(2)(E), 'the claimant need not be the owner of the damaged property or resources to recover for lost profits or income.'" (alteration in original) (citing H.R. Conf. Rep. No. 101-653, 101st Cong., 2d Sess. 103 (1990), U.S. Code Cong. & Admin. News 1990, p. 722.)). *Contra In re Cleveland Tankers, Inc.,* 791 F. Supp. 669, 678-79 (E.D. Mich. 1992), (interpreting *subsection (E)* to require that the injury be to the *claimant's* property). Accordingly, we must decide whether Claimants' damages are recoverable under § 2702(b)(2)(E). Appellants contend that Claimants may not recover because the property damage was not caused by the gaseous cargo. Because we have not yet had occasion to consider this issue, we find the decision of the Fourth Circuit in *Gatlin Oil Co. v. United States,* 169 F.3d 207 (4th Cir. 1999), instructive.

In *Gatlin Oil*, vandals opened some of Gatlin Oil's above-ground fuel storage tanks causing an oil spill. Vapors from the oil ignited a fire that destroyed a warehouse, plant, inventory and other property. In order to prevent further discharge of oil, federal officials instructed Gatlin Oil to remove oil from storm ditches and surface waters and to take other preventative measures. Gatlin Oil presented a claim to the Oil Spill Liability Trust Fund for payment of uncompensated removal costs and damages, claiming damages resulting from the discharge of oil and the ensuing fire. The Coast Guard determined that Gatlin Oil's damages were limited to those caused by the discharge and the measures ordered by the federal officials to prevent discharge. The court held that as a matter of law Gatlin Oil could not recover compensation for fire damage because the evidence did not establish that the fire caused the discharge of oil into navigable waters or posed a threat to do so, as required by section 2702(a). *Gatlin Oil,* 169 F.3d at 212.

Claimants argue that *Gatlin Oil* is inapplicable because it involved a claim for recovery from the Oil Spill Liability Trust Fund, not a responsible party; however, the Fourth Circuit noted, "the principal dispute between Gatlin and the Coast guard pertains to the damages that are compensable within the meaning of section 2702," *id.* at 210. Indeed, the court stated, "We hold that the removal costs and 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." *Id.* at 211. We agree. Even assuming arguendo that OPA applies, none of the claimants has raised an issue of fact as to whether any property damage was caused by the pollution incident, i.e., the release of the gaseous cargo.

A party is liable under OPA if, inter alia, the claimant's damages "*result from such incident*," i.e., the discharge or threatened discharge of oil. *See* 33 U.S.C. § 2702(a) (emphasis added); *Gatlin Oil,* 169 F.3d at 210-11 ("The Coast Guard has interpreted the Act to provide that only removal costs and damages that '*result from such incident*' are compensible [sic]." (emphasis in original) (citing § 2702(a))). Any property damage upon which Claimants must rely to recover under § 2702(b)(2)(E) did not result from the discharge or threatened discharge of oil. Claimants have not raised an issue of fact as to whether their economic losses are due to damage to property resulting from the discharge of the gas. Therefore, Claimants cannot recover under OPA and the district court erred in denying Appellants' motions for partial summary judgment. ***

United States v. Nature's Way Marine, *L.L.C.*, 904 F.3d 416 (5th Cir. 2018)

Elrod, Circuit Judge:

This appeal presents us with a question of statutory interpretation. Specifically, we must determine whether the district court was correct in its summary judgment determination that Nature's Way, as the owner of a tugboat, was also "operating" an oil barge that the tugboat was moving at the time of a collision, as the term is used in the Oil Pollution Act of 1990 (OPA). Because we agree that the ordinary and natural meaning of "operating" under the statute would apply to the exclusive navigational control that Nature's Way exercised over the barge at the time of the collision, we AFFIRM the judgment of the district court.

I.

The relevant facts of this appeal are not in dispute. In January 2013, a tugboat owned by Nature's Way was moving two oil-carrying barges owned by Third Coast Towing down the Mississippi River. The barges were "dumb" barges lacking the ability for self-propulsion or navigation, and as such were reliant on the propulsion and navigation provided by the tugboat. The barges collided with a bridge, resulting in one of the barges discharging over 7,000 gallons of oil into the Mississippi River. Nature's Way and its insurer (collectively "Nature's Way"), as well as Third Coast Towing and its insurer (collectively "Third Coast") were all designated by the Coast Guard as "responsible parties" under the Oil Pollution Act. Nature's Way subsequently spent over $2.99 million on the clean-up, and various governmental entities spent over an additional $792,000.

Third Coast and Nature's Way settled a lawsuit between them in late 2014. In May 2015, Nature's Way submitted a claim to the National Pollution Funds Center (NPFC) seeking reimbursement of over $2.13 million on the grounds that its liability should be limited by the tonnage of the tugboat and not the tonnage of the barges.[3] Nature's Way also requested that it be relieved of any obligation to reimburse the government for the additional $792,000-plus. Those claims were denied by the NPFC based upon its determination that Nature's Way was an "operator" of the oil-discharging barge at the time of the collision. In January 2016, the United States initiated this litigation, seeking recovery of the additional $792,000-plus from Nature's Way and Third Coast. Nature's Way answered that it was not liable for the additional $792,000-plus, and counterclaimed that the NPFC violated the Administrative Procedure Act (APA) by deeming it to be an "operator" of the barge and consequently ineligible for reimbursement of the $2.13 million-plus.

The government moved for partial summary judgment on the sole question of whether the NPFC violated the APA by declaring Nature's Way an "operator" of the barge and denying reimbursement of the $2.13 million-plus. The district court granted the government's motion for partial summary judgment, concluding that a "common sense" understanding of the term "operator," as it is used in the statute, would include a tugboat that was moving a barge through the water. Nature's Way timely appeals.***

III.

Because this is a question of statutory interpretation, we begin with the text of the statute. *See Matter of Glenn*, 900 F.3d 187, 190 (5th Cir. 2018) ("We begin with the text of [the relevant statute]."). 33 U.S.C § 2702(a) establishes that each "responsible party" shall be liable for the removal costs and damages when oil is discharged into navigable waters or onto adjoining shorelines. Section 2701(32)(A) defines a "responsible party" as "[i]n the case of a vessel, any person owning, operating, or demise chartering the vessel." The statute does not define "operating," offering instead only the circular definition that an "owner or operator" is "in the case of a vessel, any person owning, operating, or chartering by demise, the vessel." *Id.* § 2701(26)(A)(i). It therefore falls to the court to give the term its "ordinary or natural meaning." *United States v. Bestfoods*, 524 U.S. 51, 66, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998) (citation omitted).

Defining the term "operating" in the context of an oil discharge is not *terra nova* for the courts. Indeed, the Supreme Court has already grappled with the term as it is used in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), which defines the term "operator" with the exact same language as is used in the OPA. *See* 42 U.S.C. § 9601(20)(A)(i). Given that

[3] The OPA limits the potential liability of a "responsible party" based on the tonnage of the vessels it was operating. *See* 33 U.S.C. § 2704(a). The NPFC manages a claims process by which eligible responsible parties who are initially over-charged can subsequently request reimbursement from the federal government. *See id.* § 2708(a)(2); 26 U.S.C. § 9509.

the OPA and CERCLA have common purposes and a shared history, parallel language between the two statutes is significant. *See Buffalo Marine,* 663 F.3d at 756; *see also Gen. Elec. Co. v. United States Dep't of Commerce*, 128 F.3d 767, 769-70, 327 U.S. App. D.C. 33 (D.C. Cir. 1997) (noting that prior to passage of the OPA, damages resulting from oil spills were assessed pursuant to CERCLA). A unanimous Supreme Court has analyzed CERCLA's definition of "operator" as such:

> In a mechanical sense, to "operate" ordinarily means "[t]o control the functioning of; run: operate a sewing machine." American Heritage Dictionary 1268 (3d ed. 1992); *see also* Webster's New International Dictionary 1707 (2d ed. 1958) ("to work; as, to operate a machine"). And in the organizational sense more obviously intended by CERCLA, the word ordinarily means "[t]o conduct the affairs of; manage: operate a business." American Heritage Dictionary, *supra*, at 1268; *see also* Webster's New International Dictionary, *supra*, at 1707 ("to manage"). So, under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of afacility.

Bestfoods, 524 U.S. at 66.

It follows from that analysis that the ordinary and natural meaning of an "operator" of a vessel under the OPA would include someone who directs, manages, or conducts the affairs of the vessel. Furthermore, it follows that the ordinary and natural meaning of "operating" a vessel under the OPA would thereby include the act of piloting or moving the vessel. It is undisputed that Nature's Way had exclusive navigational control over the barge at the time of the collision, and, as such, that it was a party whose direction (or lack thereof) caused the barge to collide with the bridge. Consequently, we—like the NPFC and district court—hold that Nature's Way was "operating" the barge at the time of the collision based on the ordinary and natural meaning of the term.

Nonetheless, Nature's Way argues that the *Bestfoods* definition of "operator" should be understood differently. Nature's Way emphasizes language in another section of the *Bestfoods* opinion which states: "when [Congress] used the verb 'to operate,' we recognize that the statute obviously meant something more than mere mechanical activation of pumps and valves, and must be read to contemplate 'operation' as including the exercise of direction over the facility's activities." *Id.* at 71. According to Nature's Way, its conduct in moving the barge was more akin to the "mere mechanical activation of pumps," and it cannot be deemed to have been "operating" the barge because it was merely moving the barge as per Third Coast's directions, and it did not exercise control over its environmental affairs or inspections. In support of its argument, Nature's Way points to an order from the District of Kansas, where that court held that a vice-president with only general management responsibilities over a facility was not an "operator" of the facility under CERCLA because there was no showing that he actively managed or directed any of the facility's environmental operations. *See Harris v. Oil Reclaiming Co.*, 94 F. Supp. 2d 1210, 1213 (D. Kan. 2000).

However, navigating a barge through a river entails a degree of discretion and judgment significantly different than that required for the "mere mechanical activation of pumps." Moreover, even if the District of Kansas case were applicable to the case at hand, it would appear to cut the other way. In that case, the vice-president was held not to be an "operator" of a facility because there was no showing that he personally engaged in the activities which caused the pollution; in this case, Nature's Way directed precisely the activity that caused the pollution—it literally was the party that crashed the barge into the bridge. To hold that Nature's Way was not "operating" the barge at the time of the collision would be to strain beyond the ordinary and natural meaning of the word.***

***Buffalo Marine Services, Inc. v. United States*, 663 F.3d 750 (5th Cir. 2011)**

Higginbotham, Circuit Judge:

This appeal arises out of an oil spill on the Neches River. Appellants challenge the National Pollution Funds Center's final claim determination denying reimbursement for costs arising from the spill. The district court rejected appellants' challenge to the agency's claim determination. We affirm.

I.

In August 2004, a barge and a tug owned by appellant Buffalo Marine Services, Inc. ("Buffalo Marine") attempted to dock alongside the TORM MARY, a large tanker ship, in order to deliver fuel that had been ordered by entities responsible for the tanker ship (collectively, "the Torm"). The fuel delivery never took place. Buffalo Marine's barge collided with the TORM MARY, rupturing the vessel's skin and adjacent fuel-oil tank. As a result of the rupture, approximately 27,000 gallons of heavy fuel oil spilled into the Neches River. Buffalo Marine, the Torm, and their insurers coordinated the clean-up effort, assessed at a cost of $10.1 million.

The Oil Pollution Act of 1990 ("OPA") creates a strict-liability scheme for the costs of cleaning up oil spills: "each responsible party for a vessel . . . from which oil is discharged . . . is liable for the removal costs and damages . . . that result from such incident." The "responsible party" for a vessel is "any person owning, operating, or demise chartering the vessel." The liability of the responsible party is capped at a dollar limit that is set by statute; the limit is based on the gross tonnage of the responsible party's vessel. If the cleanup costs exceed the statutory limit, the responsible party can seek to have those excess costs reimbursed by the Oil Spill Liability Trust Fund. In this case, because the oil spilled from the TORM MARY, the Torm was the "responsible party" under the OPA's strict liability scheme.

However, a responsible party may have a complete defense to liability under § 2703(a)(3) if it "establishes, by a preponderance of the evidence," that the oil spill was "caused solely by . . . an act or omission of a third party, other than . . . a third party whose act or omission occurs in connection with any contractual relationship with the responsible party." Section 2703(a)(3) also requires a showing that the responsible party exercised due care with respect to the spilled oil and that it took precautions against the foreseeable acts or omissions of the third party to whom it is attempting to shift liability.

On March 16, 2007, the owners and insurers of the three vessels involved in the spill jointly submitted a request for reimbursement of their cleanup expenses to the Coast Guard's National Pollution Funds Center ("NPFC"), which is the agency charged with administering the Oil Spill Liability Trust Fund. The request sought to declare Buffalo Marine the sole "thirdparty" cause of the spill, exonerate the Torm, substitute Buffalo as the formal "responsible party" for cleanup costs, and limit Buffalo Marine's liability to $2 million—the approximate value of the barge —pursuant to the OPA.[8]

On November 8, 2007, the NPFC denied the claim, concluding that the claimants had not established by a preponderance of evidence that Buffalo Marine's acts were not "in connection with any contractual relationship with the responsible party." The NPFC denied the claimants' motion for reconsideration of its decision. Buffalo Marine and its insurers then sought review of the NPFC's decision in the district court. After the parties filed cross-motions for summary judgment, the district court granted the government's motion for summary judgment and denied the plaintiffs' motion for summary judgment. Buffalo Marine and its insurers timely appealed. ***

Appellants argue that the NPFC's decision should be overturned, and the district court reversed, because the Torm and Buffalo Marine did not have a "contractual relationship" and because the Torm satisfied the other elements of its third-party defense. The government argues that the Torm and Buffalo Marine had at least an indirect contractual relationship and that the acts that allegedly caused the spill occurred in connection with that contractual relationship, precluding a successful

[8] The TORM MARY is much larger than the barge and hence would have been liable for the first $36 million of clean-up costs, an amount far in excess of the $10.1 million that the Torm and Buffalo Marine allege was spent on clean-up. Because the OPA allows a responsible party to bring a civil action for contribution against any other person who shares responsibility for the spill, *see* 33 U.S.C. § 2709, Buffalo Marine likely would have faced liability for its role in the spill even if the Torm had not submitted a third-party affirmative defense claim to the NPFC. But if the NPFC had granted the claimants' request to substitute Buffalo Marine as the "responsible party," it would have then reimbursed Buffalo Marine for approximately $8.1 million of the $10.1 million the claimants purportedly spent on the cleanup.

third-party affirmative defense under § 2703(a)(3). Alternatively, the government argues that if this court rejects its position, we should remand the case to the agency so that it can determine whether the Torm satisfies the other elements of its defense. ***

[T]he legislative history confirms that Congress meant to encompass indirect contractual relationships within the phrase "any contractual relationship." The version of the OPA originally passed in the House simply referred to "a contractual relationship with a responsible party." The Senate version, however, copied the language used in the parallel provision in CERCLA, allowing the third-party defense where a spill resulted from "an act or omission of a third party other than . . . one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant." The phrase "any contractual relationship" was added at conference. The conference report explains:

> The Conference substitute adopts the Senate language on complete defenses to liability. The substitute refers to any contractual arrangement rather than direct or indirect contractual relationships as referred to in the Senate amendment and to responsible party rather than defendant as in the Senate amendment.

In other words, although the final version of the OPA substituted the phrase "any contractual relationship" for the phrase "a contractual relationship, existing directly or indirectly," Congress's use of "any contractual relationship" reflected the adoption of the Senate version of the third-party defense provision, which emphasized the breadth of the "contractual relationship" limitation.

Appellants suggest that the revision of 33 U.S.C. § 2703 in 2004 to include a definition of "contractual relationship" cuts against an inference that Congress intended to impose a broad "contractual relationship" limitation to the third-party defense. However, the "Definition" merely specifies that "the term 'contractual relationship' . . . *includes, but is not limited to*, land contracts, deeds, easements, leases, or other instruments transferring title or possession." This definition replicates the definition of "contractual relationship" that appears in CERCLA. If the definition were meant to exclude indirect contractual relationships, then Congress would not have provided, in CERCLA, that the third-party defense does not apply where the third party's act or omission "occurs in connection with a contractual relationship, existing directly or indirectly." The amendment to § 2703, passed as part of the Coast Guard and Marine Transportation Act of 2004, reinforces the inference that Congress intended the "contractual relationship" limitation to the third-party defense available under the OPA to be as broad in scope as CERCLA's limitation.

Fourth, allowing responsible parties to escape liability even when the third party's act was in connection with an indirect contractual relationship with the responsible party would risk allowing the exception (the third-party defense) to swallow the rule (strict liability for the vessel discharging the oil). To determine the meaning of a statute, "we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." As the district court observed, the interpretation advocated by appellants "would allow contracting parties in cases such as this to avoid liability by the simple expedient of inserting an extra link or two in the chain of distribution." The NPFC's understanding of the third-party defense as inapplicable where the third party's act or omission occurs in connection with an indirect contractual relationship with the responsible party is consistent with the strict liability policy at the center of the statutory scheme. ***

B.

Having determined that the NPFC's interpretation of the OPA is entitled to deference, we find that the agency's determination that the Torm was not eligible for the third-party defense should be upheld, as it was supported by substantial evidence and not arbitrary, capricious, or otherwise not in accordance with law. ***

Here, the e-mails and other communications exchanged among the Torm and its agents, Bominflot, and Buffalo Marine support the agency's conclusion that Buffalo Marine's tug and barge "approached the TORM MARY to perform a prearranged delivery of bunkers." The claimants acknowledged that the Torm, through its agent, contracted with Bominflot to deliver fuel bunkers to the TORM MARY and Bominflot arranged for the bunkers to be delivered by Buffalo Marine's barge. Buffalo Marine and the Torm thus were linked by "a promise of bunkering services in return for payment." While the contractual relationship between the Torm and Buffalo Marine may have been an indirect one, involving a chain of intermediaries, the NPFC reasonably concluded that the arrangement whereby Buffalo Marine's barge delivered the bunkers to the TORM MARY "squarely falls under the meaning of 'any contractual relationship.'"

United States v. American Commercial Lines, L.L.C., 875 F.3d 170 (5th Cir. 2017)

Higginson, Circuit Judge:

On July 23, 2008, nearly 300,000 gallons of oil spilled into the Mississippi River when a tugboat veered across the river, putting the oil-filled barge it towed into the path of an ocean-going tanker. The tugboat, the M/V MEL OLIVER, was owned by American Commercial Lines ("ACL") but operated by DRD Towing Company pursuant to a contractual agreement between the companies. As the statutorily defined responsible party under the Oil Pollution Act ("OPA"), ACL incurred approximately $70 million in removal costs and damages. The United States also incurred approximately $20 million in removal costs and damages.

The United States initiated this action in 2014, seeking a declaration that ACL is liable for all removal costs and damages resulting from the spill and to recover the costs that it incurred. The United States moved for partial summary judgment on its claims that ACL was not entitled to any defenses to liability under OPA. The district court granted that motion, and later entered final judgment ordering ACL to pay the United States $20 million. ACL appealed. We AFFIRM.

I

In 2007, ACL, a marine-transportation company that operates a fleet of barges and tugboats, contracted with DRD Towing, another marine-transportation company, to operate some of its tugboats. ACL and DRD entered into two charter agreements. Under the "Master Bareboat Charter," ACL chartered several tugboats, including the M/V MEL OLIVER, to DRD for one dollar per day. Under the "Master Fully Found Charter," DRD agreed to crew the tugboats and charter its services back to ACL. Both agreements required compliance with "all applicable laws and regulations [with] respect to the registration, licensing, use, manning, maintenance, and operation of the Vessel(s)."

The MEL OLIVER's crew consisted of Captain Terry Carver, Steersman John Bavaret, and two deckhands. Captain Carver was the only crewmember with a valid United States Coast Guard Master of Towing Vessels license, which authorized him to lawfully operate tugboats on the lower Mississippi River. Steersman Bavaret held only an Apprentice Mate (Steersman) license, which authorized him to serve as an apprentice mate under the direct supervision of a properly licensed master. He was not authorized to operate the vessel without continuous supervision. *See* 46 C.F.R. § 10.107(b) (requiring that Steersman "be under the direct supervision and in the continuous presence of a master"); 46 C.F.R. § 15.401 (prohibiting mariners from serving in any positions that exceed the limits of their credentials).

On July 20, 2008, Captain Carver left the MEL OLIVER to go on shore, leaving Steersman Baravet in control of the vessel. Two days later, while—unbeknownst to ACL—Captain Carver was still on shore, ACL directed the MEL OLIVER to tow an ACL barge, the DM-932, to pick up fuel from a facility in Gretna, Louisiana. At that time, Steersman Bavaret had worked for 36 hours with only short naps, in violation of Coast Guard regulations. *See* 46 U.S.C. § 8104(h) ("[A]n individual licensed to operate a towing vessel may not work for more than 12 hours in a consecutive 24-hour period except in an emergency."); 46 C.F.R. § 15.705(d) (stating that "a master or mate (pilot)" may not work "more than 12 hours in a consecutive 24-hour period except in an emergency"). Still under Steersman Bavaret's control, the MEL OLIVER arrived at the Gretna facility around 2:00 p.m. on July 22, 2008.

The DM-932 was loaded with fuel, and the MEL OLIVER departed for its return trip, with the fuel-filled barge in tow, at about 12:30 a.m. on July 23, 2008.

As the MEL OLIVER pushed the DM-932 along the Mississippi River, it began travelling erratically. At about 1:30 a.m., it turned to cross the path of an ocean-going tanker, the TINTOMARA, owned by a third party. The TINTOMARA's pilot and the Coast Guard's New Orleans Vessel Traffic Service staff attempted to hail the MEL OLIVER by radio, but no one answered. The TINTOMARA also sounded its alarm whistle. Unable to change course, the TINTOMARA collided with the DM-932. The DM-932 broke away from the MEL OLIVER and sank downriver, spilling approximately 300,000 gallons of oil into the Mississippi River. Immediately after the collision, a crewmember on the MEL OLIVER found Steersman Bavaret slumped over the steering sticks and non-responsive.

Following the spill, the government prosecuted DRD, Captain Carver, and Steersman Bavaret for criminal violations of federal environmental law. DRD and Steersman Bavaret each pleaded guilty to one count of violating the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1), and one count of violating the Clean Water Act ("CWA"), 33 U.S.C. § 1319(c)(1)(A). Captain Carver pleaded guilty to one count of violating the Ports and Waterways Safety Act.

In the course of the criminal investigation, DRD admitted that it knowingly allowed its crewmembers to work without appropriate licenses or qualifications and to work more hours than were permitted under Coast Guard safety regulations and that it failed to report those "manning deficiencies" to the Coast Guard, also in violation of Coast Guard regulations. Captain Carver and Steersman Bavaret admitted to knowing that Bavaret was not licensed to act as captain in Carver's absence. In addition to the criminal prosecution, the government sued ACL and DRD under OPA to recover clean-up costs resulting from the spill. DRD promptly declared bankruptcy and later dissolved its LLC. The government moved for summary judgment against ACL on the issue of liability under OPA. The district court granted summary judgment in favor of the government, and later issued a final judgment ordering ACL to pay the government $20 million. This appeal followed. ***

III

A

OPA was enacted in 1990 in response to the Exxon Valdez oil spill. It "was intended to streamline federal law so as to provide quick and efficient cleanup of oil spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry." *Rice v. Harken Exploration Co.,* 250 F.3d 264, 266 (5th Cir. 2001) (citing S. REP. NO. 101-94, *reprinted in* 1990 U.S.C.C.A.N. 722, 723). OPA's cost internalization measures, which increased the financial consequences of oil spills, were intended to "encourage greater industry efforts to prevent spills and develop effective techniques to contain them." S. REP. NO. 101-94 at 3. To that end, OPA redresses "gross inadequacies . . . in the CWA's provisions dealing with spiller responsibility for cleanup costs" by extending the CWA's regime of strict, joint, and several liability; limiting the available defenses to liability; increasing the applicable limits to liability; and eliminating the liability limits altogether under certain circumstances. *Id.* at 4-5, 12-14.

OPA holds statutorily-defined "responsible parties" strictly liable for pollution-removal costs and damages associated with oil spills. *See Buffalo Marine Servs. Inc. v. United States,* 663 F.3d 750, 752 (5th Cir. 2011) (stating that OPA "creates a strict-liability scheme for the costs of cleaning up oil spills"). It provides that "each responsible party for a vessel or a facility from which oil is discharged . . . is liable for the removal costs and damages . . . that result from such incident." 33 U.S.C. § 2702(a). With respect to vessels, the "responsible party" is "any person owning, operating, or demise chartering the vessel." 33 U.S.C. § 2701(32)(A).

OPA generally limits the liability of a responsible party to a specified dollar amount based on the tonnage of the vessel from which oil was discharged. 33 U.S.C. § 2704(a). However, the limits on liability do not apply if:

> the incident was proximately caused by—(A) gross negligence or willful misconduct of, or (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party . . . .

33 U.S.C. § 2704(c)(1*)*. Accordingly, under those circumstances, there is no limit to the liability of the responsible party.

In addition to the general limits on liability, OPA provides for a complete defense to liability under four enumerated circumstances. It provides that:

> [a] responsible party is not liable for removal costs or damages . . . if [that] party establishes, by a preponderance of the evidence, that the discharge . . . of oil and the resulting damages or removal costs were caused solely by—(1) an act of God; (2) an act of war; (3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party . . . or (4) any combination of *paragraphs (1)*, *(2)*, and *(3)*.

33 U.S.C. § 2703(a). To be entitled to the third-party defense, a responsible party must also establish that it "exercised due care with respect to the oil concerned" and that it "took precautions against foreseeable acts or omissions" of the third party. 33 U.S.C. § 2703(a)(3)(A)-(B).

ACL contends that it is entitled to the third-party defense under § 2703(a)(3) or, in the alternative, that it is entitled to limit its liability pursuant to § 2704(a). For the reasons stated below, we disagree.

B

ACL contends that it is entitled to a complete defense to liability under 33 U.S.C. § 2703(a)(3) on the ground that the conduct of DRD, a third party, caused the spill. The government responds that the third-party defense is not available because DRD's conduct occurred in connection with a contractual relationship with ACL. The parties agree that DRD's acts and omissions were the sole cause of the spill and that ACL and DRD had a contractual relationship. They dispute only whether DRD's acts and omissions occurred in connection with that contractual relationship.

The meaning of § 2703(a)(3)'s "in connection with" language is a question of first impression. To determine whether DRD's conduct occurred "in connection with" its contractual relationship with ACL, we begin with the meaning of "connection." *See Taniguchi v. Kan Pac. Saipan, Ltd.,* 566 U.S. 560, 566, 132 S. Ct. 1997, 182 L. Ed. 2d 903 (2012). Because the term is not defined in the statute, we must give it its ordinary meaning. *See id.* ("When a term goes undefined in a statute, we give the term its ordinary meaning."). Webster's Third New International Dictionary defines "connection" as "relationship or association in thought (as of cause and effect, logical sequence, mutual dependence or involvement)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 481 (2002). The Oxford English Dictionary defines it as "[t]he condition of being related to something else by a bond of interdependence, causality, logical sequence, coherence, or the like; relation between things one of which is bound up with, or involved in, another." 3 OXFORD ENGLISH DICTIONARY 747 (2d ed. 1989).

"Connection" is therefore a capacious term, encompassing things that are logically or causally related or simply "bound up" with one another. It is, however, not so capacious as to be rendered meaningless. Conduct does not automatically occur "in connection with" a contractual relationship by the mere fact that such a relationship exists. *See Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp.,* 964 F.2d 85, 89 (2d Cir. 1992) (interpreting virtually identical language in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and holding that "[t]he mere existence of a contractual relationship . . . does not foreclose the owner of and from escaping liability"). Rather, the conduct must be causally or logically related to the contractual relationship. Accordingly, the third party's acts or omissions that cause a spill occur "in connection with any contractual relationship" between the responsible party and the third party whenever the acts or omissions relate to the contractual relationship in the sense that the third party's acts and omissions would not have occurred but for that contractual relationship. ***

Section 2703(a)(3) requires only two things: (1) that a third party's act or omission caused the spill at issue and (2) that that act or omission did not "occur[] in connection with *any* contractual relationship with the responsible party." 33 U.S.C. § 2703(a)(3) (emphasis added). It does not condition the applicability or inapplicability of the exception on the nature of the contract between the parties. Accordingly, the contract need not explicitly relate to hazardous substances (here, oil) or permit the responsible party to control the third party's activities.

ACL also contends that DRD's acts and omissions cannot be "in connection with" their contractual relationship because those acts and omissions directly violated the terms of their contracts. The charter agreements specifically required DRD to comply with all applicable laws and regulations, but the acts and omissions that caused the spill did not. But "in connection with" does not mean "in compliance with," and the meaning of "connection" is broad enough to encompass acts that are not specifically contemplated, or even acts that are specifically not contemplated, in a contract. A contrary reading would permit responsible parties to circumvent OPA by easily contracting out of liability, a result Congress specifically sought to avoid. *See* S. REP. NO. 101-94 at 13 (stating that the contractual-relationship exception from the third-party defense is intended to "preclude defendants from avoiding liability" through contractual relationships); *see also Buffalo Marine Servs.,* 663 F.3d at 757 & n.36 (citing to *United States v. LeBeouf Bros. Towing Co.,* 621 F.2d 787, 789 (5th Cir. 1980) and rejecting interpretation of "contractual relationship" that would enable defendants to easily avoid liability).

Given the broad meaning of "in connection with," ACL has failed to establish that it is entitled to the third-party defense. The conduct that caused the spill—Captain Carver's leaving the MEL OLIVER under the control of an unlicensed Steersman and Bavaret's working more consecutive hours than permitted under Coast Guard regulations, becoming unconscious while in command of the vessel, and veering into the path of the TINTOMARA while transporting oil at ACL's direction—occurred "in connection with" DRD's contractual relationship with ACL. Pursuant to the charter agreements, DRD agreed to crew the MEL OLIVER and charter DRD's services to ACL. But for those charter agreements, DRD would not have been operating the MEL OLIVER and transporting ACL's fuel filled barge, and the spill would not have occurred.

C

ACL alternatively contends that it is entitled to OPA's general limit on liability. The government responds that DRD's conduct falls within the exception from limited liability for spills proximately caused by "gross negligence," "willful misconduct," or federal regulatory violations committed by "a person acting pursuant to a contractual relationship with the responsible party." See 33 U.S.C. § 2704(c)(1). We agree.

The parties dispute whether DRD was acting "pursuant to" its contractual relationship with ACL when it committed the regulatory and criminal violations that caused the spill. Once again, the meaning of § 2704(c)(1)'s "pursuant to" language, which is not defined in the statute, appears to be a matter of first impression. As before, we turn to the ordinary meaning of the words. Black's Law Dictionary defines "pursuant to" as "[i]n compliance with; in accordance with," "[a]s authorized by," or "[i]n carrying out." BLACK'S LAW DICTIONARY 1431 (10th ed. 2014). Webster's Third similarly defines "pursuant to" as "in the course of carrying out; in conformance to or agreement with; [or] according to." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1848 (2002). *See also* OXFORD ENGLISH DICTIONARY 887 (2d ed. 1989) (defining "pursuant to" as "following upon, consequent and conformable to, [or] in accordance with"). Accordingly, and as ACL contends, "pursuant to" has a narrower meaning than "in connection with." While the latter encompasses any conduct that is logically related to the contractual relationships in the sense that it would not have occurred but for the third party's contractual relationship with the responsible party, the former contemplates compliance or conformity.

However, ACL goes too far when it argues that the specific acts or omissions that cause the spill must be authorized by the contract. Section 2704(c)(1) requires only that the gross negligence, willful misconduct, or federal regulatory violations that cause the spill be committed by the responsible party, its agent or employee, or "a person acting pursuant to a contractual relationship with the responsible party." Accordingly, the "pursuant to" language is satisfied if the person who commits the gross negligence, willful misconduct, or regulatory violation does so in the course of carrying out the terms of the contractual relationship with the responsible party. Reading the statute to require that the negligent or wrongful act itself be "pursuant" to the contract would be nonsensical; it would be a rare contract indeed that specifically contemplated gross negligence, willful misconduct, or the violation of federal safety regulations. Exceptions to statutes are to be construed narrowly, but ACL's proposed construction would read the exception out of the statute altogether.

That the conduct that caused the spill here rose to the level of a criminal violation does not take it out of § 2704(c)(1). ACL contends that because § 2704(c)(1) specifically mentions gross negligence, willful misconduct, and the violation of federal regulations, but says nothing of criminal violations, the exception from limited liability must not apply to the latter. But that draws a false distinction. As evidenced by the facts of this case, there is considerable overlap between gross negligence, willful misconduct, and violations of federal regulations, on the one hand, and criminal violations on the other. There is no principled basis on which to distinguish between the negligent acts that would lift the general limits on liability and the criminal acts that would not. Would the relevant conduct simply have to *be* a criminal violation? That would seem to largely eviscerate the exception. Or would the responsible actors have to be actually charged with a criminal violation, or convicted, to take the conduct out of § 2704(c)(1) and reimpose the limits to liability?

Nor would such a distinction give effect to OPA's purpose. OPA increased the financial consequences of oil spills in order to encourage responsible parties to take precautionary measures to prevent such spills. Section 2704(c)(1), in particular, encourages compliance with the kinds of regulations that are themselves intended to prevent oil spills—like the manning requirements violated by DRD—by providing for unlimited liability where those regulations are flouted. *See* S. REP. NO. 101-94 at 14 (stating that "where compliance [with federal regulations] perhaps could have prevented or mitigated the effects of an oilspill [sic], no such limits [to liability] will apply"). There is no reason to think that Congress intended to lift the limits on liability for spills caused by conduct that is forbidden by federal regulation but to reimpose those limits for spills caused by conduct considered so dangerous or risky that it is also subject to criminal penalties. Such a distinction would run counter to OPA's purpose of encouraging compliance with the very rules and regulations intended to prevent oil spills in the first instance.
Finally, ACL's reliance on the doctrine of *respondeat superior* is inapposite. Under that doctrine, employers are not liable for the intentional torts or criminal acts of their employees if those acts are committed outside the scope of their employment. But that is of no help to ACL. First, employer liability under the doctrine of *respondeat superior* is a creature of the common law of agency. *See* Restatement (Third) of Agency § 2.04 cmt. b (2006) (noting that the doctrine of *respondeat superior* "has long been classified as an element of agency doctrine"). The liability of a responsible party for oil spills caused by the negligence or misconduct of a third party under OPA is a creature of statute. Second, even if the doctrine of *respondeat superior* were applicable here by analogy, it appears to support our reading of "pursuant to." Employers *are* liable for the intentional torts of their employees if committed by an employee "acting within the scope of their employment." *Id.* § 2.04. Conduct may be within the scope of employment, even if not authorized, if it occurs "while performing work assigned by the employer" and if it is "intended to further any purpose of the employer." *Id.* § 7.07 cmt. b. Accordingly, even if the doctrine of *respondeat superior* were relevant here, our reading of what it means to be "acting pursuant to a contractual relationship" appears to be consistent with the imposition of liability on employers for torts committed by employees in the course of their employment.

Here, there is no dispute that the July 23, 2008 spill was caused by DRD's wrongful conduct and regulatory violations, committed in the course of carrying out its contractual obligation to transport ACL's fuel-filled barge. Accordingly, the spill was caused by the gross negligence, willful misconduct or regulatory violations of "a person acting pursuant to a contractual relationship with" ACL, and ACL is therefore not entitled to limited liability. ***

Chuc Nguyen v. American Commercial Lines, L.L.C., 805 F.3d 134 (5th Cir. 2015)

Per curiam:

Following a collision, a barge owned by American Commercial Lines, L.L.C., discharged oil into the Mississippi River. A number of fishermen and others dependent on fishing filed claims under the Oil Pollution Act of 1990 against the owner of the barge for damages arising from the spill. The district court denied the motion of American Commercial Lines for summary judgment but certified to this court the two controlling issues of law concerning the requirements for proceeding under the Act. For the following reasons, we AFFIRM in part and REVERSE in part the order denying summary judgment.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On July 23, 2008, a collision occurred on the Mississippi River in the Port of New Orleans between the M/V TINTOMARA and Barge DM-932, causing oil to discharge from the barge into the river. *See Gabarick v. Laurin Mar. (Am.) Inc.,* 753 F.3d 550, 551-52 (5th Cir. 2014) (discussing the same oil spill at issue in this case). Following the discharge, the oil traveled downriver and entered various bodies of water, including estuaries within Plaquemines Parish, Louisiana. The United States Coast Guard designated Barge DM-932 as the source of the discharge and named American Commercial Lines, L.L.C., ("ACL"), the owner of the barge, as the responsible party under the Oil Pollution Act of 1990 ("OPA"). ACL hired Worley Catastrophe Response, LLC, ("Worley") as its third-party claims administrator to handle any claims against ACL under the OPA for damages arising from the oil spill.

In June 2009, Michael A. Fenasci, an attorney representing commercial fishermen and others affected by the oil spill (the "claimants"), began submitting claims to Worley on form claim letters signed only by Fenasci—not the individual claimants. Attached to the form letters were copies of the individual fishermen's applicable licenses and selected copies of dock receipts for seafood sold to wholesalers. Each letter alleged that oil entered and contaminated the fishing grounds of the individual fisherman and that the oil disrupted fishing operations for approximately 25 days. The letters also stated that as a result of the pollution discharge, the fishermen suffered losses in earning capacity and in the subsistence use of harvested sea life. Each letter included a specific "evaluation of damages" that constituted the fisherman's demand under the OPA. Each evaluation included the claimant's gross loss of earning capacity, which was calculated by multiplying the gross loss of earnings per day by the total number of lost fishing days and then reduced by 5% to account for overhead costs. ***

On July 23, 2009, Worley sent a letter to Fenasci stating that it had reviewed each of the 224 claims submitted thus far. Worley also requested additional documentation from each claimant. The documentation included the following: (1) a copy of the claimant's federal income tax return for 2007 and 2008; (2) a record of daily catch or sales data for the five months surrounding the spill; (3) an explanation, with support, for the number of lost fishing days; (4) a calculation demonstrating how the lost income per day was determined from the supporting materials provided by each claimant; (5) an explanation of how the $60 in subsistence loss was calculated; (6) the invoice for the hull cleaning; and (7) a map indicating where the claimant normally fished and normally stored his vessel. Fenasci responded to Worley's request by sending tax returns for the individual claimants, which had increased from 224 to 247. On December 2, 2009, Worley informed Fenasci that some of the submitted tax returns were missing information and reiterated its request for the other information it had previously demanded. On June 4, 2010, Wayne W. Yuspeh, the attorney currently representing the claimants, responded that both his office and Fenasci's office had previously forwarded a number of claims concerning the oil spill to Worley. He also stated that if no response with a good faith effort to settle the previously submitted claims was received within ten days, then a lawsuit would be filed. On July 22, 2011, Yuspeh sent notices of new and amended individual claims, and on July 25, 2011, the claimants filed this action.

On November 9, 2012, the district court granted ACL's motion to dismiss under Federal Rule of Civil Procedure 12(c) and entered judgment accordingly on December 7, 2012. The court found that, by not providing Worley with the information it requested, the claimants had failed to comply with the OPA's requirement that claims first be properly presented to the responsible party. The court also explained that compliance with this presentment requirement was a mandatory condition precedent to commencing an action in court. However, the district court vacated its judgment on September 23, 2013, and directed ACL to file a motion for summary judgment. On July 18, 2014, the district court denied ACL's motion for summary judgment, stating that "[t]he Plaintiffs clearly satisfied the substantive presentment requirements imposed by the language of the OPA itself." On December 17, 2014, the district court denied ACL's motion for reconsideration but granted ACL's motion for certification of an interlocutory appeal under 28 U.S.C. 1292(b).

The district court certified two issues of law for appeal: (1) "whether [the claimants] met proper presentment requirements when they failed to personally sign the claim forms . . . and did not provide certain specific requested items of evidence in support of their claims"; and (2) "whether the requirement of a 90-day waiting period after making proper presentment before starting litigation against the responsible party . . . coupled with the three-year limitation period for commencing an action against a responsible party . . . means that the [claimants] had to make a proper presentment at least 90 days before the expiration of the limitation period." The first issue is relevant to all claimants in this case, as none of them personally signed their claims or provided Worley with all of the documentation it requested. The second issue relates only to those claimants who first presented their claims to Worley on or after July 22, 2011, since these claimants failed to wait 90 days after first presenting their claims to file suit in order to avoid having their claims time barred by the period of limitations. This court granted leave to appeal from the interlocutory order of the district court on January 27, 2015. ***

II.

PRESENTMENT UNDER THE OPA

Congress passed the OPA, 33 U.S.C. § 2701 et seq., after the Exxon Valdez oil spill "to streamline federal law so as to provide quick and efficient cleanup of oil spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry." *Rice v. Harken Expl. Co.,* 250 F.3d 264, 266 (5th Cir. 2001) (citing S. Rep. No. 101-94 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 722, 723). To facilitate prompt cleanup and compensation, the OPA requires the "Coast Guard [to] identif[y] 'responsible part[ies]' who must pay for oil spill cleanup in the first instance." *United States v. Am. Commercial Lines, LLC*, 759 F.3d 420, 422 (5th Cir. 2014) (quoting 33 U.S.C. § 2701(32)). "Responsible parties are strictly liable for cleanup costs and damages and [are] first in line to pay [for] . . . damages that may arise under OPA." *Id.* at 422 n.2 (citing 33 U.S.C. § 2702(a)). Individuals and entities harmed by an oil spill may file claims against the responsible party for damages. However, "to promote settlement and avoid litigation," *Johnson v. Colonial Pipeline Co.,* 830 F. Supp. 309, 310 (E.D. Va. 1993), the OPA establishes specific procedures which claimants must follow. Specifically, the statute provides:

> (a) Presentment
> Except as provided in subsection (b) of this section, all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source designated under section 2714(a) of this title.
>
> (b) Presentment to Fund
> (1) In general Claims for removal costs or damages may be presented first to the [Oil Liability Trust] Fund—
> (A) if the President has advertised or otherwise notified claimants in accordance with section 2714(c) of this title;

> . . .
>
> (c) Election
> If a claim is presented in accordance with subsection (a) of this section and—
>
> > (1) each person to whom the claim is presented denies all liability for the claim, or
> > (2) the claim is not settled by any person by payment within 90 days after the date upon which (A) the claim was presented, or (B) advertising was begun pursuant to section 2714(b) of this title, whichever is later, the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the [Oil Liability Trust] Fund.

33 U.S.C. § 2713.
Thus, under the OPA's presentment requirement, claimants must first present their claims to the responsible party and wait until that party denies all liability or until 90 days from the time of presentment have passed before "commenc[ing] an action in court against the responsible party." 33 U.S.C. § 2713(c); *see also Am. Commercial Lines,* 759 F.3d at 425 ("[I]f the responsible party has not paid the claim within 90 days, 'the claimant may elect to bring suit against the responsible party. . . .'" (quoting 33 U.S.C. § 2713(a))). In lieu of pursuing their claims in court,.claimants may elect to file their claims against the Oil Liability Trust Fund (the "Fund"), which is a public trust fund established by the OPA to compensate those harmed by oil spills, if allowed by 33 U.S.C. § 2713(b). In this case, no claimant has filed a claim against the Fund.

Neither party disputes that "the clear text of [33 U.S.C.] § 2713 creates a mandatory condition precedent barring all OPA claims unless and until a claimant has presented her claims in compliance with § 2713(a) . . . ." *Boca Ciega Hotel, Inc. v. Bouchard Transp. Co.,* 51 F.3d 235, 240 (11th Cir. 1995). However, the parties disagree over whether the claimants have properly presented their claims to Worley, and the issues of law certified for appeal concern compliance with the presentment requirement. We first consider what supporting documentation claimants must include when they present their claims to a responsible party and conclude that the claimants have properly presented their claims to Worley. We then address whether claimants must present their claims to the responsible party at least 90 days before the end of the three-year period of limitations established by the OPA. See 33 U.S.C. § 2717(f)(1) (requiring that an action for damages be brought "within 3 years after . . . the date on which the loss and the connection of the loss with the discharge in question are reasonably discoverable with the exercise of due care.").

A. The Claimants Submitted Sufficient Information to Comply with the Presentment Requirement

Turning first to the issue of what information and supporting documentation claimants must submit to comply with the OPA's presentment requirement, there is no question that the claimants presented their claims and some supporting information to Worley. Neither ACL nor the claimants dispute that Worley received claim letters from all claimants or that each letter included a statement alleging losses from the oil spill and an evaluation of damages, which constituted the claimant's demand for damages under the OPA. Each letter also included applicable fishing licenses and selected dock receipts for seafood sold to wholesalers. Most claimants also submitted federal tax returns to support their claims. However, ACL contends that because the claimants failed to produce all of the information and supporting documentation Worley requested, the claimants have not properly complied with the OPA's presentment requirement.

"As in all statutory construction cases, [our analysis] begin[s] with the language of the statute," *Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438, 450, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002), so we turn to the language of the presentment requirement. In relevant part, the OPA requires that "all claims for removal costs or damages shall be presented first to the responsible party." 33 U.S.C. § 2713(a). The statute defines "claim" as "a request, made in writing for a sum certain, for compensation for damages or removal costs resulting from an incident." 33 U.S.C. § 2701(3). "Damages" are defined to include real property damage, loss of subsistence use of natural resources, loss of revenues, loss of profits, and loss of public services. 33 U.S.C. § 2701(5); *see also* 33 U.S.C. § 2702(b)(2). "Statutory definitions control the meaning of statutory words . . . in the usual case," *Burgess v. United States,* 553 U.S. 124, 129, 128 S. Ct. 1572, 170 L. Ed. 2d 478 (2008) (quoting *Lawson v. Suwannee Fruit & S.S. Co.,* 336 U.S. 198, 201, 69 S. Ct. 503, 93 L. Ed. 611 (1949)), and nothing in the plain language of any of these provisions or definitions suggests that claimants must submit anything more than what they have already submitted to Worley. We need not decide whether less documentation than what the claimants submitted here would satisfy the presentment requirement. Because the claimants have submitted sufficient supporting documentation, they have properly presented their claims to Worley under the OPA.

ACL's arguments, that more information and supporting documentation are required, are based on a misreading of the OPA. ACL urges this court to read 33 U.S.C. § 2713 together with § 2714 and argues that these two sections allow it, as the responsible party, to determine the required documentation for claims. ACL contends that because § 2713(a) refers to § 2714(a), which applies to the designation of the responsible party, this court must consider § 2714(b). Section 2714(b) requires a responsible party to "advertise the designation and the procedure by which claims may be presented, in accordance with regulations promulgated by the President." 33 U.S.C. § 2714(b)(1). ACL then points to 33 C.F.R. § 136.105—the OPA claims procedure regulation promulgated by the Coast Guard governing the supporting materials claimants must include when filing claims against the Fund—as its justification for requiring claimants to submit additional information. This regulation requires claimants who file their claims against the Fund to provide, among other things, "[e]vidence to support the claim[s]". 33 C.F.R. § 136.105. Based on 33 U.S.C. §§ 2713 and 2714 and 33 C.F.R. § 136.105, ACL argues that it can require claimants to produce, as part of the presentment requirement, any documentation it desires as long as that documentation is consistent with 33 C.F.R. § 136.105.

We find, as the district court found, that ACL's reading of the statute is erroneous. First, ACL misreads the OPA by conflating the requirements for filing claims against the Fund with the requirements for presenting claims to a responsible party. The plain language of 33 U.S.C. § 2713(e) makes clear that 33 C.F.R. § 136.105 applies only to claims filed against the Fund and not to claims presented to responsible parties. Section 2713(e) empowers the "President [to] promulgate . . . regulations for the presentation, filing, processing, settlement, and adjudication of claims under this Act *against the Fund*." 33 U.S.C. § 2713(e) (emphasis added). Based on this statutory language, 33 C.F.R. § 136.105 applies only to claims filed against the Fund and does not apply to claims presented to the responsible party.***

In addition to requesting documentation and information beyond what the OPA requires the claimants to present to a responsible party, Worley also demanded that claimants individually sign their claim letters. ACL's arguments that claimants must sign their claim letters are based on its assertion that 33 C.F.R. § 136.105 applies to claims presented to the responsible party. The regulation requires that "[e]ach claim must be signed in ink by the claimant certifying to the best of the claimant's knowledge and belief that the claim accurately reflects all material facts." 33 C.F.R. § 136.105(c). However, as discussed above, this regulation does not apply to claims presented to the responsible party, and the statute that does apply, 33 U.S.C. § 2701, nowhere requires that claimants individually sign their claims. Moreover, each claim letter at issue here was signed by the claimant's attorney, and ACL does not contend that the attorney lacked the authority to sign on the claimant's behalf. Therefore, the claims at issue here were not improperly presented simply because they lacked the signatures of individual claimants.

The district court correctly concluded that the claimants' claims were not barred for failing to sign their claims or to provide sufficient supporting documentation. The plain language of the presentment requirement does not compel claimants to provide any explanation or documentation beyond what they have already submitted, and the purpose of the presentment requirement can be achieved with the information submitted. The district court also correctly determined that the claims were not improperly presented simply because the individual claimants did not sign their claim letters, as the signature requirement appears in a regulation not applicable to the presentment of claims to the responsible party.

B. The Claimants Must Comply With Both the Presentment Requirement and Three-Year Period of Limitations Under the OPA

We now address the second issue certified for appeal: whether claimants must present their claims to the responsible party at least 90 days before the end of the three-year period of limitations established by the OPA. The majority of claimants presented their claims to Worley in June and July of 2009 and did not file suit until July 2011, thus clearly presenting their claims at least 90 days prior to the expiration of the period of limitations. However, a number of claimants waited until July 22, 2011—nearly three years after the oil spill—to present their claims. These claimants then commenced their actions along with all of the other claimants on July 25, 2011—only three days after first presenting their claims—because waiting the full 90 days would necessarily involve filing suit outside the three-year period of limitations. The district court held that "in this instance the failure to wait 90 days before submitting those claims should not be grounds for dismissal," and noted that "[m]ore than enough time has passed to cure this deficiency." We disagree.

As before, our analysis begins with the language of the OPA. *Barnhart* 534 U.S. at 450; *see also Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 475, 112 S.Ct. 2589, 120 L. Ed. 2d 379 (1992). An action for damages is barred under the OPA unless it is brought:

> within 3 years after—
>
> > (A) the date on which the loss and the connection of the loss with the discharge in question are reasonably discoverable with the exercise of due care, or
> >
> > (B) in the case of natural resource damages under section 2702(b)(2)(A) of this title, the date of completion of the natural resources damage assessment under section 2706(c) of this title.

33 U.S.C. § 2717(f)(1). The provisions of the OPA establishing the presentment requirement and period of limitations do not refer to one another and therefore operate independently of each other. 33 U.S.C. § 2713, 2717; s*ee also Denehy v. Mass. Port Auth.*, 42 F. Supp. 3d 301, 308 (D. Mass. 2014) ("The catch is that the OPA's presentment requirement operates independently of the law's other statutes of limitations."). Because these two provisions operate independently, the claimants cannot, as a general rule, rely on compliance with one to excuse non-compliance with the other. The claimants who failed to comply with the

presentment requirement's 90-day waiting period in order to avoid filing suit outside the three-year period of limitations offer four reasons why their claims should nonetheless be allowed to go forward. None of these reasons is persuasive.

First, these claimants urge this court to apply the "Equity Doctrine under maritime law" to excuse their failure to wait 90 days after presenting their claims to Worley to file suit. The claimants point out that at least one court has allowed a claimant to commence an action against a responsible party without waiting 90 days from the time of presentment. In *Denehy*, the Coast Guard did not designate a responsible party until "55 days before the end of the three-year window to file the instant lawsuit." *Id.* The court explained that "[a]t that point, [the claimant] simply could not have met both the presentment requirement and the statute of limitations." *Id.* The claimant in *Denehy* chose to comply with the period of limitations by filing a claim "a few days before the three-year deadline but scarcely a month after presenting claims to [the responsible parties]." *Id.* After noting that "[s]tatutes are to be interpreted in accordance with their 'plain and ordinary meaning,' in order to give practical effect to the beneficial goals that impelled Congress to enact the law," the court determined that "the two sections best may be harmonized equitably by staying [the] timely filed action until a 90-day period for presentment has passed." *Id.* at 309 (internal citations omitted).

The claimant in *Denehy* pointed to extenuating circumstances that made it impossible to wait 90 days prior to commencing an action against the responsible party—the Coast Guard did not identify the responsible party until less than 90 days before the expiration of the period of limitations. However, the claimants here point to no extenuating circumstances that precluded them from presenting their claims 90 days before they filed suit. Although the claimants advance a number of hypothetical scenarios that they argue warrant excusing non-compliance with the 90-day waiting period, we decline their invitation to speculate. Without some explanation for why the claimants did not comply with both the presentment requirement and three-year period of limitations, we need not decide whether extenuating circumstances could justify excusing their noncompliance with the 90-day waiting period as the court in *Denehy* did. *Cf. Eastman v. Coffeyville Res. Ref. & Mktg., LLC,* No. 10-1216-MLBKGG, 2010 U.S. Dist. LEXIS 123366, 2010 WL 4810236, at *4 (D. Kan. Nov. 19, 2010) (refusing to relate an OPA claim back to the date the original complaint was filed, in part, because "if the amended complaint were to relate back to the date of the original complaint, the OPA claim would be treated as having commenced . . . before the 90 day[] [presentment period] had expired.").***

Third, the claimants argue that at least one district court has allowed unpresented claims to proceed. *See In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on Apr. 20, 2010,* 808 F. Supp. 2d 943, 965 (E.D. La. 2011) *aff'd sub nom. In re DEEPWATER HORIZON,* 745 F.3d 157 (5th Cir. 2014). However, *Deepwater Horizon* involved over 100,000 individual claims in a multi-district litigation. While the court in that case declined to engage in the "impractical, time consuming, and disruptive" task of reviewing so many claims to determine, *inter alia*, presentment prior to allowing them to proceed, the claimants here number less than 300, making the task of reviewing their claims much less arduous. *Id.* (noting that "[a] judge handling [a multi-district litigation] often must employ special procedures and case management tools."). Moreover, the court in *Deepwater Horizon* held that "presentment is a mandatory condition-precedent with respect to Plaintiffs' OPA claims," despite its decision to not review individual claims because of the number of claims involved. *Id.*

Finally, the claimants argue that ACL tacitly denied their claims and that ACL was not prejudiced by the district court allowing the claims presented on July 22, 2011, to go forward. Based on this tacit denial and lack of prejudice, the claimants argue that their claims are not barred under the OPA. The claimants contend that, because ACL had not responded to any of the previous claims presented to it, they were justified in assuming it would not respond to the claims presented in July 2011. However, an assumption that claims would be denied is not sufficient to constitute compliance with the presentment requirement. The statute requires that claimants wait until "each person to whom the claim is presented denies all liability for the claim, or . . . the claim is not settled by any person by payment within 90 days after the date upon which . . . the claim was presented." 33 U.S.C. § 2713. Without an actual denial of all liability for a claim by the responsible party or compliance with the 90-day waiting period, the presentment requirement has not been satisfied.

Therefore, based on the plain language of the statute, the claimants in this case who failed to present their claims at least 90 days prior to commencing an action in court are barred from pursuing litigation against ACL.***

In re Frescati Shipping Co., 886 F.3d 291 (3d Cir. 2018)

Smith, Chief Judge:

I. Introduction

After a 1,900-mile journey from Venezuela to Paulsboro, New Jersey, the M/T *Athos I*, a single-hulled oil tanker, had come within 900 feet of its intended berth when it struck an abandoned anchor on the bottom of the Delaware River. The anchor pierced the *Athos I*'s hull, causing approximately 264,000 gallons of crude oil to spill into the river.

The cost of cleaning up the spill was $143 million. We are presented with the question of how to apportion responsibility for that cost between three parties. The first party comprises not only the shipowner, Frescati Shipping Company, Ltd., but also the ship's manager, Tsakos Shipping & Trading, S.A. (collectively, "Frescati").

Frescati, through an intermediary, contracted to deliver crude oil to the second party, which is made up of several affiliated companies—CITGO Asphalt Refining Company, CITGO Petroleum Corporation, and CITGO East Coast Oil Corporation (collectively, "CARCO"). The oil shipment was to be delivered to CARCO at its marine terminal in Paulsboro. After the oil spill, Frescati paid for the cleanup effort, and was eventually reimbursed $88 million by the third party to this litigation, the United States, pursuant to the Oil Pollution Act (OPA) of 1990, 33 U.S.C. § 2701 *et seq*. Frescati and the United States now seek to recover their cleanup costs from CARCO. ***

VI. Subrogation and Equitable Recoupment

This litigation does not implicate the interests of only Frescati and CARCO. The United States reimbursed Frescati for $88 million in cleanup expenses above the liability limit established by the OPA. Consequently, the United States became subrogated to Frescati's claims, and joined the fray by filing suit against CARCO in 2008.

Frescati initially paid for the oil spill cleanup costs as a "responsible party" under the OPA. *See* 33 U.S.C. § 2702(a). The OPA allows a responsible party like Frescati to limit its liability to a specified sum; any cleanup costs above that amount are reimbursed out of the Oil Spill Liability Trust Fund. *See* 33 U.S.C. § 2704. Under this scheme, Frescati's liability for the cost of the oil spill cleanup was limited to approximately $45 million. The Trust Fund reimbursed Frescati for its remaining cleanup costs, which totaled approximately $88 million. The United States then became statutorily "subrogated to all rights, claims, and causes of action that the claimant [Frescati] has under any other law." 33 U.S.C. § 2715(a). The United States pursued these claims against CARCO as a "person who is liable, pursuant to any law, to the compensated claimant [Frescati] or to the Fund, for the cost or damages for which the compensation was paid." 33 U.S.C. § 2715(c).

Pursuant to the partial settlement agreement, the United States limited itself to the same contractual claims Frescati asserted. Because CARCO was liable to Frescati in contract, it was also liable to the United States for the amount the Trust Fund had reimbursed Frescati: nearly $88 million. But CARCO asserted a defense against the United States it did not assert against Frescati—equitable recoupment—and in response, the District Court reduced the United States' judgment by 50%. Both CARCO and the United States appealed. CARCO argues that the District Court erred by not eliminating the United States' recovery, while the United States argues that the District Court should have left the contract judgment untouched and denied CARCO any equitable remedy. We conclude that the District Court erred by reducing the United States' judgment by 50%. The United States is entitled to a full recovery.

a. Subrogation and Subrogee-Specific Defenses

As an initial matter, we note that the dispute between CARCO and the United States presents an unusual question about the nature of subrogation. Subrogation itself is not unusual; in general terms, it "simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against a third party." *US Airways v. McCutchen*, 569 U.S. 88, 97 n.5, 133 S. Ct. 1537, 185 L. Ed. 2d 654 (2013). Most often, it arises in the insurance context as a procedural mechanism to allow an insurer (the subrogee) to step into the shoes of its insured (the subrogor) after it has compensated the insured for harm caused by a third party. The subrogee, having stepped into the shoes of the subrogor, is entitled to assert all of the subrogor's rights and claims against the responsible third party. Likewise, the third party—now defending an action brought by the subrogee—is entitled to assert every defense it otherwise could have raised against the subrogor. In that vein, the third party's liability to a subrogee cannot be greater than it would have been to the subrogor. Restatement (Third) of Restitution & Unjust Enrichment § 24.

All that is unexceptional. The unusual question presented here is whether a third party may assert a defense against a subrogee that it could *not* assert against the subrogor. As we discussed above, CARCO is liable to Frescati, the subrogor, in contract. Consequently, CARCO is liable to the United States, the subrogee, under that very same contract. But CARCO wishes to assert a defense against the United States—namely, that equitable recoupment requires the United States to bear the loss rather than CARCO because of the allegedly misleading conduct of three federal agencies—that it could not assert against Frescati.

The United States makes a related argument. Its position is that the equitable recoupment defense, predicated as it is on the conduct of federal agencies rather than the contractual relationship between Frescati and the United States, violates the statutory subrogation provision of the OPA. Specifically, the United States argues that it is entitled to "all [of Frescati's] rights, claims, and causes of action" under the OPA. 33 U.S.C. § 2715(a). Frescati's contractual right is not limited by CARCO's claims against the Coast Guard, NOAA, and the Army Corps of Engineers; the United States asserting Frescati's contractual right should also not be so limited, and to do otherwise would infringe on the United States' statutory entitlement. When Frescati has the right to a full recovery under its contract, the argument goes, so does the United States.

We agree. CARCO may only assert defenses against the United States' subrogated claims which it could have asserted against Frescati—including any equitable recoupment defense it could have asserted against Frescati. In its capacity as a subrogee, the United States should be subject to the same treatment as Frescati.

Just as the United States, as subrogee, may only assert Frescati's claims, CARCO, as defendant, is not entitled to extra defenses because the United States asserts Frescati's claims rather than Frescati itself. Of course, no party is exempt from the Federal Rules of Civil Procedure. The United States is subject to the ordinary procedural rules governing counterclaims and third-party complaints, and the OPA does not bar CARCO from asserting whatever claims it has against the United States using those recognized procedural mechanisms where appropriate.

In this case, the only claim asserted by the United States is Frescati's contract claim. *In re Frescati*, 718 F.3d at 189; JA at 390. It follows that CARCO's equitable recoupment defense must be directed toward the United States' contract claim. *See* 718 F.3d at 214 (declining to preclude CARCO from raising "equitable defense[s] to the Government's subrogation claims"). If CARCO had other cognizable claims against the three federal agencies involved in regulating the Delaware River and the anchorage, sounding in tort or otherwise, it was free to assert them in a third-party complaint or counterclaim, just as the United States was free to pursue other claims against CARCO. In that light, we proceed to analyze CARCO's equitable recoupment defense as it applies to the United States' contractual rights.

b. Equitable Recoupment

Equitable recoupment is a "principle that diminishes a party's right to recover a debt to the extent that the party holds money or property of the debtor to which the party has no right." *In re Frescati*, 718 F.3d at 214 n.35. For an equitable recoupment defense to succeed, the defendant must possess a claim against the plaintiff arising from the same transaction or occurrence as the plaintiff's suit, seeking relief of the same kind as that sought by the plaintiff, in an amount no greater than that sought by the plaintiff. *See Livera v. First Nat'l State Bank of New Jersey*, 879 F.2d 1186, 1195 (3d Cir. 1989).

CARCO's equitable recoupment defense faces at least two serious obstacles. As an initial matter, the United States questions whether CARCO possesses a "claim" against it, rather than a generalized request for the court to balance the equities. Second, the United States questions whether CARCO seeks relief of the same kind as the United States. On both points, CARCO fails to meet its burden.

CARCO's claim, such as it is, appears to be that the equities favor CARCO, and require the United States to bear the cost of the spill. CARCO argues that the United States, through the Coast Guard, NOAA, and the Army Corps of Engineers, had responsibility for maintaining the anchorage where the allision occurred free of obstructions. In the alternative, if the agencies were not responsible to preemptively search for obstructions, CARCO argues they should have more explicitly made clear that they were not conducting such searches. CARCO asserts that it reasonably believed, based on the agencies' conduct, that the agencies were maintaining the anchorage free of obstructions. Additionally, CARCO argues that equity requires the Oil Spill Liability Trust Fund to bear the cost of the cleanup rather than CARCO.

Equitable recoupment requires more than just a request to balance the equities. CARCO points out that although equitable recoupment most often arises in the context of offsetting monetary claims, as in tax or bankruptcy cases, it is not necessarily limited to those situations. *See, e.g., Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104, 136-37 (N.D.N.Y. 2002) (allowing an equitable recoupment defense in the context of offsetting requests for declaratory judgments in a land rights case). But CARCO still must assert some cognizable claim, rather than simply a request for the Court to reduce the United States' damages in the interest of equity. Here, CARCO has failed to do so.

Neither does CARCO seek the same kind of relief as the United States. The United States seeks contractual relief, to which it is entitled by operation of statute. *See* 33 U.S.C. § 2715. CARCO, by contrast, seeks equitable relief, or (on another reading) essentially tort-based relief grounded in misrepresentation by the agencies. The mismatched relief sought by CARCO and the United States does not support CARCO's equitable recoupment defense.

The requirement that a defendant seek the same kind of relief as has been sought in the plaintiff's claim is a fundamental requisite for recoupment. The defense is not intended to be a catch-all to allow any claims otherwise barred by time, settlement, or statute to be heard as equity seems to require. Equitable recoupment is intended to allow only truly similar claims arising from the same transaction to offset one another in the interest of equity between the parties. As noted, equitable recoupment is well-suited for disputes in which two claims arise out of the same taxable event or the same contractual obligation, as often seen in tax or bankruptcy cases. When, as here, the plaintiff seeks relief on a contract, the defendant may not resort to equitable recoupment as a means to assert a non-contractual claim, whether sounding in an equitable-balancing analysis, in tort, or otherwise.

CARCO has failed to meet its burden of establishing an equitable recoupment defense. It is liable to the United States in full.

VII. Limitation of Liability under the Oil Pollution Act

CARCO argues that a provision of the OPA, 33 U.S.C. § 2702(d)(2)(B), limits its liability in this case to the same extent to which Frescati's liability was limited—approximately $45 million. Because CARCO did not raise this defense with the requisite clarity until nearly ten years after this litigation began, the District Court concluded that CARCO waived it. We agree that the defense was waived.

A District Court's holding that an affirmative defense has been waived is reviewed for abuse of discretion. *Cetel v. Kirwan Financial Group, Inc.*, 460 F.3d 494, 506

(3d Cir. 2006). Waiver is appropriate if the party raising the defense did not do so at a "pragmatically sufficient time" and if the opposing party would be prejudiced if the defense were allowed. *Charpentier v. Godsil*, 937 F.2d 859, 864 (3d Cir. 1991).

Whether CARCO raised its defense at a pragmatically sufficient time requires us to determine *when* CARCO first raised the § 2702(d)(2)(B) defense. CARCO argues that it first raised the limitation defense in its 2005 answer to Frescati's Amended Counterclaim by referring to the OPA. The District Court concluded that CARCO's answer contained nothing that would have put Frescati or the United States on notice that CARCO planned to rely on a limitation of liability defense. In general, "[a]n affirmative defense . . . 'need not be articulated with any rigorous degree of specificity, and is sufficiently raised for purposes of [Fed. R. Civ. P. 8] by its bare assertion.'" *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206, 218 (3d Cir. 2017) (quoting *Zotos v. Lindbergh Sch. Dist.*, 121 F.3d 356, 361 (8th Cir. 1997)). Nevertheless, the party asserting the defense must actually do so, and in a way that gives fair notice of that defense.

CARCO relies on the averment listed as its "Seventh Separate Defense," which reads simply: "The claims and causes of action set forth in the plaintiffs' Amended Counterclaim are barred in whole or in part by the provisions of the Oil Pollution Act of 1990, 33 U.S.C. § 2701, *et seq*." JA at 355. Noticeably absent from this general averment is any specific citation to the limitation of liability defense or even a description of the nature of the defense. This is significant, because the OPA includes a number of potential affirmative defenses. *See, e.g.*, 33 U.S.C. § 2702(b) (limiting scope of damages for which the OPA imposes liability); § 2702(c) (excluding certain oil spills from OPA liability); § 2702(d)(1)(A) (shifting liability under the OPA to a solely responsible third party); § 2702(d)(2) (limiting the liability of certain parties under the OPA); § 2703 ("Defenses to liability"). CARCO's general reference to the entirety of the OPA did not provide adequate information from which Frescati could determine that CARCO was seeking to limit its liability under § 2702(d)(2)(B). Nor did CARCO develop this defense at any point before the first trial. For that reason, CARCO's unspecified reference to the OPA did not provide the requisite fair notice to Frescati.

Furthermore, Frescati would be prejudiced if the defense were allowed. As the District Court found, if CARCO had asserted its defense in a timely fashion, fifteen days of depositions and trial testimony from seven witnesses could have been avoided, along with the OPA damages phase of the first trial.

CARCO did not clearly assert the limitation defense until nearly a decade after this action commenced, and over a year after the first trial and appeal had concluded.

The District Court appropriately concluded that CARCO had not raised the defense at a pragmatically sufficient time, and that Frescati would be prejudiced if the defense were allowed. The District Court did not abuse its discretion in finding the defense waived. ***

Chapter 6: Displacement of Federal Common Law

City of Milwaukee v. Illinois, 451 U.S. 304 (1981)

Justice Rehnquist delivered the opinion of the Court.

When this litigation was first before us we recognized the existence of a federal "common law" which could give rise to a claim for abatement of a nuisance caused by interstate water pollution. *Illinois v. Milwaukee*, 406 U.S. 91 (1972). Subsequent to our decision, Congress enacted the Federal Water Pollution Control Act Amendments of 1972. We granted certiorari to consider the effect of this legislation on the previously recognized cause of action. 445 U.S. 926.

I.

Petitioners, the city of Milwaukee, the Sewerage Commission of the city of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee, are municipal corporations organized under the laws of Wisconsin. Together they construct, operate, and maintain sewer facilities serving Milwaukee County, an area of some 420 square miles with a population of over one million people. The facilities consist of a series of sewer systems and two sewage treatment plants located on the shores of Lake Michigan 25 and 39 miles from the Illinois border, respectively. The sewer systems are of both the "separated" and "combined" variety. A separated sewer system carries only sewage for treatment; a combined sewer system gathers both sewage and storm water runoff and transports them in the same conduits for treatment. On occasion, particularly after a spell of wet weather, overflows occur in the system which result in the discharge of sewage directly into Lake Michigan or tributaries leading into Lake Michigan. The overflows occur at discrete discharge points throughout the system.

Respondent Illinois complains that these discharges, as well as the inadequate treatment of sewage at the two treatment plants, constitute a threat to the health of its citizens. ***

On May 19, 1972, Illinois filed a complaint in the United States District Court for the Northern District of Illinois, seeking abatement, under federal common law, of the public nuisance petitioners were allegedly creating by their discharges.

Five months later Congress, recognizing that "the Federal water pollution control program . . . has been inadequate in every vital aspect," S. Rep. No. 92-414, p. 7 (1971), 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-1, p. 1425 (1973) (hereinafter Leg. Hist.), passed the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816. The Amendments established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit. . . . Petitioners operated their sewer systems and discharged effluent under permits issued by the Wisconsin Department of Natural Resources (DNR), which had duly qualified under § 402 (b) of the Act, 33 U. S. C. § 1342 (b) (1976 ed. and Supp. III), as a permit-granting agency under the superintendence of the EPA. See *EPA v. State Water Resources Control Board, supra*, at 208. Petitioners did not fully comply with the requirements of the permits and, as contemplated by the Act, § 402 (b)(7), 33 U. S. C. § 1342 (b)(7), see Wis. Stat. Ann. § 147.29 (West 1974), the state agency brought an enforcement action in state court. On May 25, 1977, the state court entered a judgment requiring discharges from the treatment plants to meet the effluent limitations set forth in the permits and establishing a detailed timetable for the completion of planning and additional construction to control sewage overflows.

Trial on Illinois' claim commenced on January 11, 1977. On July 29 the District Court rendered a decision finding that respondents had proved the existence of a nuisance under federal common law, both in the discharge of inadequately treated sewage from petitioners' plants and in the discharge of untreated sewage from sewer overflows. The court ordered petitioners to eliminate all overflows and to achieve specified effluent limitations on treated sewage. App. to Pet. for Cert. F-25 --F-26. A judgment order entered on November 15 specified a construction timetable for the completion of detention facilities to eliminate overflows. Separated sewer overflows are to be completely eliminated by 1986; combined sewer overflows by 1989. ***

II.

Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *United States v. Hudson & Goodwin,* 7 Cranch 32 (1812). The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). *Erie* recognized as much in ruling that a federal court could not generally apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress.

When Congress has not spoken to a particular issue, however, and when there exists a "significant conflict between some federal policy or interest and the use of state law," *Wallis, supra,* at 68, the Court has found it necessary, in a "few and restricted" instances, *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963), to develop federal common law. See*, e. g., Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943). Nothing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable. . . . Federal common law is a "necessary expedient," *Committee for Consideration of Jones Falls Sewage System v. Train,* 539 F.2d 1006, 1008 (CA4 1976) (en banc), and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.

Contrary to the suggestions of respondents, the appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law. In considering the latter question "'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)). While we have not hesitated to find pre-emption of state law, whether express or implied, when Congress has so indicated, see *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 157 (1978), or when enforcement of state regulations would impair "federal superintendence of the field," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142 (1963), our analysis has included "due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy." *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 243 (1959). Such concerns are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required. Indeed, as noted, in cases such as the present "we start with the assumption" that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law. [9]

III.

We conclude that, at least so far as concerns the claims of respondents, Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative

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[9] Since the States are represented in Congress but not in the federal courts, the very concerns about displacing state law which counsel against finding pre-emption of *state* law in the absence of clear intent actually suggest a willingness to find congressional displacement of *federal* common law. Simply because the opinion in *Illinois* v. *Milwaukee* used the term "pre-emption," usually employed in determining if federal law displaces state law, is no reason to assume the analysis used to decide the usual federal-state questions is appropriate here.

agency. The 1972 Amendments to the Federal Water Pollution Control Act were not merely another law "touching interstate waters" of the sort surveyed in*Illinois v. Milwaukee*, 406 U.S., at 101-103, and found inadequate to supplant federal common law. Rather, the Amendments were viewed by Congress as a "total restructuring" and "complete rewriting" of the existing water pollution legislation considered in that case. . . . Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation. *Every* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals. The "major purpose" of the Amendments was "to establish a *comprehensive* long-range policy for the elimination of water pollution." . . . The establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois* v. *Milwaukee* was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law. See *Texas v. Pankey*, 441 F.2d, at 241.[14]
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The Court of Appeals, we believe, also erred in stating:

> "Neither the minimum effluent limitations prescribed by EPA pursuant to the provisions of the Act nor the effluent limitations imposed by the Wisconsin agency under the National Pollutant Discharge Elimination System limit a federal court's authority to require compliance with more stringent limitations under the federal common law."

599 F.2d at 173.

Federal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme.***

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[14] This conclusion is not undermined by Congress' decision to permit States to establish more stringent standards, see § 510, 33 U. S. C. § 1370. While Congress recognized a role for the States, the comprehensive nature of its action suggests that it was the exclusive source of *federal* law. Cases recognizing that the comprehensive character of a federal program is an insufficient basis to find pre-emption of state law are not in point, since we are considering which branch of the Federal Government is the source of federal law, not whether that law pre-empts state law, *see supra*, at 316-317. Since federal courts create federal common law only as a necessary expedient when problems requiring federal answers are not addressed by federal statutory law, *see supra,* at 312-315, the comprehensive character of a federal statute is quite relevant to the present question, while it would not be were the question whether state law, which of course does not depend upon the absence of an applicable Act of Congress, still applied.

Respondents argue that congressional intent to preserve the federal common-law remedy recognized in *Illinois* v. *Milwaukee* is evident in §§ 510 and 505 (e) of the statute, 33 U. S. C. §§ 1370, 1365 (e). Section 510 provides that nothing in the Act shall preclude States from adopting and enforcing limitations on the discharge of pollutants more stringent than those adopted under the Act. It is one thing, however, to say that States may adopt more stringent limitations through state administrative processes, or even that States may establish such limitations through state nuisance law, and apply them to in-state dischargers. It is quite another to say that the States may call upon *federal* courts to employ *federal* common law to establish more stringent standards applicable to out-of-state dischargers. Any standards established under federal common law are federal standards, and so the authority of States to impose more stringent standards under § 510 would not seem relevant. Section 510 clearly contemplates state authority to establish more stringent pollution limitations; nothing in it, however, suggests that this was to be done by federal-court actions premised on federal common law.

Subsection 505 (e) provides:

> "Nothing *in this section* shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)"

(emphasis supplied). Respondents argue that this evinces an intent to preserve the federal common law of nuisance. We, however, are inclined to view the quoted provision as meaning what it says: that nothing in § 505, the citizen-suit provision, should be read as limiting any other remedies which might exist.

Subsection 505 (e) is virtually identical to subsections in the citizen-suit provisions of several environmental statutes. The subsection is common language accompanying citizen-suit provisions and we think that it means only that the provision of such suit does not revoke other remedies. It most assuredly cannot be read to mean that the Act as a whole does not supplant formerly available federal common-law actions but only that the particular section authorizing citizen suits does not do so. No one, however, maintains that the citizen-suit provision pre-empts federal common law.

We are thus not persuaded that § 505 (e) aids respondents in this case, even indulging the unlikely assumption that the reference to "common law" in § 505 (e) includes the limited *federal* common law as opposed to the more routine state common law. ***

We therefore conclude that no federal common-law remedy was available to respondents in this case. ***

Further Reading:

***Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981)** (federal common law of nuisance is displaced by the comprehensive provisions of the Clean Water Act)

Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151 (2d Cir. 1978)

Mehrtens, Circuit Judge:

The oil-laden Barge New London, push-towed by the Tug Ocean Prince, struck a charted rock outside the navigable channel in the Hudson River, sustaining damage and causing a considerable oil spill. Tug Ocean Prince, Inc. and Red Star Towing & Transportation Co. (Red Star), the owner and charterer of the Tug Ocean Prince, petitioned for exoneration from or limitation of liability under 46 U.S.C. § 183 *et seq*. in which proceeding Pittston Marine Transport Corp. (Pittston) filed claims for damage to the barge and loss of cargo. Red Star thereafter filed a third-party action against the United States of America (the United States), alleging that its fault caused the casualty. The United States counterclaimed against the tug and crossclaimed against the barge for the pollution cleanup expenses. Pittston crossclaimed against the United States for its damages and the United States counterclaimed against Red Star for the money spent for cleanup. The United States also filed a separate action against them for the cleanup costs in the civil pollution penalty under 33 U.S.C. § 1321. The actions were consolidated for trial. The trial court denied exoneration but granted limitation to the value of the tug. It further found that Pittston was not responsible for the oil spill and dismissed the United States' action against Pittston. The court also dismissed both Red Star's and Pittston's claims in the third-party action as well as Pittston's counterclaim against the United States in the action it instituted to recover the cleanup costs, limiting the tug's liability for pollution cleanup to $ 100 per gross ton under the provisions of 33 U.S.C. § 1321. Nobody is happy and everybody has appealed. ***

The Limitation of Liability

The district court held that the casualty resulted from errors of navigation and management on board the tug, not within Red Star's privity and knowledge, and that, therefore, its liability was limited to the value of the tug and her pending freight and that Red Star's liability to the United States was subject to the tonnage limitation contained in 33 U.S.C. § 1321(g). ***

Accepting as we do all of the district court's consistent fact findings, we nonetheless conclude in the context of the uncontradicted facts of this record that the casualty occurred as a result of negligence and unseaworthiness within the privity and knowledge of Red Star; that the order granting limitation of liability should be vacated; and that the court should have entered an order denying limitation of liability. ***

Government's Responsibility for the Grounding

We need not pause long to conclude that the district court properly held that the United States should not be found liable under the Suits in Admiralty Act, 46 U.S.C. §§ 741-52. There was substantial evidence from which the district court found that during the ice season the can buoy is the best practical floating aid for the site under present technology; that a fixed tower on the rock, the base of which would be in 7 feet of water, would be damaged or destroyed by ice, and that it cannot be said that the negligence, if any, of the United States in not establishing more effective aids to navigation was the proximate cause of the grounding.

We therefore affirm the district court's dismissal of the claims over against the United States.

Red Star's Liability to the United States for Pollution Cleanup Costs

The district court limited Red Star's liability to the United States, for pollution cleanup costs, to $ 100 per gross ton of the Tug Ocean Prince, or $ 19,800.00.

The United States insists that Red Star's actions, as a whole, constitute willful negligence or willful misconduct within its privity and knowledge. ***

The district court held that the cause of the grounding was not a fault within the privity and knowledge of Red Star and, therefore, never reached the question of what constituted willful negligence or willful misconduct. Because we hold that the Ocean Prince was unseaworthy at the inception of the voyage and that Red Star was guilty of negligence within its privity and knowledge, we must decide whether Red Star's actions constituted willful negligence or willful misconduct and, if it did not, whether the "flotilla rule" should be applied.

Increased oil pollution of the seas is a natural consequence of the world's increased dependence on oil to satisfy industrial needs and basic energy requirements. Each year approximately 60% of the world production of oil is transported by sea. About 1/10 of 1% of this amount is lost at sea. This amount is divided between tank cleaning operations wherein "slops" are dumped overboard and accident-related spills. The advent of the supertanker has created the danger of larger oil spills, such as occurred as a result of the strandings of The Torrey Canyon and the Ocean Eagle. Dumping and accidental spilling of oil constitutes a major pollution threat to the water resources of the nation. It can destroy or limit marine life, ruin wild life habitats, kill birds, limit or destroy the recreational value of ocean beaches, lake shores and river stretches, contaminate water supplies and create fire hazards. Congress has repeatedly indicated its high regard for our water quality and, conversely, its disdain for its pollution. *United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145 (D.Vt.1972).

The first statute specifically dealing with oil discharges was the Oil Pollution Act of 1924 (33 U.S.C. §§ 431-437), intended to protect the nation's coastal waters from vessel discharges. Congress next passed the 1948 Water Pollution Control Act (33 U.S.C. § 466), which was amended in 1956 and 1961. In 1965 Congress enacted the Water Quality Act establishing water quality standards for interstate waters. The Clean Water Restoration Act of 1966 (33 U.S.C. § 466) amended the Oil Pollution Act of 1924.

The 1966 Act was superseded by the Water Quality Improvement Act of 1970 (33 U.S.C. § 1161), a more comprehensive Act wherein Congress declared the policy to be "that there should be no discharges of oil . . . into or upon the waters of the contiguous zone" (33 U.S.C. § 1321). The 1970 Act, as amended by the Federal Water Pollution Control Act of 1972 (33 U.S.C. § 1321), is the law applicable to this case. This Act adopts the same measure of damage as the 1924 Oil Pollution Act; however, the defenses are more limited, reflecting a strict liability rather than a negligent standard.

The 1970 Water Quality Improvement Act, incorporated into and modified by the Federal Water Pollution Control Act of 1972, is a comprehensive plan attempting to expedite oil pollution cleanup and to establish a workable scheme for limiting and distributing liability. As amended, the Act prohibits any discharge of oil or other hazardous substances into or upon the navigable waters of the United States and adjoining shorelines or into or upon waters of the contiguous zone, except where permitted under Article IV of the International Convention for the Prevention of Pollution of the Seas by Oil, as amended, or where permissible by presidential regulation (33 U.S.C. § 1321).

Summarized, the Act provides that in cases where a discharge of oil is not permissible under the Act, the owner or operator of the applicable vessel or onshore or offshore facility shall be liable to the United States for cleanup costs, except if the owner or operator proves that the discharge was caused by Act of God, Act of War, negligence by the United States, or an act or omission of a third party whether or not negligent or by any combination of those causes. It provides that "Notwithstanding any other provision of law, liability of vessel owners to the United States for the actual cost of removing oil or hazardous substances discharged is limited to $ 100 per gross ton or $ 14,000,000.00, whichever is lesser," and that limitation in the above amounts will be denied where the United States can show that the discharge was the result of "willful negligence or willful misconduct within the privity and knowledge of the owner" (33 U.S.C. § 1321(f)(1)). With respect to third party liability it provides that where the owner or operator of a vessel or onshore or offshore facility proves that a discharge was caused by an act or omission of a third party, the third party shall be liable to the United States and contains the same penalties and defenses as set out in subsection (f) dealing with the actual spiller or discharger.

The statute is not a model of clarity. In the absence of clarifying case law or legislative history on point, one can only speculate as to the meaning of the "Notwithstanding any other provision of law" clause. With respect to federal cleanup costs, it is uncertain whether Congress intended the Federal Water Pollution Control Act to supersede the Limitation of Liability Act or whether it intended both Acts to be read together so as to provide the greatest relief to the United States. Because the two statutes serve different purposes and differ substantially on crucial issues, in all probability the United States is limited to recover under the Federal Water Pollution Control Act, which does not deny limitation for cleanup costs unless the discharge is the result of willful negligence or willful misconduct within the privity and knowledge of the owner. ***

The knowledge required for a finding of willful misconduct is that there must be either actual knowledge that the act, or the failure to act, is necessary in order to avoid danger, or if there is no actual knowledge, then the probability of harm must be so great that failure to take the required action constitutes recklessness. *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965); *Pekelis v. Transcontinental & Western Air, supra*.

In this case, the questions are whether Red Star's omissions, specifically its failure to inform Kiernan of Reimer's unfamiliarity with the river, its failure to appoint a captain, and its failure to require a lookout under the circumstances, were done intentionally, and whether Red Star knew such a combination of omissions would likely result in damage; or whether, if Red Star did not have actual knowledge, it should have recognized the probable consequences, and that, therefore, the failure to act constituted a reckless disregard of those probable consequences. We think it did. ***

The circumstances surrounding this trip warrant an inference that Red Star acted in reckless disregard of the probable consequences. Red Star's management failed to designate the captain of the tug and failed to inform Kiernan of Reimer's unfamiliarity with the river. Red Star knew that deckhands were sent below for coffee, thereby eliminating them as a lookout, yet failed to take any steps to halt this practice. Given the conditions at the time of the accident the ice along the bank, the possibility of the buoys having been moved by the ice, the darkness, and the ebbing tide all of which Red Star knew or should have known, Red Star's failure to act allows an inference of a reckless disregard of the probable consequences.

In summary, we hold that the order of the district court that Red Star is entitled to limit liability with respect to Pittston's claim and also the United States' claim for pollution cleanup costs should be vacated and that an order be entered denying Red Star the right to such relief; directing the entry of judgment in favor of Pittston and the United States for the amount of their damages; and that the district court's judgment in all other respects be affirmed. ***

In re Oswego Barge Corp., 664 F.2d 327 (5th Cir. 1982)

Newman, Circuit Judge:

In the aftermath of a massive oil spill in the St. Lawrence Seaway, the United States filed claims for cleanup costs against the owner of the discharging vessel. Some of the claims were based on § 311 of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1321 (1976); others were based on traditional maritime law, the federal common law of public nuisance, and § 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1976) (§ 13 is known as the Refuse Act). The District Court for the Northern District of New York (Howard G. Munson, Chief Judge) dismissed the FWPCA claims without prejudice, and those claims have been refiled in a separate action that is still pending. This appeal is from a judgment dismissing all of the remaining claims on the ground that they are preempted by the provisions of the FWPCA. We affirm the dismissal insofar as the non-FWPCA claims seek recovery of the costs of cleaning up navigable waters of the United States; however, we reverse and remand for further proceedings the claim of the United States for recovery of money reimbursed to Canada for the costs Canada incurred in cleaning up Canadian waters.

The oil spill occurred on June 23, 1976, when the Barge "Nepco 140," while being towed by the Tug "Eileen C," grounded in fog in American territorial waters, causing a discharge of oil into the St. Lawrence Seaway. The appellee Oswego Barge Company ("Oswego") owned the barge and had chartered the tug. As a result of the spill, the United States alleges it spent $8,062,981 to clean its territorial waters and reimbursed Canada, pursuant to an executive agreement, for the $768,265 Canada spent to clean Canadian waters.

On June 30, 1976, Oswego filed in the Northern District of New York a petition for exoneration from or limitation of liability pursuant to the Limitation of Liability Act of 1851, 46 U.S.C. § 183 (1976) ("Limitation Act"). The District Court ordered all claimants to submit their claims by December 31, 1976. On December 15, 1976, the United States submitted a claim seeking recovery of up to $9,000,000 from Oswego. Invoices were tendered by the Government to Oswego in the total amount of $8,831,246, including $768,265 paid by the United States to Canada. On November 13, 1978, the District Court ruled on Oswego's motion to dismiss the claim presented by the United States. First, the District Court dismissed, without prejudice, the Government's claim to the extent that it was based on § 311 of the FWPCA, because recovery under that statute would not be subject to the Limitation Act Fund. The Government refiled its claim based on the FWPCA in a separate action, United States v. Tug Eileen C, No. 79 CV 117 (N.D.N.Y., filed Feb. 23, 1979), which is still pending. Second, to the extent that the Government's claim for cleanup costs rested on the Refuse Act, the common law of nuisance, or maritime tort law, the District Court ruled that the Government's right to proceed was precluded by the exclusive provisions of the FWPCA. Finally, the Court's ruling permitted the Government to proceed on its claim for recovery on behalf of its citizens for damage to natural resources and wildlife.

On October 28, 1980, the Government moved to amend its complaint so as to segregate its claim for its own cleanup expenses from its claim for recoupment of money reimbursed to Canada for Canada's cleanup expenses; the amendment also set out fully the facts (and amounts claimed) pertinent to the "Canadian claim." On April 3, 1981, the District Court denied the United States' motion to amend because of "the prejudice that would befall the petitioner in this action if the amendment were permitted, and the Court's previous ruling on the exclusivity of the Federal Water Pollution Control Act." Meanwhile the parties had settled the claim for damage to natural resources and wildlife. Since the United States did not retain any outstanding claims in the limitation proceeding, the District Court entered judgment against the Government pursuant to Fed.R.Civ.P. 54(b). This appeal followed.

On appeal the Government contends that by enacting the FWPCA Congress did not intend to limit the availability of other remedies that would be consistent with the general purpose of the FWPCA to prevent the discharge of oil into United States waters. The Government asserts that the FWPCA was enacted only to insure a minimum recovery of oil pollution cleanup expenses and was not intended to preclude supplementary remedies that would also help prevent oil spills. The Government also argues that the District Court erred in not permitting its complaint to be amended with regard to the "Canadian claim," which it contends is clearly not precluded by the FWPCA. Oswego responds that permitting the Government to seek supplementary remedies would undermine and conflict with the carefully balanced and comprehensive remedial scheme established by Congress in § 311 of the FWPCA. As for the "Canadian claim," Oswego contends that amendment of the complaint was properly denied because of the prejudice that it would otherwise suffer, and that, in any event, the claim is time-barred and precluded by the exclusive provisions of the FWPCA.

1. The Claim for Cleanup of United States Waters

To determine whether the Government is limited to FWPCA remedies in its claim against Oswego for costs of cleaning up pollution of United States waters requires some understanding of the background against which Congress enacted § 311. Before 1970, the Government's statutory remedy for recovery of its cleanup costs was the Oil Pollution Act of 1924, 43 Stat. 604, as amended by Act of Nov. 3, 1966, Pub.L. No. 89-753, § 211(a), 80 Stat. 1246-1252. Recovery was available only upon proof of gross negligence or willfulness on the part of the discharging vessel. Non-statutory remedies required proof of the elements of a public nuisance or a maritime tort, and any non-statutory recovery would be limited by the Limitation Act to the value of the vessel after the accident unless the act causing the spill was within the privity or knowledge of the vessel owner. See generally Note, Oil Spills and Cleanup Bills: Federal Recovery of Oil Spill Cleanup Costs, 93 Harv. L. Rev. 1761, 1763 (1980) (hereafter "Note, Oil Spills ").

Recognizing the inadequacy of these remedies, Congress included a detailed scheme for recovery by the United States of oil spill cleanup costs in § 102 of the Water Quality Improvement Act of 1970, Pub.L. No. 91-224, 84 Stat. 91 (formerly codified at 33 U.S.C. § 1161 (1970)), a statute designed to remedy several deficiencies in the Nation's then-existing water pollution laws. Two years later, in the course of a comprehensive restructuring of water pollution laws, Congress reenacted the oil spill cleanup provisions of § 102 in slightly modified form as § 311 of the FWPCA, 33 U.S.C. § 1321 (1976) (hereafter cited as § 1321). Pub.L. No. 92-500, § 2, 86 Stat. 862 (1972). Under § 1321(f)(1) the Government, with exceptions not relevant to this appeal, can recover its cleanup costs under a theory of strict liability from the vessel owner or operator, up to specified dollar limits. The Government can recover its total cleanup costs if it can prove "willful negligence or willful misconduct within the privity and knowledge of the owner." The Act also requires vessels to establish evidence of financial responsibility up to the limits for recovery based on strict liability. *Id.* § 1321(p)(1). The Oil Pollution Act of 1924 was expressly repealed, Pub.L. No. 91-224, § 108, 84 Stat. 113 (1970), but no mention was made of either the preservation or repeal of additional remedies for cleanup costs under theories of public nuisance, maritime tort, or the Refuse Act.

Non-Statutory Theories of Recovery ***

As we analyze the Government's non-statutory theories, they both must rest upon maritime law. The essential facts supporting the legal theories are that a vessel discharged oil into navigable waters of the United States and the United States incurred costs in cleaning up the oil from those waters. The facts satisfy the elements of admiralty jurisdiction-a maritime locality and a significant relationship to a traditional maritime activity. See *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972). Whatever federal liabilities arise from these facts, only maritime law, both judge-made and statutory, creates them. In referring to both maritime law and federal common law as the sources of liability, the Government is apparently searching for bodies of law that will support theories of negligence and public nuisance. But maritime law, unless preempted by the FWPCA, can comprehend both theories. Negligent conduct causing loss to others constitutes a traditional maritime tort. *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 413 & n.6, 74 S. Ct. 202, 207 & n.6, 98 L. Ed. 143 (1953); *cf. Union Oil Co. v. Oppen,* 501 F.2d 558, 567-68 (9th Cir. 1974). Whether non-negligent conduct amounting to a public nuisance creates liability within maritime law is more debatable, but this type of "maritime nuisance tort" has been recognized. *National Sea Clammers Ass'n v. City of New York,* 616 F.2d 1222, 1236 (3d Cir. 1980)*, rev'd without consideration of this point sub nom. Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,* 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981); Burgess v. M/V Tamano, 370 F. Supp.

247 (D.Me.1973). We therefore conclude that both of the Government's non-statutory theories of recovery are based upon liabilities arising from judge-made maritime law.

Refuse Act Theory of Recovery

The Government presents its theory of recovery based on the Refuse Act as if it were a statutory cause of action, but this theory also rests ultimately upon judge-made maritime law, though differing from the non-statutory nuisance and negligence theories in that they involved maritime law liabilities, whereas the Refuse Act theory involves a judicially created maritime remedy.

The Refuse Act, which is § 13 of the Rivers and Harbors Act of 1899, makes it unlawful to discharge any refuse matter into navigable water of the United States, and "refuse matter" has been construed to include oil accidentally discharged. *United States v. Standard Oil Co.,* 384 U.S. 224, 86 S. Ct. 1427, 16 L. Ed. 2d 492 (1966). While the Rivers and Harbors Act does not provide explicit remedies enabling the United States to recover costs incurred in removing anything placed in navigable water in violation of the various prohibitions of the Act, the authority of federal courts to fashion cost recovery remedies for the United States has been recognized. *Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967) (costs of removing vessel negligently sunk in violation of § 15, 33 U.S.C. § 409 (1976)); *United States v. Perma Paving Co.,* 332 F.2d 754 (2d Cir. 1964) (costs of removing fill deposited or permitted to be washed into water in violation of § 13); see *United States v. Republic Steel Corp.,* 362 U.S. 482, 80 S. Ct. 884, 4 L. Ed. 2d 903 (1960) (injunction to remove solid wastes creating obstruction in violation of § 10, 33 U.S.C. § 403 (1976), despite statutory injunction provision specifying removal only of "structures," § 12, 33 U.S.C. § 406 (1976)). In this case, the remedy sought by the Government to recover cleanup costs for an oil spill in violation of § 13 is a judge-made remedy, and, since the source of the spill is a vessel operating on navigable waters, the judge-made remedy to enforce § 13 must be grounded in non-statutory maritime law.

Criteria for Gauging Statutory Preemption of Judge-Made Law

In order to determine whether the liabilities and remedies grounded in judge-made maritime law have been preempted by the FWPCA, we next consider the criteria for assessing when federal statutes displace judicial law-making authority. In particular we examine whether the Supreme Court's approach to statutory preemption of judge-made law applies to maritime law as rigorously as it now appears to apply to non-maritime federal common law.

With respect to non-maritime federal common law, the Court has recently articulated a strict test for determining the preemptive effect of a federal statute. *City of Milwaukee v. Illinois,* 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981).

Instead of inquiring whether "Congress ha(s) affirmatively proscribed the use of federal common law," *id.* 101 S. Ct. at 1791, we are to conclude that federal common law has been preempted as to every question to which the legislative scheme "spoke directly," and every problem that Congress has "addressed." Ibid. While federalism concerns create a presumption against preemption of state law, including state common law, *id.* 101 S. Ct. at 1792; *Jones v. Rath Packing Co.,* 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977), separation of powers concerns create a presumption in favor of preemption of federal common law whenever it can be said that Congress has legislated on the subject.

Applying this test, the Court concluded in City of Milwaukee that the FWPCA preempted the federal common law of public nuisance in the area of interstate water pollution, at least to the extent of displacing the authority of a district court to impose more stringent effluent limitations upon sewer systems than those promulgated pursuant to § 301 of the Act, 33 U.S.C. § 1311 (1976). In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,* 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981), the Court more broadly characterized City of Milwaukee as a determination that "the federal common law of nuisance in the area of water pollution" has been "entirely pre-empted" by the FWPCA. *Id.* 101 S. Ct. at 2627.

The Supreme Court has recognized, however, that the federal judiciary has a more expansive role to play in the development of maritime law than in the development of non-maritime federal common law. *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 101 S. Ct. 2061, 2067, 68 L. Ed. 2d 500 (1981); *Northwest Airlines, Inc. v. Transport Workers Union,* 451 U.S. 77, 101 S. Ct. 1571, 1582-83, 67 L. Ed. 2d 750 (1981); *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282, 285, 72 S. Ct. 277, 279, 96 L. Ed. 318 (1952); *see Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 259, 99 S. Ct. 2753, 2756, 61 L. Ed. 2d 521 (1979); *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625, 98 S. Ct. 2010, 2015, 56 L. Ed. 2d 581 (1978); *United States v. Reliable Transfer Co.,* 421 U.S. 397, 409, 95 S. Ct. 1708, 1714, 44 L. Ed. 2d 251 (1975); *Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 20, 83 S. Ct. 1646, 1650, 10 L. Ed. 2d 720 (1963). The distinction is illustrated by contrasting the Court's willingness to create a right of contribution between joint tortfeasors under maritime law, *Cooper Stevedoring Co. v. Fritz Kopke, Inc.,* 417 U.S. 106, 94 S. Ct. 2174, 40 L. Ed. 2d 694 (1974), and its unwillingness to create such a right under federal common law in the areas of antitrust, *Texas Industries, Inc. v. Radcliff Materials, Inc., supra*, or employment discrimination, *Northwest Airlines, Inc. v. Transport Workers Union, supra*.

In recognizing a substantial law-creating function for federal courts in maritime law, the Supreme Court appears to have applied the presumption of statutory preemption somewhat less forcefully to judge-made maritime law than to non-maritime federal common law. In several cases the Court has approved the creation of new rights pursuant to judge-made maritime law despite the presence of arguably preempting federal statutes. Thus, in *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970), the Court created a maritime wrongful death action for deaths occurring within state territorial waters, notwithstanding that the maritime wrongful death action created by Congress was limited to deaths occurring on the high seas. Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-767 (1976). In *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 585-90 & n.22, 94 S. Ct. 806, 814-17, 39 L. Ed. 2d 9 & n.22 (1974), the Court interpreted maritime law to include loss of society within the measure of damages for a wrongful death in state territorial waters, notwithstanding that Congress had not included this component in the damages available for a statutory claim under DOHSA. See also *American Export Lines, Inc. v. Alvez,* 446 U.S. 274, 100 S. Ct. 1673, 64 L. Ed. 2d 284 (1980) (extending Gaudet to claims for loss of society in cases of non-fatal injuries occurring in state territorial waters). And in *Cooper Stevedoring Co. v. Fritz Kopke, Inc., supra*, the Court created a right of contribution between joint tortfeasors under maritime law, notwithstanding substantial Congressional activity in the area of maritime personal injuries, see *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., supra*, 342 U.S. at 285-86, 72 S. Ct. at 279-80. ***

Though judge-made maritime law has thus been less easily displaced by statutory preemption than non-maritime federal common law, preemption of maritime law has occurred both as to prior judge-made law and the authority to fashion new law. In *Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 72 S. Ct. 1011, 96 L. Ed. 1294 (1952), the Court declined to apply prior maritime law permitting an employer a setoff against wages due a seaman, concluding that, in light of legislation that "touches nearly every phase of a seaman's life," *id.* at 784, 72 S. Ct. at 1015, only setoffs expressly authorized by statute should be allowed. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., supra*, the Court declined to create a right of contribution against a longshoreman's employer in the face of the limitation of liability established by the LHWCA. *See Cooper Stevedoring Co. v. Kopke, Inc., supra,* 417 U.S. at 112, 94 S. Ct. at 2177. In *Edmonds v. Compagnie Generale Transatlantique, supra*, the Court, after deciding that the 1972 Amendments to the LWHCA did not preempt the existing rule that prohibits proportionate liability, concluded that the Amendments did preclude the Court from fashioning a new rule that would reduce a vessel's liability to a longshoreman to reflect concurrent negligence of third parties. Similarly, in *Bloomer v. Liberty Mutual Insurance Co.,* 445 U.S. 74, 100 S. Ct. 925, 63 L. Ed. 2d 215 (1980), the Court declined to fashion a new rule permitting a longshoreman to pass on to the employing stevedore a portion of the legal fee incurred by the longshoreman in his suit against the vessel; again the 1972 Amendments to the LHWCA were thought to preclude authority to initiate such a rule. In *Mobil Oil Corp. v. Higginbotham, supra*, the Court concluded that maritime law could not add loss of society to the statutory damages specified by DOHSA for wrongful death on the high seas. "When (Congress) does speak directly to a question, the courts are not free to "supplement' Congress' answer so thoroughly that the Act becomes meaningless." 436 U.S. at 625, 98 S. Ct. at 2015. It was this "speak directly to a question" standard, expressed in an admiralty case, that the Court enlisted in City of Milwaukee to find that the FWPCA preempted the federal common law of interstate water pollution. 101 S. Ct. at 1791. These cases suggest that a presumption of legislative preemption applies to judge-made maritime law, though less forcefully than it applies to non-maritime federal common law.

We also think it reasonable to conclude that the force of the presumption of preemption is somewhat reduced when the judge-made law arguably preempted by a new statute is a remedy fashioned by admiralty or common law courts in aid of a preexisting statute. The presumption thus will have less force in this case when we proceed to consider whether the FWPCA preempts the judge-made maritime remedy entitling the Government to collect cleanup costs for violations of the Refuse Act. The presumption still retains more force than it would have if the issue were whether the FWPCA impliedly repeals any of the substantive provisions of the Refuse Act, for repeals of statutes by implication are disfavored. *Radzanower v. Touche Ross & Co.,* 426 U.S. 148, 154, 96 S. Ct. 1989, 1993, 48 L. Ed. 2d 540 *(1976)*; *United States v. United Continental Tuna Corp.,* 425 U.S. 164, 168, 96 S. Ct. 1319, 1322, 47 L. Ed. 2d 653 (1976). On the other hand, the presumption of preemption does not apply as forcefully as it would apply, after City of Milwaukee, to bodies of federal common law, such as public nuisance arising from interstate water pollution, that are related to generalized federal interests, rather than to specific federal statutes. Judicially created remedies in aid of statutes like the Refuse Act fall somewhere between the federal common law of nuisance and the specific commands of the Refuse Act in their resistance to implied preemption by the FWPCA.

Ultimately determining whether non-statutory maritime law, as to both liabilities and remedies, survives enactment of a statute requires a careful analysis of several factors that the Supreme Court has considered relevant in assessing whether the presumption of preemption has been overcome. Any terms of the statute explicitly preserving or preempting judge-made law are of course controlling, as is clear evidence of Congressional intent to achieve such results. In the absence of clearly expressed legislative intent, legislative history may provide useful guidance. The "scope of the legislation" must be assessed. *City of Milwaukee v. Illinois, supra,* 101 S. Ct. at 1791 n.8. A judgment must be made whether applying judge-made law would entail "filling a gap left by Congress' silence" or "rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham, supra,* 436 U.S. at 625, 98 S. Ct. at 2015. The detail and comprehensiveness of a statute will frequently aid this determination. Finally, Congress is less likely to have intended preemption of "long-established and familiar principles" of "the common law or the general maritime law." *Isbrandtsen*

Co. v. Johnson, 343 U.S. 779, 783, 72 S. Ct. 1011, 1014, 96 L. Ed. 1294 (1952), quoted in *Edmonds v. Compagnie Generale Transatlantique, supra,* 443 U.S. at 263, 99 S. Ct. at 2758. See also *Robert C. Herd & Co. v. Krawill Machinery Corp., supra,* 359 U.S. at 303-05, 79 S. Ct. at 770-71, *The Kensington, supra,* 183 U.S. at 268-69, 22 S. Ct. at 104. In sum, we recognize, as City of Milwaukee instructs, that the doctrine of separation of powers creates a presumption that legislation preempts the role of federal judges in developing and applying federal common law, but we also recognize that it is not a simple task to determine the force and proper application of this presumption. With these principles in mind, we turn to the impact of the FWPCA upon the Government's non-FWPCA theories of recovery.

Without any doubt the FWPCA legislates on the subject of recovery by the United States of its costs of cleaning up oil spilled into American waters. Section 1321(f) establishes a comprehensive remedial scheme providing for both strict liability up to specified limits and recovery of full costs upon proof of willful negligence or willful misconduct within the privity and knowledge of the owner. We must therefore start with a presumption that non-FWPCA maritime liabilities and remedies for oil spill cleanup costs of the United States have been preempted.

This presumption is not rebutted by the language of FWPCA. The remedies created by § 1321(f)(1) are established "notwithstanding any other provisions of law." While various meanings can be drawn from this phrase, see *United States v. Dixie Carriers, Inc.,* 627 F.2d 736, 739 (5th Cir. 1980); *Tug Ocean Prince, Inc. v. United States,* 584 F.2d 1151, 1162 (2d Cir. 1978), *cert. denied*, 440 U.S. 959, 99 S. Ct. 1499, 59 L. Ed. 2d 772 (1979); Note, Oil Spills, *supra*, 93 Harv. L. Rev. at 1772-73, we think it means that the remedies established by the FWPCA are not to be modified by any preexisting law. The main objective apparently was to assure that the limits on recoveries established by § 1321(f) are not to be varied by the different limits established by the Limitation Act. See *In re Hokkaido Fisheries Co.,* 506 F. Supp. 631, 633-34 (D. Alaska 1981); G. Gilmore & C. Black, The Law of Admiralty 828 (2d ed. 1975). The "notwithstanding" phrase is not a preservation of preexisting bases of recovery. ***

Arguably of more significance is § 1321(h)(2), which preserves the Government's rights against "any third party whose actions may in any way have caused or contributed to" an oil spill. See *United States v. Redwood City,* 640 F.2d 963, 969-70 (9th Cir. 1981); *Burgess v. M/V Tamano,* 564 F.2d 964, 983 (1st Cir. 1977), *cert. denied*, 435 U.S. 941, 98 S. Ct. 1520, 55 L. Ed. 2d 537 (1978); *United States v. Bear Marine Services,* 509 F. Supp. 710 (E.D.La.1980), [*vacated and remanded*, 696 F.2d 1117 (5th Cir. 1983)]. This clause does not directly aid the Government's claim because cleanup costs are sought in this case from the discharging vessel's owner, and not from a third party. Nevertheless the existence of subsection (h) lends some support to the Government's position. It would be anomalous, the Government contends, for Congress to preserve non-FWPCA remedies against third parties (including vessels) if it had intended to abolish such remedies against discharging vessels and their owners. But even if the Government is correct that subsection (h) preserves all non-FWPCA remedies against all third parties, it would be even more anomalous for Congress to have drafted express language to preserve such remedies against third parties while leaving the preservation of such remedies against ship owners to be inferred by courts. Once Congress legislates comprehensively on the subject of Government remedies for oil spill cleanup costs, the responsibility lies with Congress to spell out expressly what, if any, role remains for courts to fashion and apply non-statutory remedies. None of the savings clauses of the Act preserves the non-statutory remedies the Government is asserting in this case. ***

An analysis of each of the Government's three non-FWPCA theories of recovery indicates that the other factors that we have identified as relevant to an assessment of whether the presumption of preemption has been overcome are likewise of no help to the Government's position. These other factors include the scope of the preempting legislation, its detail and comprehensiveness, whether the judge-made law is filling a gap in legislation or effectively rewriting the statute, and how well established the judge-made law was at the time of the statute's passage.

With respect to the Government's maritime nuisance tort theory, the Supreme Court has ruled in City of Milwaukee and National Sea Clammers that the comprehensive provisions of the FWPCA regarding effluent discharges preempt the public nuisance ingredient of this approach, at least in the context of non-maritime federal common law. We see no reason why the "often vague and indeterminate nuisance concepts," *City of Milwaukee, supra*, 101 S. Ct. at 1792, to whatever extent imported into maritime law, should survive the comprehensive and detailed provisions of the FWPCA regarding Government recovery of oil spill cleanup costs. The contours of a federal common law of public nuisance are unsettled, and the recognition of such concepts within maritime law is of recent vintage. *See Burgess v. M/V Tamano,* 370 F. Supp. 247 (D.Me.1973).

To whatever extent judge-made remedies for violation of the Refuse Act include recovery for cleanup costs based on strict liability, such remedies would be plainly inconsistent with the FWPCA, because the strict liability remedy of the FWPCA is subject to dollar limitations, while recovery of damages under the Rivers and Harbors Act of 1899, when permitted at all, is not subject to the limits of the *Limitation Act, University of Texas Medical Branch v. United States,* 557 F.2d 438 (5th Cir. 1977), *cert. denied*, 439 U.S. 820, 99 S. Ct. 84, 58 L. Ed. 2d 111 (1978); *In re Chinese Maritime Trust, Ltd.,* 478 F.2d 1357 (2d Cir. 1973), *cert. denied*, 414 U.S. 1143, 94 S. Ct. 894, 39 L. Ed. 2d 98 (1974). Allowing the Government a judge-made damage remedy without limits in strict liability under the Refuse Act would amount to "rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp., supra.*

Whether the presumption of preemption of non-FWPCA liabilities and remedies based on negligence has been overcome requires further analysis. If the FWPCA means what it says in permitting recovery of full cleanup costs upon proof of "willful negligence or willful misconduct" within the knowledge and privity of the owner, such a remedy would be inconsistent with a maritime negligence remedy, since the latter would avoid the limits of the Limitation Act simply upon proof of ordinary negligence within the privity or knowledge of the owner. While alternative remedies with dissimilar characteristics can sometimes coexist side by side, when two remedies differ on such an essential element of a cause of action as the degree of negligence that must be demonstrated in order to permit unlimited recovery, the remedies become inconsistent. To permit a judge-made remedy so significantly different from the one Congress has expressly provided would amount to rewriting the rule that Congress has enacted. On the other hand, if, as the Government contends, the reference in § 1321(f) to "willful negligence or willful misconduct" is only an inartistic way of expressing ordinary negligence, then Congress has, for no apparent reason, created an FWPCA negligence remedy for full costs to stand alongside a similar maritime tort remedy.

Whatever degree of negligence applies to a claim for full costs under § 1321(f), a holding against preemption would result in a four-tiered scheme of liabilities: strict liability under the FWPCA up to FWPCA limits, common law liability for negligence not within the knowledge or privity of the owner up to Limitation Act limits, common law liability for negligence within the knowledge or privity of the owner without limits (because the Limitation Act would not apply), and FWPCA liability for "willful negligence or willful misconduct" within the privity and knowledge of the owner (because the FWPCA limits would not apply). The FWPCA would be the basis for recovery on the two ends of the spectrum of recoveries, but judge-made law would be the basis for the two means of recovery in the middle. A statute would have to specify such an unwieldy scheme with express provisions before a court could assume that it may continue to administer the common law components of such an arrangement. Without such an express provision, judge-made remedies falling within the scope of the remedies provided by the statute are preempted, at least in the context of a statute as comprehensive as § 1321.

For all these reasons, we agree with those courts that have ruled, even prior to City of Milwaukee, that § 1321(f) has preempted the Government's non-FWPCA remedies against a discharging vessel for cleanup costs. *See, e.g.*, *United States v. Dixie Carriers, Inc., supra*; *Steuart Transportation Co. v. Allied Towing Corp., supra*; United States v. Tug J. P. McAllister, Civ. No. 76-462 (D.P.R. Apr. 3, 1980). *See also Tug Ocean Prince, Inc. v. United States, supra,* 584 F.2d at 1162.

2. The Claim for Cleanup of Canadian Waters

The Canadian portion of the United States' claim concerns only the costs of cleaning up oil from Canadian waters. The United States seeks to recover the money it reimbursed Canada for cleanup costs that Canada incurred. We disagree with the District Court that this portion of the Government's claim has been preempted by the FWPCA and reverse the Court's denial of the Government's motion to amend its complaint to amplify the reimbursement claim.

The FWPCA explicitly limits its coverage to Government recovery of costs for the cleanup of American territorial waters. 33 U.S.C. § 1321(b)(1) (1976) declares that "it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone," § 1321(b)(3) prohibits "(t)he discharge of oil ... into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone," and § 1321(c)(1) authorizes the President to act to remove oil discharged "into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone." The broader purpose of the FWPCA in its entirety is "to restore and maintain the chemical, physical, and biological integrity of the Nations's waters." *Id.* § 1251(a). ***

While a statute might have a preemptive effect upon some matters outside its coverage, the preemption analysis we have discussed leaves no possibility that the FWPCA has any effect on claims for cleaning the territorial waters of foreign countries. The FWPCA does not "speak to" the problem of polluting foreign waters, and therefore no presumption of preemption arises. When an entire subject is outside the scope of a statute, liabilities and remedies concerning that subject remain in force unless the statute unmistakably evidences Congressional intention to alter them. It cannot be said that Congress, in creating specific remedies for cleanup of oil from American waters, affirmatively legislated to preclude remedies concerning foreign waters. Obviously the FWPCA does not purport to affect Canada's rights to sue a vessel discharging into American waters oil that pollutes Canadian waters. And we find nothing in the statute to suggest that Congress intended to alter any rights the United States may have to collect money reimbursed to Canada for Canada's costs, whether the claim of the United States for reimbursement is derived from treaty obligations, subrogation, or otherwise. In rejecting the contention that the reimbursement claim is preempted by the FWPCA, we express no views on whether the United States is entitled to reimbursement, nor whether public nuisance or more traditional maritime tort law or treaty rights provide a basis for Oswego's liability.

United States v. M/V Big Sam, 681 F.2d 432 (5th Cir. 1982)

Tate, Circuit Judge:

The United States appeals from the dismissal of its suit against the Motor Vessel BIG SAM and its owner to recover oil spill cleanup costs. It is conceded that the sole fault of the accident was the negligent operation of the BIG SAM, which struck a tanker barge and caused the discharge of substantial quantities of oil. The district court held that liability for the cleanup costs was exclusively governed by section 311(g) of the Federal Water Pollution Control Act ("the Act"), 33 U.S.C. § 1321(g), and that under this section the sole party responsible was the insolvent bareboat charterer of the BIG SAM.

We reverse, holding (1) that both owner and charterer of the sole-fault, non-discharging vessel are liable under § 1321(g), (2) that this statutory section does not exclude an in rem remedy, and (3) that any maritime tort remedy of the United States against the negligent vessel is not pre-empted by § 1321(g), in view of the express provision of 33 U.S.C. § 1321(h)(2) that the liabilities established by the Act "shall in no way affect any rights which ... the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance."

Factual Context of the Issues

The case originated out of a collision in the Mississippi River between the M/V BIG SAM and the T/B BUTANE, April 25, 1975, which resulted in hull damages to and oil spill from the BUTANE. The BIG SAM is a twin screw towboat, 155 gross tons, which at the time of the collision was owned by Zito Towing, Inc. and bareboat chartered by Tri-Capt, Inc. Due to negligent navigation and an inexperienced pilot, the BIG SAM collided with the tank barge BUTANE, owned and operated by Delta Barge Line. The collision caused 280,000 gallons of oil to be discharged from the BUTANE. Delta Barge Line immediately began cleanup operations. After spending over $ 50,000 in cleaning up and protecting water intakes, Delta turned the operation over to the U. S. Coast Guard, which spent almost $ 300,000 more to finish cleaning up the spill.

The United States brought this suit against the BIG SAM (in rem), Zito (its owner), and Tri-Capt (the vessel's bareboat charterer), alleging causes of action based upon (a) § 1321(g) of the Act, (b) the Refuse Act, 33 U.S.C. § 407, and (c) general negligence (maritime tort law), to recover its cleanup costs. The findings in litigation between the private parties were stipulated, under which the sole cause of the collision was the negligence of the BIG SAM, the non-discharging third-party vessel. The district court held that liability was determined exclusively by § 1321(g); that under that section no in rem remedy against the vessel was recognized; and that under § 1321(g) Tri-Capt, the bareboat charterer (by now insolvent), was solely at fault and that it alone was thus liable in the amount of $ 15,500, the limit of liability under the circumstances as provided by § 1321(g). ***

The Statutory Scheme ***

The Act, 33 U.S.C. §§ 1251-1376, was originally enacted as the Water Quality Improvement Act of 1970, Pub.L.No.91-224, with relevant provisions reenacted as part of the Federal Water Pollution Control Act Amendments of 1972. The Act prohibits the discharge of oil into the navigable waters of the United States, 33 U.S.C. § 1321(b)(1). The government is authorized to clean up any oil spill not properly removed by the discharger, 33 U.S.C. § 1321(c)(1), including the emergency power to remove, and if necessary destroy, the discharging vessel, 33 U.S.C. § 1321(d).

The Act imposes liability for cleanup costs on "dischargers," and cleanup costs incurred by the government are recoverable under § 1321(f)(1), (2), (3) from the discharging vessel or facility. If, however (as here), the sole cause of the accident is the act or omission of a third party, the government is permitted to recover its cleanup costs from such sole-cause third-party. § 1321(g). The Act also expressly provides that the liabilities thereby provided "shall in no way affect any rights" that a discharging vessel or facility, or the United States, may have against any third party whose acts "may in any way have caused or contributed to the discharge." § 1321(h) (emphasis supplied).

A primary issue of this appeal is the interrelationship between subsections (f), (g), and (h), with regard to the liability of a sole-cause non-discharging vessel. ***

Subsection (f) imposes a strict liability standard under which the United States may recover from a discharger its cleanup costs up to stated limits without a showing of fault. The discharger may, however, escape this strict liability if he shows that the discharge was caused solely by an act of God, an act of war, negligence on the part of the United States-or an act or omission of a third party. On the other hand, if the United States proves that the discharge "was the result of willful negligence or willful misconduct within the privity and knowledge of the owner," the owner is liable to the United States for the full amount of the cleanup costs.

Subsection (g) comes into play when the discharger proves that the discharge "was caused solely by an act or omission" of a third party "without regard to whether such act or omission was or was not negligent." If the discharger can so prove, then the third party is liable for cleanup costs up to stated limits (a strict liability, without fault)-in the case of a vessel, as of 1975 the statutory liability of the "owner or operator ... shall not exceed $ 100 per gross ton of such vessel or $ 14,000,000, whichever is the lesser." However, if the United States can prove that the discharge was "the result of willful negligence or willful misconduct within the privity and knowledge of such third party," then the United States may recover from the third party for the full amount of its cleanup costs. Subsection (g) . . . does not expressly recognize an in rem remedy for cleanup costs as a maritime lien, as does subsection (f)(1) . . . with respect to the discharging vessel.

Subsection (h) relates only to third parties whose acts "in any way" caused or contributed to the discharge. It provides that the liabilities established by the Act "shall in no way affect any rights" against such third party that either the discharging vessel-facility or the United States may have.

Subsection (g), third-party liability.

The principal issue raised with regard to third-party liability is whether subsection (g) provides the exclusive remedy for the government's recovery of oil-spill cleanup costs. Before reaching that issue, however, we will first decide two subsidiary issues of statutory interpretation with regard to that subsection's imposition of strict (no fault) liability upon a third-party vessel whose act or omission was the sole cause of a discharge: (1) whether the Act contemplated that either the owner of the non-discharging vessel or the operator (the bareboat charterer) shall be so liable, or whether instead the statutory terms contemplate joint and several liability; and (2) whether subsection (g)'s silence as to an in rem remedy against a non-discharging third-party vessel, precludes an admiralty court from affording one to the government? No decision cited to us has touched upon these issues other than the opinion of the district court in the present case.

(1) Liability of "owner or operator": Subsection (g), which emerged from the 1970 Congressional conference committee without explanation, speaks in terms of the liability of the "owner or operator" of the non-discharging third-party vessel. Noting that this liability is expressed in the disjunctive, the able district court interpreted it as "giving a choice of parties, depending on the existing facts." 505 F. Supp. at 1033. Finding that under the existing facts the only third-party whose act or omission caused the discharge was Tri-Capt (the bareboat charterer, in exclusive control of the vessel), the district court held that within the meaning of the statute that Tri-Capt was the only third party whose act or omission had caused the accident.

In our opinion, the conclusion by the district court errs in regarding the term "owner and operator of a vessel" as disjunctively differentiating liability. This interpretation overlooks that the term "owner and operator" is a term of art in the statute that, as specifically defined therein, means "any person owning, operating, or chartering by demise" the vessel in question. 33 U.S.C. § 1321(a)(6). ***

Section 1321(p) of the Act requires each vessel to maintain evidence of financial responsibility to meet the liability to which it could be subjected under § 1321. Zito, the owner of the BIG SAM, argues that 46 C.F.R. § 542.4(a), the federal regulation implementing § 1321(p), now prevents the non-operating owner from applying for a certificate of financial responsibility and, therefore, from protecting its interest against oil pollution liability. Although an applicant for such a certificate can establish evidence of financial responsibility in several ways, one of which is with insurance, 46 C.F.R. § 542.8, nevertheless, while the regulation does not require the owner to secure vessel insurance, neither does it prohibit him from doing so. If the owner is assured that the operator has in fact secured such insurance, a matter of course allocable by contractual responsibility, then obviously it need not do so.

We therefore find that the liability of the owner and the operator under subsection (g) is not alternative but is instead joint and several.

(2) In rem remedy against the non-discharging vessel : In disallowing an in rem remedy, the district court persuasively noted: (a) while an in rem remedy is expressly recognized against the discharging vessel by subsection (f), subsection (g) is silent as to the availability of such a remedy against (as here) the non-discharging third-party vessel; (b) that, due to the exclusive remedy provided by the Act (a holding we disapprove below), no independent maritime tort has been created that would give rise to a maritime lien. 505 F. Supp. at 1031-32.

As to (a), we should first note that the inclusion of in rem language in subsection (f) is indicated by the conference report as clarifying the existence of the remedy, not as creating it. If the omission of similar clarifying language in subsection (g) was deliberate, the explanation well might be that in subsection (h)(2) (see note 7) the rights of the United States were expressly in no way affected as against any third party causing or contributing to the discharge. We are unable to find any Congressional intent in subsection (g) that no in rem remedy should be allowed as against a third-party non-discharging vessel that caused or contributed to the discharge.

As to (b), the decision of the issue under the present facts is clear. The sole fault of the accident causing the oil spill was the negligence of the BIG SAM. Under the Act, the United States may be responsible for removing the substance from the navigable waters unless it is determined that the removal will be done properly by the discharger. 33 U.S.C. § 1321(c), (d). As stated in this context, "negligent conduct causing loss to others constitutes a traditional maritime tort." *Matter of Oswego Barge Corp.,* 664 F.2d 327, 334 (2d Cir. 1981). "(T)he federal courts have held that oil pollution is a tort under general maritime law." Comment, Federal Water Pollution Control Act, 53 Tul.L.Rev. 1421, 1422 (1979). "Oil pollution in navigable waters has been deemed a tort for which the United States is entitled damages." *United States v. City of Redwood City,* 640 F.2d 963, 969-70 (9th Cir. 1981). See also *Commonwealth of Puerto Rico v. SS Zoe Colocotroni,* 628 F.2d 652, 672 (1st Cir. 1980).

Thus, even if subsection (g) of the Act provides an exclusive remedy (which below we hold it does not), the damages caused to the United States (its cleanup costs)-even if (as we below reject) subject to the liability limits of the Act-result from a maritime tort, at least when caused by the negligence of a non-discharging vessel on the navigable waters.

A maritime lien, necessary as a prerequisite for the in rem action, Gilmore & Black, The Law of Admiralty, § 1-12 at 35, § 9-19 at 622 (2 ed. 1975), may arise out of a tort claim against a vessel, id., § 9-2, at 587-89. 2 Benedict, Admiralty, § 11 at 1-58-1-59 (7th ed. 1981). Suit may be brought against the vessel in rem in the proceeding to enforce the lien. Gilmore & Black, supra, § 9-3 at 589-90. Tort liens may arise against a vessel even when it is under the control of persons neither the owner nor the owner's agents, including that of a bareboat charterer. *The Barnstable*, 181 U.S. 464, 21 S. Ct. 684, 45 L. Ed. 954 (1901); *The China v. Walsh,* 74 U.S. (7 Wall.) 53, 19 L. Ed. 67, 73 (1868); *see also Baker v. Raymond Intern., Inc.,* 656 F.2d 173, 183-84 (5th Cir. 1981); *Grigsby v. Coastal Marine Service, Inc.*, 412 F.2d 1011, 1030-31 (5th Cir. 1969), *cert. dismissed*, 396 U.S. 1033, 90 S. Ct. 612, 24 L. *Ed. 2d* 531 (1970).

Thus, the statutory no-fault remedy of limited liability provided by subsection (g) is here grounded also upon the sole negligence of the non-discharging third-party vessel. We see no reason why, at least as to a negligent third-party non-discharging vessel, the United States may not exercise an in rem remedy under the general maritime law to recover oil-pollution cleanup costs incurred as a result of conduct that constitutes a maritime tort, even though subsection (g) might limit the recovery whether or not the sole-cause act or omission was tortious under the present facts. We need not here decide whether the United States likewise has an in rem remedy when the sole-cause act or omission did not constitute negligence. Subsection (g): Exclusive Remedy for Government's Recovery of Oil-Spill Cleanup Costs against Negligent Third-Party Non-Discharging Vessel?

Subsection (f) relates to oil-spill liability of discharging vessels or facilities, and subsection (g) relates to such liability for third parties whose act or omission is the sole cause of the discharge. In virtually identical terms . . . , these subsections provide for (a) a strict (no fault) liability up to stated limits (excusable only by the intervening sole cause of a limited specified nature) and (b) full liability for all such costs if the discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the discharger or third party. By reference to the legislative history, the government persuasively argues that the specification of these two new remedies was not intended to exclude other remedies available for the recovery of damages (costs of cleanup) caused by oil-spill, such as for those through simple negligence (a maritime tort) of a vessel without the owner's privity or knowledge, where the owner's liability is limited to the value of the vessel and its freight, *see* 46 U.S.C. § 183(a).

With regard to subsection (f), relating the liability of a discharging vessel, this argument has been rejected by this and other courts. The appellee vessel and owner strongly argue that similar reasoning requires a similar interpretation of the identical language of subsection (g), relating to the liability of a non-discharging sole-cause third-party vessel. For reasons to be explained, we find that as to third-parties any Congressional intent to provide subsection (g) as an exclusive remedy for the United States is negatived by the express provision of subsection (h)(2) that the liabilities provided by § 1321 "shall in no way affect any rights which ... the United States Government may have against any third party."

Preliminarily, we note the rationale of the decisions that held that subsection (f) was implicitly intended to provide the exclusive remedy against discharging vessels for the government's recovery of its oil-spill cleanup costs. ***

Applying these criteria, we will for reasons stated below find that subsection (g) of the Act did not preempt or exclude a remedy in simple-negligence maritime tort, subject to statutory limitation of liabilities, 46 U.S.C. § 183(a); but that it did exclude any potential remedy of the United States under the Refuse Act against the third party non-discharging vessel.

Subsection (h)(2): Express Preservation of Judge-Made Maritime Tort Remedy to Recover Damages Caused by Oil Spill?

As noted in Oswego Barge, "any terms of the statute explicitly preserving or preempting judge-made law are of course controlling." 664 F.2d at 339. Although no such preservation is evidenced by the statutory language with regard to the liability of dischargers to the United States, subsection (h)(2) unequivocably states that "(t)he liabilities established by this section (1321) shall in no way affect any rights which . . . the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance." The legislative history of this provision, which first appeared in the 1970 predecessor provisions of the Act that establishes the present statutory scheme for recovery of oil-spill cleanup costs, affords no reason not to read this statute according to its unambiguous expression. Thus, as against third parties causing or contributing to an oil spill, the United States may assert other causes of action than those established by subsection (g), or at least any others that are not inconsistent with the remedies thereby provided.

If the BIG SAM's negligence was a concurring instead of sole cause of the accident, no statutory provision of the Act applies to prevent the government's recovery of the non-discharging vessel's apportioned share of the oil-spill cleanup-cost damage occasioned by its contributing negligence. *United States v. City of Redwood City,* 640 F.2d 963, 969-70 (9th Cir. 1981). We can see no functional reason, nor does the legislative history afford any suggestion of such a purpose, that the government's remedy against the negligent third party vessel should be less because that negligence was the sole instead of merely a contributing cause of the accident.

The government here asserts two causes of action beyond those provided by subsection (g): (1) a maritime tort action, based upon the negligence of the BIG SAM, and (2) an alleged implied action for violation of the Refuse Act. We now turn to these two causes of action alleged:

(1) Maritime Tort: As we previously noted, under traditional maritime principles, negligent conduct on the navigable waters that causes loss to another constitutes a maritime tort. *See*, *e.g*., *Oswego Barge, supra,* 664 F.2d at 334, 343-44. "Oil pollution in navigable waters has been deemed a tort for which the United States is entitled damages." *United States v. City of Redwood City,* 640 F.2d 963, 969-70 (9th Cir. 1981). Even prior to the enactment of the 1970 predecessor of the present Act, at least one federal district court had recognized a cause of action in maritime tort in favor of a state government for damages caused by an oil discharge into the state territorial waters. *State of California, etc. v. S.S. Bournemouth,* 307 F. Supp. 922, 926-28 (C.C.Cal.1969). We have little doubt that, even prior to the 1970 enactment, had the United States brought an action to recover damages by way of cleanup costs, recovery would have been allowable under maritime law for a maritime tort. *See* Comment, *supra*, 53 Tul.L.Rev. at 1422-23; Note, *supra*, 93 Harv. L. Rev. at 1770-72.

Before us, the government only raises the issue of whether, by virtue of subsection (h)(2)"s express preservation, it is permitted to assert its cause of action in maritime tort against the BIG SAM and its owner, to recover damages to the government (the oil-spill cleanup costs) caused solely by the BIG SAM's negligence, under circumstances where the conduct occurred without the privity or knowledge of the owner-so that the owner is entitled to the limitation of personal liability provided by 46 U.S.C. § 183(a) of no more than the value of the vessel and its freight. We have little hesitation in declaring that such a remedy is not inconsistent with the remedy provided by subsection (g). *See United States v. City of Redwood City,* 640 F.2d 963, 970 (9th Cir. 1981). The allowance of the remedy thereby permitted does not thwart any Congressional purpose of the Act to protect vessel owners from potentially crushing liability and from an uninsurable risk, since the vessel is so liable and insurable to those limits against recovery of damages caused by maritime torts, whether the present one or others.

We expressly do not reach two issues, unnecessary for us to decide under present facts: (1) whether a maritime tort not subject to the limitation of liability because of the owner's knowledge or privity would be inconsistent with the remedy provided by the Act for willful conduct or willful negligence; and (2) whether the maritime tort remedy provides a recovery that is cumulative to or concurrent with the remedy provided by subsection (g).

(2) The Refuse Act: Section 13 of the Rivers and Harbors Act, 33 U.S.C. § 407 (commonly referred to as the "Refuse Act") prohibits the discharge of "refuse

matter" (which has judicially been interpreted to include oil) from any vessel into the navigable waters of the United States. The United States argues that a civil remedy action is implied by that statute, and it seeks recovery on that basis also. With regard to the remedy against the discharger, the courts have consistently held that any Refuse Act remedy for cleanup damages is inconsistent with the remedy against the discharger provided by the subsection (f) and is therefore preempted by that latter statute. *Oswego Barge, supra,* 664 F.2d at 343; *Dixie Carriers, supra,* 627 F.2d at 740. The essential reasoning is that any such strict liability remedy held to be implied by the Refuse Act, would provide recovery of damages without limitation, while subsection (f) in providing strict (no fault) liability provides for specified limits.

For identical reasons, we affirm the district court's conclusion that subsection (g), providing for strict liability in limited amount against a faultless third-party causing the accident, is inconsistent with the no-limitation strict liability remedy to be implied from the Refuse Act.

Conclusion

Accordingly, we AFFIRM the district court's dismissal of the United States claim insofar as based upon the Refuse Act; but we REVERSE the dismissal of the government's maritime tort claim and the district court's disallowance of an in rem remedy for the subsection (g) cleanup-cost damages resulting from the BIG SAM's negligence. ***

***Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008)**

Justice Souter delivered the opinion of the Court.

There are three questions of maritime law before us: whether a shipowner may be liable for punitive damages without acquiescence in the actions causing harm, whether punitive damages have been barred implicitly by federal statutory law making no provision for them, and whether the award of $ 2.5 billion in this case is greater than maritime law should allow in the circumstances. We are equally divided on the owner's derivative liability, and hold that the federal statutory law does not bar a punitive award on top of damages for economic loss, but that the award here should be limited to an amount equal to compensatory damages.

I.

On March 24, 1989, the supertanker *Exxon Valdez* grounded on Bligh Reef off the Alaskan coast, fracturing its hull and spilling millions of gallons of crude oil into Prince William Sound. The owner, petitioner Exxon Shipping Co. (now SeaRiver Maritime, Inc.), and its owner, petitioner Exxon Mobil Corp. (collectively, Exxon), have settled state and federal claims for environmental damage, with payments exceeding $ 1 billion, and this action by respondent Baker and others, including commercial fishermen and native Alaskans, was brought for economic losses to individuals dependent on Prince William Sound for their livelihoods.

A

The tanker was over 900 feet long and was used by Exxon to carry crude oil from the end of the Trans-Alaska Pipeline in Valdez, Alaska, to the lower 48 States. On the night of the spill it was carrying 53 million gallons of crude oil, or over a million barrels. Its captain was one Joseph Hazelwood, who had completed a 28-day alcohol treatment program while employed by Exxon, as his superiors knew, but dropped out of a prescribed followup program and stopped going to Alcoholics Anonymous meetings. According to the District Court, "[t]here was evidence presented to the jury that after Hazelwood was released from [residential treatment], he drank in bars, parking lots, apartments, airports, airplanes, restaurants, hotels, at various ports, and aboard Exxon tankers." . . . Witnesses testified that before the *Valdez* left port on the night of the disaster, Hazelwood downed at least five double vodkas in the waterfront bars of Valdez, an intake of about 15 ounces of 80-proof alcohol, enough "that a non-alcoholic would have passed out." 270 F.3d at 1236.

The ship sailed at 9:12 pm. on March 23, 1989, guided by a state-licensed pilot for the first leg out, through the Valdez Narrows. At 11:20 pm., Hazelwood took active control and, owing to poor conditions in the outbound shipping lane, radioed the Coast Guard for permission to move east across the inbound lane to a less icy path. Under the conditions, this was a standard move, which the last outbound tanker had also taken, and the Coast Guard cleared the *Valdez* to cross the inbound lane. The tanker accordingly steered east toward clearer waters, but the move put it in the path of an underwater reef off Bligh Island, thus requiring a turn back west into the shipping lane around Busby Light, north of the reef.

Two minutes before the required turn, however, Hazelwood left the bridge and went down to his cabin in order, he said, to do paperwork. This decision was inexplicable. There was expert testimony that, even if their presence is not strictly necessary, captains simply do not quit the bridge during maneuvers like this, and no paperwork could have justified it. And in fact the evidence was that Hazelwood's presence was required, both because there should have been two officers on the bridge at all times and his departure left only one, and because he was the only person on the entire ship licensed to navigate this part of Prince William Sound. To make matters worse, before going below Hazelwood put the tanker on autopilot, speeding it up, making the turn trickier, and any mistake harder to correct.

As Hazelwood left, he instructed the remaining officer, third mate Joseph Cousins, to move the tanker back into the shipping lane once it came abeam of Busby Light. Cousins, unlicensed to navigate in those waters, was left alone with helmsman Robert Kagan, a nonofficer. For reasons that remain a mystery, they failed to make the turn at Busby Light, and a later emergency maneuver attempted by Cousins came too late. The tanker ran aground on Bligh Reef, tearing the hull open and spilling 11 million gallons of crude oil into Prince William Sound. ***

In the aftermath of the disaster, Exxon spent around $ 2.1 billion in cleanup efforts. The United States charged the company with criminal violations of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1); the Refuse Act of 1899, 33 U.S.C. §§ 407 and 411; the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a); the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1); and the Dangerous Cargo Act, 46 U.S.C. § 3718(b). Exxon pleaded guilty to violations of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act and agreed to pay a $ 150 million fine, later reduced to $ 25 million plus restitution of $ 100 million. A civil action by the United States and the State of Alaska for environmental harms ended with a consent decree for Exxon to pay at least $ 900 million toward restoring natural resources, and it paid another $ 303 million in voluntary settlements with fishermen, property owners, and other private parties.

B

The remaining civil cases were consolidated into this one against Exxon, Hazelwood, and others. The District Court for the District of Alaska divided the plaintiffs seeking compensatory damages into three classes: commercial fishermen, Native Alaskans, and landowners. At Exxon's behest, the court also certified a mandatory class of all plaintiffs seeking punitive damages, whose number topped 32,000. Respondents here, to whom we will refer as Baker for convenience, are members of that class.

For the purposes of the case, Exxon stipulated to its negligence in the *Valdez* disaster and its ensuing liability for compensatory damages. The court designed the trial accordingly: Phase I considered Exxon and Hazelwood's recklessness and thus their potential for punitive liability; Phase II set compensatory damages for commercial fishermen and Native Alaskans; and Phase III determined the amount of punitive damages for which Hazelwood and Exxon were each liable. (A contemplated Phase IV, setting compensation for still other plaintiffs, was obviated by settlement.)

In Phase I, the jury heard extensive testimony about Hazelwood's alcoholism and his conduct on the night of the spill, as well as conflicting testimony about Exxon officials' knowledge of Hazelwood's backslide. At the close of Phase I, the court instructed the jury in part that

> "[a] corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment. The reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the

> performance of his duties, is held in law to be the reckless act or omission of the corporation." App. K to Pet. for Cert. 301a.

The court went on that "[a]n employee of a corporation is employed in a managerial capacity if the employee supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business." *Ibid*. Exxon did not dispute that Hazelwood was a managerial employee under this definition, see App. G, *Id*. at 264a, n 8, and the jury found both Hazelwood and Exxon reckless and thus potentially liable for punitive damages, App. L, *Id*. at 303a.

In Phase II, the jury awarded $ 287 million in compensatory damages to the commercial fishermen. After the court deducted released claims, settlements, and other payments, the balance outstanding was $ 19,590,257. Meanwhile, most of the Native Alaskan class had settled their compensatory claims for $ 20 million, and those who opted out of that settlement ultimately settled for a total of around $ 2.6 million.

In Phase III, the jury heard about Exxon's management's acts and omissions arguably relevant to the spill. . . . The jury awarded $ 5,000 in punitive damages against Hazelwood and $ 5 billion against Exxon.

On appeal, the Court of Appeals for the Ninth Circuit upheld the Phase I jury instruction on corporate liability for acts of managerial agents under Circuit precedent. *See In re Exxon Valdez,* 270 F.3d at 1236 (citing *Protectus Alpha Nav. Co. v. North Pacific Grain Growers, Inc.,* 767 F.2d 1379 (CA9 1985)). With respect to the size of the punitive-damages award, however, the Circuit remanded twice for adjustments in light of this Court's due process cases before ultimately itself remitting the award to $ 2.5 billion. *See* 270 F.3d at 1246-1247; 472 F.3d 600, 601, 625 (2006) (per curiam), and 490 F.3d 1066, 1068 (2007).

We granted certiorari to consider whether maritime law allows corporate liability for punitive damages on the basis of the acts of managerial agents, whether the Clean Water Act (CWA), 86 Stat. 816, 33 U.S.C. § 1251 *et seq*. (2000 ed. and Supp. V), forecloses the award of punitive damages in maritime spill cases, and whether the punitive damages awarded against Exxon in this case were excessive as a matter of maritime common law. . . .

II.

On the first question, Exxon says that it was error to instruct the jury that a corporation "is responsible for the reckless acts of . . . employees . . . in a managerial capacity while acting in the scope of their employment." App. K to Pet. for Cert. 301a. The Courts of Appeals have split on this issue, and the company relies primarily on two cases, *The Amiable Nancy*, 16 U.S. 546, 3 Wheat. 546, 4 L. Ed. 456 (1818), and *Lake Shore & Michigan Southern R. Co. v. Prentice,* 147 U.S. 101, 13 S. Ct. 261, 37 L. Ed. 97 (1893), to argue that this Court's precedents are clear that punitive damages are not available against a shipowner for a shipmaster's recklessness. The former was a suit in admiralty against the owners of *The Scourge*, a privateer whose officers and crew boarded and plundered a neutral ship, *The Amiable Nancy*. In upholding an award of compensatory damages, Justice Story observed that,

> "if this were a suit against the original wrong-doers, it might be proper to . . . visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered, that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can *scarcely ever* be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of opinion, that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages." *The Amiable Nancy, supra,* at 558-559, 4 L. Ed. 456 (emphasis in original).

Exxon takes this statement as a rule barring punitive liability against shipowners for actions by underlings not "directed," "countenanced," or "participated in" by the owners.

Exxon further claims that the Court confirmed this rule in *Lake Shore, supra,* a railway case in which the Court relied on *The Amiable Nancy* to announce, as a matter of pre-*Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), general common law, that "[t]hough [a] principal is liable to make compensation for [intentional torts] by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate." 147 U.S., at 110, 13 S. Ct. 261, 37 L. Ed. 97. Because maritime law remains federal common law, and because the Court has never revisited the issue, Exxon argues that *Lake Shore* endures as sound evidence of maritime law. And even if the rule of *Amiable Nancy* and *Lake Shore* does not control, Exxon urges the Court to fall back to a modern-day variant adopted in the context of Title VII of the Civil Rights Act of 1964 in *Kolstad v. American Dental Assn.,* 527 U.S. 526, 544, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1999), that employers are not subject to punitive damages for discriminatory conduct by their managerial employees if they can show that they maintained and enforced good-faith antidiscrimination policies.

Baker supports the Ninth Circuit in upholding the instruction, as it did on the authority of *Protectus Alpha Nav. Co.,* 767 F.2d 1379, which followed the Restatement rule recognizing corporate liability in punitive damages for reckless acts of managerial employees, *see* 4 *Restatement (Second) of Torts* § 909(c) (1977) (hereinafter Restatement). Baker says that *The Amiable Nancy* offers nothing but dictum, because punitive damages were not at issue, and that *Lake Shore* merely rejected company liability for the acts of a railroad conductor, while saying nothing about liability for agents higher up the ladder, like ship captains. He also makes the broader points that the opinion was criticized for failing to reflect the majority rule of its own time, not to mention its conflict with the *respondeat superior* rule in the overwhelming share of land-based jurisdictions today. Baker argues that the maritime rule should conform to modern land-based common law, where a majority of States allow punitive damages for the conduct of any employee, and most others follow the Restatement, imposing liability for managerial agents.

The Court is equally divided on this question, and "[i]f the judges are divided, the reversal cannot be had, for no order can be made." *Durant v. Essex Co.,* 74 U.S. 107, 7 Wall. 107, 112, 19 L. Ed. 154 (1869). We therefore leave the Ninth Circuit's opinion undisturbed in this respect, though it should go without saying that the disposition here is not precedential on the derivative liability question. . . .

III.

Exxon next says that, whatever the availability of maritime punitive damages at common law, the CWA preempts them. Baker responds with both procedural and merits arguments, and although we do not dispose of the issue on procedure, a short foray into its history is worthwhile as a cautionary tale.

At the pretrial stage, the District Court controlled a flood of motions by an order staying them for any purpose except discovery. The court ultimately adopted a case-management plan allowing receipt of seven specific summary judgment motions already scheduled, and requiring a party with additional motions to obtain the court's leave. One of the motions scheduled sought summary judgment for Exxon on the ground that the Trans-Alaska Pipeline Authorization Act, 87 Stat. 584, 43 U.S.C. §§ 1651-1656, displaced maritime common law and foreclosed the availability of punitive damages. The District Court denied the motion.

After the jury returned the Phase III punitive-damages verdict on September 16, 1994, the parties stipulated that all post-trial Federal Rules of Civil Procedure 50 and 59 motions would be filed by September 30, and the court so ordered. App. 1410-1411. Exxon filed 11 of them, including several seeking a new trial or judgment as a matter of law on one ground or another going to the punitive-damages award, all of which were denied along with the rest. On October 23, 1995, almost 13 months after the stipulated motions deadline, Exxon moved for the District Court to suspend the motions stay, App. to Brief in Opposition 28a-29a, to allow it to file a "Motion and Renewed Motion . . . for Judgment on Punitive Damages Claims" under Rules 49(a) and 58(2) and, "to the extent they may be applicable, pursuant to Rules 50(b), 56(b), 56(d), 59(a), and 59(e)," *Id.* at 30a-31a. Exxon's accompanying memorandum asserted that two recent cases, *Glynn v. Roy Al Boat Management Corp.,* 57 F.3d 1495 (CA9 1995), and *Guevara v. Maritime Overseas Corp.,* 59 F.3d 1496 (CA5 1995), suggested that the rule of maritime punitive damages was displaced by federal statutes, including the CWA. On November 2, 1995, the District Court summarily denied Exxon's request to file the motion, App. to Brief in Opposition 35a, and in January 1996 (following the settlement of the Phase IV compensatory claims) the court entered final judgment.

Exxon renewed the CWA preemption argument before the Ninth Circuit. The Court of Appeals recognized that Exxon had raised the CWA argument for the first time 13 months after the Phase III verdict, but decided that the claim "should not be treated as waived," because Exxon had "consistently argued statutory preemption" throughout the litigation, and the question was of "massive . . . significance" given the "ambiguous circumstances" of the case. 270 F.3d at 1229. On the merits, the Circuit held that the CWA did not preempt maritime common law on punitive damages. *Id.* at 1230.

Although we agree with the Ninth Circuit's conclusion, its reasons for reaching it do not hold up. First, the reason the court thought that the CWA issue was not in fact waived was that Exxon had alleged other statutory grounds for preemption from the outset of the trial. But that is not enough. It is true that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992). But this principle stops well short of legitimizing Exxon's untimely motion. If "statutory preemption" were a sufficient claim to give Exxon license to rely on newly cited statutes anytime it wished, a litigant could add new constitutional claims as he went along, simply because he had "consistently argued" that a challenged regulation was unconstitutional. *See id.* at 533, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (rejecting substantive due process claim by takings petitioners who failed to preserve it below); *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277, n. 23, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989) (rejecting due process claim by Eighth Amendment petitioners).

That said, the motion still addressed the Circuit's discretion, to which the "massive" significance of the question and the "ambiguous circumstances" of the case were said to be relevant. 270 F.3d at 1229. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below," *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976), when to deviate from this rule being a matter "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases," *id.* at 121, 96 S. Ct. 2868, 49 L. Ed. 2d 826. We have previously stopped short of stating a general principle to contain appellate courts' discretion, *see ibid.,* and we exercise the same restraint today.

As to the merits, we agree with the Ninth Circuit that Exxon's late-raised CWA claim should fail. There are two ways to construe Exxon's argument that the CWA's penalties for water pollution, *see* 33 U.S.C. § 1321 (2000 ed. and Supp. V), preempt the common law punitive-damages remedies at issue here. The company could be saying that any tort action predicated on an oil spill is preempted unless § 1321 expressly preserves it. Section 1321(b) (2000 ed.) protects "the navigable waters of the United States, adjoining shorelines, . . . [and] natural resources" of the United States, subject to a saving clause reserving "obligations . . . under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil," § 1321(o). Exxon could be arguing that, because the saving clause makes no mention of preserving punitive damages for economic loss, they are preempted. But so, of course, would a number of other categories of damages awards that Exxon did not claim were preempted. If Exxon were correct here, there would be preemption of provisions for compensatory damages for thwarting economic activity or, for that matter, compensatory damages for physical, personal injury from oil spills or other water pollution. But we find it too hard to conclude that a statute expressly geared to protecting "water," "shorelines," and "natural resources" was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals.

Perhaps on account of its overbreadth, Exxon disclaims taking this position, admitting that the CWA does not displace compensatory remedies for consequences of water pollution, even those for economic harms. *See, e.g.,* Reply Brief for Petitioners 15-16. This concession, however, leaves Exxon with the equally untenable claim that the CWA somehow preempts punitive damages, but not compensatory damages, for economic loss. But nothing in the statutory text points to fragmenting the recovery scheme this way, and we have rejected similar attempts to sever remedies from their causes of action. See *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 255-256, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984). All in all, we see no clear indication of congressional intent to occupy the entire field of pollution remedies, see, *e.g., United States v. Texas*, 507 U.S. 529, 534, 113 S. Ct. 1631, 123 L. Ed. 2d 245 (1993)."In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law" (internal quotation marks omitted)); nor for that matter do we perceive that punitive damages for private harms will have any frustrating effect on the CWA remedial scheme, which would point to preemption.

IV.

Finally, Exxon raises an issue of first impression about punitive damages in maritime law, which falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result . . . . In addition to its resistance to derivative liability for punitive damages and its preemption claim already disposed of, Exxon challenges the size of the remaining $2.5 billion punitive damages award.

Other than its preemption argument, it does not offer a legal ground for concluding that maritime law should never award punitive damages, or that none should be awarded in this case, but it does argue that this award exceeds the bounds justified by the punitive-damages goal of deterring reckless (or worse) behavior and the consequently heightened threat of harm. ***

Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute. Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another. Thus, a penalty should be reasonably predictable in its severity, so that even Justice Holmes's "bad man" can look ahead with some ability to know what the stakes are in choosing one course of action or another. *See* The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897). And when the bad man's counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage. Cf. *Koon v. United States,* 518 U.S. 81, 113, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996) (noting the need "to reduce unjustified disparities" in criminal sentencing "and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice"). The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances. ***

There is better evidence of an accepted limit of reasonable civil penalty, however, in several studies mentioned before, showing the median ratio of punitive to compensatory verdicts, reflecting what juries and judges have considered reasonable across many hundreds of punitive awards. *See supra,* at 497-498, and n. 14, 171 L. Ed. 2d, at 589-590. We think it is fair to assume that the greater share of the verdicts studied in these comprehensive collections reflect reasonable judgments about the economic penalties appropriate in their particular cases.

These studies cover cases of the most as well as the least blameworthy conduct triggering punitive liability, from malice and avarice, down to recklessness, and even gross negligence in some jurisdictions. The data put the median ratio for the entire gamut of circumstances at less than 1:1, *see supra,* at 497-498, and n.14, 171 L. Ed. 2d, at 589-590, meaning that the compensatory award exceeds the punitive award in most cases. In a well-functioning system, we would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum (cases like this one, without intentional or malicious conduct, and without behavior driven primarily by desire for gain, for example) and cases (again like this one) without the modest economic harm or odds of detection that have opened the door to higher awards. It also seems fair to suppose that most of the unpredictable outlier cases that call the fairness of the system into question are above the median; in theory a factfinder's deliberation could go awry to produce a very low ratio, but we have no basis to assume that such a case would be more than a sport, and the cases with serious constitutional issues coming to us have naturally been on the high side, *see*, *e.g., State Farm*, 538 U.S., at 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (ratio of 145:1); *Gore*, 517 U.S., at 582, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (ratio of 500:1). On these assumptions, a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped. Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases.

The provision of the CWA respecting daily fines confirms our judgment that anything greater would be excessive here and in cases of this type. Congress set criminal penalties of up to $ 25,000 per day for negligent violations of pollution restrictions, and up to $ 50,000 per day for knowing ones. 33 U.S.C. §§ 1319(c)(1), *(2)*. Discretion to double the penalty for knowing action compares to discretion to double the civil liability on conduct going beyond negligence and meriting punitive treatment. And our explanation of the constitutional upper limit confirms that the 1:1 ratio is not too low. In *State Farm,* we said that a single-digit maximum is appropriate in all but the most exceptional of cases, and "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S., at 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585.

V.

Applying this standard to the present case, we take for granted the District Court's calculation of the total relevant compensatory damages at $ 507.5 million. *See In re Exxon Valdez,* 236 F. Supp. 2d 1043, 1063 (D. Alaska 2002). A punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount. ***

***South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F.3d 58 (1st Cir. 2000)**

Torruella, Chief Judge:

This appeal, which arises out of a February 1997 gasoline spill in Maine's Portland Harbor, requires us to interpret both historic and contemporary maritime law in the United States. On the one hand, appellees present a *Seventh Amendment* argument that involves the state of federal admiralty jurisdiction in the early days of the Constitution. Appellant, on the other hand, raises questions of federal preemption and statutory interpretation in relation to two issues of much current interest: oil spills and punitive damages. Finally, both parties dispute the sufficiency of evidence presented to the jury on various aspects of appellant's alleged damages.

We conclude that the district court's disposition of these issues must be affirmed in part and reversed in part.

I. Factual and Procedural Background

A. The Parties

Appellant South Port Marine, LLC, ("South Port") is a family-owned marina located on a cove in Portland Harbor, Maine. The marina is principally designed to accommodate recreational motor and sailing vessels by allowing them to tie up to floating dock segments that are connected with fixed docks leading to the marina's onshore facilities. The floating dock segments are identical in function and purpose to ordinary fixed docks, but are designed in sections with Styrofoam flotation which allows them to rise and fall with the tides.

In the winter of 1996-1997, South Port's owners planned to dredge the marina and parts of the surrounding cove to allow access by larger boats. The owners also intended to increase the number of slips in the marina from approximately one hundred to closer to one hundred and twenty-five.

Appellee Gulf Oil is a Massachusetts-based petroleum company. It operates a distribution facility on Portland Harbor where, inter alia, petroleum products such as gasoline are pumped into barges for transportation to other ports. Appellee Boston Towing and Transportation operates tug boats and tank barges for the purpose of oil transportation. Gulf Oil was pumping gasoline into a barge owned and operated by Boston Towing at the time of the incident involved in this appeal.

B. The February 5, 1997 Spill

In the early morning hours of February 5, 1997, a Boston Towing tank barge was tied to the Gulf Oil pier in Portland Harbor, while a crew member transferred gasoline from a Gulf onshore storage facility into individual tanks on the barge. The gasoline transfer process required the crew member to monitor the filling of each tank and to manually switch the flow of gasoline to the next empty tank when the prior tank reached its full capacity.

Sometime after 2:00 a.m. in the morning, under severe weather conditions, the crew member assigned to monitor the gas flow left the barge and boarded a nearby tug boat, leaving the gasoline transfer completely unattended. While the crew member was absent, the gasoline overflowed the recipient tank and subsequently overflowed the barge's safety transom, flowing into Portland Harbor. Between 23,000 and 30,000 gallons of gasoline spilled into the water.

A large portion of the spilled gas entered the cove on which South Port Marine is located, and by 8:00 a.m. two to three inches of gasoline floated on the surface of the water at the marina. The Styrofoam flotation of the dock segments began to disintegrate, causing the docks to sink, list, and in many cases, fully submerge. As this happened, a number of electrical posts (at least some of which were apparently awaiting installation) fell off the docks and into the water.

C. Alleged Effects of the Spill on South Port Marine

At trial, South Port alleged damages falling into three general categories: extensive property damage, lost profits, and "other economic losses" including loss of goodwill and business stress. The spill allegedly destroyed between sixty and eighty Styrofoam floats and severely damaged forty-five dock segments. According to South Port, the repair and cleanup of this damage was both costly and, at a critical time in its development, very time-consuming. South Port further alleged that the spill set back its dredging plan an entire year and put the construction of new slips on indefinite hold due to the cash flow crisis caused by the accident and the diversion of South Port's employees from gainful work to cleanup and repair tasks. South Port claimed the economic injury caused by the spill eventually forced it to restructure its debt and threatened its owners' entire investment of almost $1,000,000.

D. Procedural History

On January 14, 1998, South Port filed a complaint in federal district court raising claims under the federal Oil Pollution Act of 1990 ("OPA") and asserting several state common law tort actions. The complaint demanded trial by jury on all claims. Appellants argued that South Port was not entitled to a jury trial because its claims sounded in admiralty. The court initially reserved judgment on that issue and proceeded to try the case before a jury.

On April 7, 1999, the first day of trial, appellees conceded liability under the OPA in response to questioning from the court. However, the court then ruled that South Port's state common law claims (which included strict liability, negligence, private nuisance, and trespass) were barred by Maine law, *see* Me. Rev. Stat. Ann. tit. 38, § 551(2)(D) (West 1999); *see also Portland Pipeline Corp. v. Envtl. Improvement Comm'n*, 307 A.2d 1, 40 (Me. 1973), because South Port failed to bring its state law claims under Maine's Oil Pollution statute, which displaces state common law claims. The court also decided that punitive damages were unavailable under the OPA.

On April 16, 1999, the jury returned a verdict in favor of South Port. The jury awarded South Port $ 181,964 in damages for injury to property, $ 110,000 for lost profits, and $ 300,000 for injury to good will and business stress. After the jury verdict, appellees renewed their motion for judgment as a matter of law, moved for a new trial, and also renewed their challenge to appellant's right to trial by jury.

The district court denied appellees' challenge to the jury trial in an order and opinion issued July 27, 1999. The motions for judgment as a matter of law and for a new trial, however, were granted in part and denied in part by order and opinion issued October 14, 1999. The court held that the evidence presented to the jury was insufficient as a matter of law to support the award of damages for lost profits and other economic loss and reduced the jury's award by $395,000. Ruling in the alternative in case its decision should be overturned on appeal, the court also granted appellees' motion for a new trial unless appellant would agree to a remittitur of $100,000.

Appellant filed this timely appeal challenging the district court's rulings on the availability of punitive damages and sufficiency of the evidence, and appellees have cross-appealed the district court's decision that appellant was entitled to trial by jury. We will address the jury issue first, the punitive damages issue second, and the sufficiency of the evidence arguments last.

II. Law and Application

A. Appellant's Seventh Amendment Right to Trial by Jury

In the district court, appellees moved to strike South Port's jury demand on the basis that the OPA claim was comparable to a claim in admiralty to which the Seventh Amendment's guarantee of trial by jury does not apply. The district court initially reserved judgment on the motion and impaneled a jury with the caveat that the jury's verdict would be merely advisory if the court later determined that appellant had no right to a jury trial. Following trial, on July 27, 1999, the district court ruled that the Seventh Amendment did in fact guarantee South Port a trial by jury on its OPA claim, and entered judgment according to the jury's verdict. Appellees now challenge that determination.

South Port's demand for a jury trial in its complaint bound the district court to Federal Rule of Civil Procedure 39, which required the court to try the case before a jury unless it found that South Port was not entitled to a jury trial under the Constitution or laws of the United States. *See* Fed. R. Civ. P. 39(a). Because the OPA does not create a statutory right to trial by jury, South Port's entitlement to such jury trial must stem, if at all, from the Seventh Amendment to the Constitution, which states, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. Const. amend. VII.

As the Supreme Court has declared,

> Although "the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791," the Seventh Amendment also applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by the courts of equity or admiralty.

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41-42, 106 L. Ed. 2d 26, 109 S. Ct. 2782 (1989). The issue before us, then, is whether South Port's OPA claim is analogous to a cause of action in admiralty in 1791, to which no right to trial by jury would apply, or to a cause of action at law, which carries the Seventh Amendment guarantee. We agree with the district court that in 1791, South Port would have brought its claim for damages to its marina under the common law rather than in admiralty, and we therefore affirm the use of a jury to hear the claim at trial.

The earliest cases from the United States courts on the scope of admiralty jurisdiction applied a "locality" test to determine whether a tort fell under the admiralty or common law jurisdiction. Justice Story, riding the Circuit in 1813, stated his understanding "that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide." *Thomas v. Lane*, 2 Sumn. 1, 23 F. Cas. 957, 960 (C.C.D. Me. 1813). More recently, the Supreme Court summarized the locality test as follows:

> The traditional test for admiralty jurisdiction asked only whether the tort occurred on navigable waters. If it did, admiralty jurisdiction followed; if it did not, admiralty jurisdiction did not exist. This ostensibly simple locality test was complicated by the rule that the injury had to be "wholly" sustained on navigable waters for the tort to be within admiralty. Thus, admiralty courts lacked jurisdiction over, say, a claim following a ship's collision with a pier insofar as it injured the pier, for admiralty law treated the pier as an extension of the land.

Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 531, 130 L. Ed. 2d 1024, 115 S. Ct. 1043 (1995) (citations omitted). As suggested by Grubart, the "location" of a tort sometimes depended on the nature of the injured structure, i.e., whether the structure was considered "an extension of the land." Beginning with *The Plymouth,* 70 U.S. (3 Wall.) 20, 18 L. Ed. 125 (1866), which found no admiralty jurisdiction over damage to a warehouse destroyed in a fire started on board a ship, admiralty jurisdiction "has not been construed to extend to accidents on piers, jetties, bridges, or even ramps and railways running into the sea." *Rodrigue v.*

Aetna Cas. Co., 395 U.S. 352, 23 L. Ed. 2d 360, 89 S. Ct. 1835 (1968*)*. Using this rubric, South Port contends that the injury to its docks would not have fallen within the admiralty jurisdiction of the federal courts in 1791.

Appellees, however, argue that several cases, most notably *The Blackheath,* 195 U.S. 361, 49 L. Ed. 236, 25 S. Ct. 46 (1904), support the opposite conclusion. In The Blackheath, Justice Holmes distinguished The Plymouth and announced the Court's decision that a collision with a beacon would lie in admiralty since it served as a navigational aid. This remained so despite the fact that the structure is "technically land, through a connection at the bottom of the sea," *Id.* at 367.

Appellees have failed to persuade us, however, that The Blackheath or any of the other cases cited in their briefs invalidated the rule established in The Plymouth. In fact, in *Cleveland Terminal & Valley R. Co. v. Cleveland S.S. Co.,* 208 U.S. 316, 52 L. Ed. 508, 28 S. Ct. 414 (1908), the Supreme Court addressed the tension between The Plymouth and The Blackheath and concluded that the two decisions were not incompatible. After discussing both cases, the Court reaffirmed that admiralty jurisdiction did not extend to injuries inflicted by a vessel upon a bridge, its protective pilings, and an adjacent dock, stating that "the bridges, shore docks, protection piling, piers, etc., pertained to the land. They were structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore and aids to commerce on land as such." *Id.* at 321.

Moreover, courts specifically examining the nature of floating docks have consistently held that they do not possess the characteristics associated with maritime objects. In *Cope v. Vallette Dry-Dock Co.,* 119 U.S. 625, 30 L. Ed. 501, 7 S. Ct. 336 (1887), for example, the Supreme Court decided that the salvage of floating dry-docks could not properly fall under admiralty jurisdiction because they "had no means of propulsion . . . and were not designed for navigation." *Id.* at 627. Circuit cases in this century have reached similar conclusions. *See, e.g., Atkins v. Greenville Shipbuilding Corp.,* 411 F.2d 279, 282-83 (5th Cir. 1969) (holding that as a matter of law, a floating dock was not a "vessel" owing a maritime warranty of seaworthiness); *Royal Ins. Co. of America v. Pier 39 Ltd. Partnership,* 738 F.2d 1035, 1037 (9th Cir. 1984) (ruling that policies insuring floating docks did not fall under admiralty jurisdiction because the subject matter was not maritime); cf. *Digiovanni v. Traylor Bros.*, 959 F.2d 1119, 1123 (1st Cir. 1992) (stating that if a float is not in actual navigation, the test for whether it qualifies as a vessel is whether its "purpose or primary business is . . . navigation or commerce"). Thus, appellees' emphasis on the floating nature of South Port's docks is insufficient and misplaced. *See id.* ("Floating is not enough."). Although these structures move with the ebb and flow of the tides, they remain moored to a fixed location and serve no navigational function. Indeed, their purpose is precisely the same as that of traditional fixed piers or docks: to facilitate commerce on land, presumably conducted in and around whatever retail and repair facilities are operated by South Port. In essence, South Port's floating docks are "extensions of the land" in the sense of that phrase in eighteenth century admiralty jurisprudence. Consequently, a tort that causes damage to them does not occur "wholly on the navigable waters" and would have constituted an action at law, rather than in admiralty, in the late eighteenth century.[1]

We therefore agree with the district court that South Port's OPA claim is analogous to a claim under the common law at the time of the Seventh Amendment's ratification in 1791, and that South Port was entitled to trial by jury.

B. Punitive Damages

Plaintiff contends that the district court erred in ruling that punitive damages were unavailable as a matter of law. We affirm the district court's ruling.

Plaintiff's complaint alleged six "counts": a claim under the OPA, four state law tort claims, and a count entitled simply "Punitive Damages." Punitive damages, however, do not constitute a separate cause of action, but instead form a remedy available for some tortious or otherwise unlawful acts. Consequently, plaintiff's claim for punitive damages must relate to some separate cause of action which permits recovery of punitive damages.

Despite a valiant effort, plaintiff has been unable to point to a legal basis for its punitive damages claim. One of the four tort claims alleged in the complaint might have been adequate; those claims, however, were dismissed by the trial court, a decision which plaintiff has not challenged on appeal. The remaining possibilities, therefore, are (1) the OPA, or (2) general admiralty and maritime law.

1. OPA Does Not Provide for Punitive Damages

In 1990, in the wake of the Exxon Valdez and other oil spill disasters, Congress established a comprehensive federal scheme for oil pollution liability in the OPA. *See* 33 U.S.C. § 2702 *et seq*. (1990). The OPA sets forth a comprehensive list of recoverable damages, including: removal costs; damage to natural resources and real or personal property; loss of subsistence use of natural resources; loss of government revenues, lost profits and earning capacity; and costs of increased or

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[1] The district court correctly noted that the Admiralty Extension Act of 1948, 46 U.S.C. § [30101], which eliminates the land-water distinction, does not affect the analysis here. While the Act might permit the extension of admiralty jurisdiction over South Port's tort action today, it does not divest the claim of its original common law character and its attendant right to trial by jury. *See, e.g., California v. Bournemouth,* 307 F. Supp. 922, 925 (C.D. Cal. 1969) ("The legislative history clearly indicates that the Act makes available a concurrent remedy in admiralty for the existing common-law action.").

additional public services occasioned by the unlawful act. *See* 33 U.S.C. § 2702(b). Absent from that list of recoverable damages is any mention of punitive damages. The question before us, therefore, is whether, by leaving punitive damages out of the OPA, Congress intended to supplant the general admiralty and maritime law that existed prior to the enactment of the statute, which permitted the award of punitive damages for reckless behavior. *See, e.g.*, *CEH, Inc. v. F/V Seafarer,* 70 F.3d 694, 699 (1st Cir. 1995) (punitive damages long recognized in admiralty actions for willful or reckless conduct).

2. Congress Intended the OPA To Be the Exclusive Federal Law Governing Oil Spills

First, we note that, although the parties have referred to this issue as one of "preemption," it does not present any of the federalism concerns normally associated with that word, because we are concerned only with the OPA's effect on preexisting *federal* law. The question, therefore, is not complicated by any "presumption against preemption," *see, e.g.*, *Medtronic, Inc., v. Lohr*, 518 U.S. 470, 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996), but is rather a straightforward inquiry into whether Congress intended the enactment of the OPA to supplant the existing general admiralty and maritime law, which allowed punitive damages under certain circumstances in the area of oil pollution. We conclude that Congress did so intend.

The best indication of Congress's intentions, as usual, is the text of the statute itself. *See Strickland v. Com'r Dept. Human Services*, 48 F.3d 12, 17 (1st Cir. 1995). Section 2702 sets forth a list of damages recoverable under the OPA, briefly describing each type. As we have noted already, this scheme is comprehensive. To our knowledge no case or commentator has suggested that the availability of punitive damages under general admiralty and maritime law survived the enactment of the OPA. We take this to be a strong indication that Congress intended the OPA to be the sole federal law applicable in this area of maritime pollution.

The text of the statute is not without its limitations, however. Plaintiff emphasizes the language at 33 U.S.C. § 2718, which states that the OPA shall not be construed as "preempting the authority of any State or political subdivision thereof from imposing any additional liability," 33 U.S.C. § 2718(a), nor to "affect the authority of the United States of any State or political subdivision thereof (1) to impose additional liability of additional requirements; or (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law," *id.* § 2718(c). Plaintiff also points to 33 U.S.C. § 2751, which states that "except as otherwise provided in this chapter, this chapter does not affect . . . admiralty and maritime law." Plaintiff argues that this language demonstrates that Congress intended to leave open claims and damages other than those enumerated in the OPA.

We have indeed acknowledged that Congress did not intend the OPA to bar the imposition of additional liability by the States. *See Ballard Shipping Co. v. Beach Shellfish,* 32 F.3d 623, 630-31 (1st. Cir. 1994) (using OPA to support validity of state liability statute permitting recovery for purely economic loss). That determination rested on the underlying federalism concerns that counsel a skeptical view towards federal preemption of state statutes. *See id.* at 630 ("Where as here the state remedy is aimed at a matter of great and legitimate state concern, a court must act with caution."). This case, however, presents an entirely different issue, namely, whether Congress's very specific treatment of oil pollution in the OPA, which does not provide for punitive damages, supplanted general admiralty and maritime law, which has traditionally provided for the general availability of punitive damages for reckless conduct. This question has largely been decided for us by the Supreme Court in *Miles v. Apex Marine,* 498 U.S. 19, 112 L. Ed. 2d 275, 111 S. Ct. 317 (1990*)*, in which the Court declined to supplement damage provisions of the Death on the High Seas Act, 46 U.S.C. § 762. The Court refused to allow recovery for loss of society when such damages were not provided in the statute, reasoning that "in an 'area covered by statute, it would be no more appropriate to prescribe a different measure of damage than to prescribe a different statute of limitations, or a different class of beneficiaries.'" *See Miles,* 498 U.S. at 31 (quoting *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625, 56 L. Ed. 2d 581, 98 S. Ct. 2010 (1978)). As we indicated in *CEH,* 70 F.3d 694 (1st Cir. 1995), Miles dictates deference to congressional judgment "where, at the very least, there is an overlap between statutory and decisional law." *Id.* at 701. Such is obviously the case here.

Although our analysis might end there, we think it necessary to address plaintiff's contention that the OPA should be construed more liberally because it was enacted for the purposes of benefitting the victims of oil pollution and punishing its perpetrators. While we agree that such intentions were Congress's principal motivation in enacting the OPA, we think it would be naive to adopt so simpleminded a view of congressional policymaking in light of the competing interests addressed by the Act. For instance, the OPA imposes strict liability for oil discharges, provides both civil and criminal penalties for violations of the statute, and even removes the traditional limitation of liability in cases of gross negligence or willful conduct. Yet at the same time, the Act preserves the liability caps in most cases and declines to impose punitive damages. We think that the OPA embodies Congress's attempt to balance the various concerns at issue, and trust that the resolution of these difficult policy questions is better suited to the political mechanisms of the legislature than to our deliberative process.

For the reasons set forth above, we agree with the district court that punitive damages were not available to plaintiff and affirm the court's ruling on that issue.
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***United States v. American Commercial Lines*, *L.L.C.*, 759 F.3d 420 (5th Cir. 2014)**

Higginson, Circuit Judge:

Following an oil spill, responsible party American Commercial Lines ("ACL") contracted with Environmental Safety & Health Consulting Services Inc. ("ES&H") and United States Environmental Services, L.L.C. ("USES") to provide cleanup services. After ACL failed to pay the full outstanding amounts owed to ES&H and USES within the 90-day period mandated by the Oil Pollution Act of 1990 ("OPA"), the United States paid the balance out of the Oil Spill Liability Trust Fund (the "Fund") and filed suit against ACL to recover its payment. ACL sought to join ES&H and USES as third party defendants, or alternatively hold ES&H and USES directly liable to ACL to the extent ACL was found liable to the United States. The district court joined both parties but dismissed ACL's claims against ES&H and USES as displaced by OPA.[1] We AFFIRM.

FACTUAL BACKGROUND

This case involves an oil spill in the Mississippi River near New Orleans, Louisiana. On July 23, 2008, the M/V TINTOMARA, an ocean-going tanker, collided with DM 932, an unmanned barge carrying slightly less than 10,000 barrels of fuel oil, which was towed by the tug M/V MEL OLIVER. The collision substantially damaged the barge, and a large quantity of oil spilled into the river. ACL owned the tug and barge. D.R.D. Towing, L.L.C. ("DRD") provided the crew for the tug towing the barge under a bareboat charter between ACL and DRD. *Gabarick v. Laurin Maritime (America) Inc. v. D.R.D. Towing Company, L.L.C.*, 753 F.3d 550, 2014 U.S. App. LEXIS 9531, 2014 WL 2118621, at *1 (5th Cir. May 21, 2014).

Under the Clean Water Act ("CWA"), also known as the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §§ 1321, as amended by OPA, the Coast Guard

[1] The district court used the term "preemption" in its "Order and Reasons." "Preemption" and "displacement" are often used interchangeably. *See, e.g.,* Conner v. Aerovox, Inc., 730 F.2d 835, 841 (1st Cir. 1984) (using "preempt" and "displace" interchangeably in concluding that the Federal Water Pollution Control Act displaced federal maritime law). Technically, however, preemption refers to whether federal statutory law supersedes state law, while "displacement" applies when, as here, a federal statute governs a question previously governed by federal common law. Although in the preemption scenario, we assume that "the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress," displacement analysis assumes that "it is for Congress, not the federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 316-17, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981). Accordingly, we use the term "displacement" throughout this opinion.

has primary overall responsibility for directing oil spill cleanup in the coastal zone. *See* 33 U.S.C. § 1321(d)(2)(C); 40 C.F.R. § 300.145. However, under OPA, the Coast Guard identifies "responsible part[ies]" who must pay for oil spill cleanup in the first instance,[2] typically "any person owning, operating, or demise chartering the vessel." 33 U.S.C. § 2701(32). Responsible parties may then contract with spill responders to execute the oil spill cleanup.

The Coast Guard's National Pollution Funds Center ("NPFC") administers the Fund. The Fund is authorized both (1) to pay outstanding cleanup costs and damages when a responsible party can limit its liability or establish a complete defense (or when no responsible party is ever identified), *see id.* § 2712(a)(4); and (2) to guarantee that particular OPA claimants, including spill responders, are paid quickly, *see id.* § 2713. Claimants must first present their claims to the responsible party, *see id.* § 2713(a), but if the responsible party has not paid the claim within 90 days, "the claimant may elect to commence an action in court against the responsible party . . . or to present the claim to the Fund." *Id.* § 2713(c)(2); *see also* 33 C.F.R. § 136.103(c)(2). The Fund will reimburse only those removal costs that are necessary and reasonable, and that adhere to the relevant statutory criteria for Fund payments. *See* 33 C.F.R. §§ 136.105, 136.201, 136.203, 136.205. When the Fund has made payments to cover the immediate costs of oil spill cleanup, it can recoup those payments from other entities, including the responsible party. "[P]ayment of any claim or obligation by the Fund" results in "the United States Government acquiring by subrogation all rights of the claimant . . . to recover from the responsible party." 33 U.S.C. § 2712(f); *see also* 33 C.F.R. § 136.115(a) (compensation from the Fund includes an assignment to the government of the claimant's rights against third parties).

Following the spill, the Coast Guard investigated and determined that, as the owner of the barge DM-932 and tug M/V OLIVER, ACL was a responsible party under OPA and therefore liable for "removal costs and damages" resulting from the incident. *See* 33 U.S.C. § 2702(a). ACL then entered into a contract with spill responders and Third Party Defendants ES&H and USES to provide cleanup services for the oil spill. The spill responders invoiced ACL for their services, but ACL disputed some of the claims and did not pay the full outstanding amounts owed to ES&H and USES for removal and cleanup costs within the 90-day time frame mandated by OPA. *See id.* § 2713(c)(2). Instead, ACL paid ES&H

[2] Responsible parties are strictly liable for cleanup costs and damages and first in line to pay any claims for removal costs or damages that may arise under OPA. *See* 33 U.S.C. § 2702(a) ("Notwithstanding any other provision or rules of law. . . each responsible party. . . is liable for the removal costs and damages."); *id.* § 2713(a) ("[A]ll claims for removal costs or damages shall be presented first to the responsible party. . . ."). Hence each responsible party must establish and maintain evidence of its ability to make significant, immediate payments to spill responders and other claimants. *See id.* § 2716(a).

approximately $10.6 million and withheld $3.9 million; it paid USES approximately $14 million and withheld $4.4 million. At that point, OPA allowed ES&H and USES to "elect" one of two options: (1) sue ACL for payment; or (2) submit a claim for uncompensated removal costs to the Fund. Both spill responders filed claims with the Fund. After requesting "documentation deemed necessary" to pay a claim, *see* 33 C.F.R. § 136.105(a), the Fund paid $3,071,222.83 to ES&H and $1,519,564.74 to USES. *See* 33 U.S.C. § 2713(a)-(d).

The United States, in turn, sued ACL to recover the Fund's payment to ES&H and USES, as well as a penalty under the CWA and statutory damages under OPA. In response, ACL contended, *inter alia*, that ES&H and USES failed to provide adequate documentation for the amounts billed to and paid out by the Fund. Consequently, ACL sought to join ES&H and USES as third party defendants to the United States' claims in the proceedings below. Alternatively, ACL sought to hold ES&H and USES directly liable to ACL to the extent that ACL was found liable to the United States. The United States, ES&H, and USES opposed the joinder of ES&H and USES, and each filed motions to dismiss ES&H and USES as third party defendants to the United States' action against ACL. The district court held that ACL's joinder of ES&H and USES was proper under Fed. R. Civ. P. 14(c) and our decision in *Luera v. M/V Alberta,* 635 F.3d 181, 188-189 (5th Cir. 2011). However, citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008), and *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, 808 F. Supp. 2d 943 (E.D. La. 2011), the district court granted the government's Rule 12(b)(6) motion to dismiss ACL's claims against ES&H and USES because OPA displaces these claims. The district court explained in its Order and Reasons that "[t]he proper procedural vehicle to litigate defects in the claim payment process is as a defense against the Fund under the 'arbitrary and capricious' standard of the Administrative Procedure Act, as ACL acknowledges."

ACL filed the instant appeal. On appeal, ACL concedes that when OPA explicitly sets a rule of law it displaces federal common law and general maritime law, and that, as the designated responsible party, ACL was strictly liable under OPA for costs of cleanup. ACL asserts, however, that the district court erred in holding that OPA displaced its federal common law and general maritime law claims against ES&H and USES because "OPA does not 'explicitly' do so." ***

DISCUSSION

Our inquiry presents the question of whether OPA provides the exclusive source of law for an action involving a responsible party's liability for removal costs governed by OPA. For the following reasons, we find that it does, and accordingly we hold that ACL does not have a cause of action against the spill responders who exercised their statutory right to file claims with the Fund after ACL failed to timely pay their claims.

We have previously held that, in enacting OPA, Congress intended to build upon the Clean Water Act to "'create a single Federal law providing cleanup authority, penalties, and liability for oil pollution.' . . . OPA prescribes a supplemental, comprehensive federal plan for handling oil spill responses, allocating responsibility among participants, and prescribing reimbursement for cleanup costs and injuries to third parties." *In re: Deepwater Horizon,* 745 F.3d 157, 168 (5th Cir. 2014) (quoting S. Rep. No. 101-94, at 9 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 730).

More generally, when Congress enacts a carefully calibrated liability scheme with respect to specific remedies, "the structure of the remedies suggests that Congress intended for th[e] statutory remedies to be exclusive." *United States v. M/V BIG SAM,* 681 F.2d 432, 441 (5th Cir. 1982) (internal quotation marks and citation omitted) (construing the analogous FWPCA, whose liability standard and limited recovery of removal costs OPA borrows). Indeed, "we are to conclude that federal common law has been preempted as to every question to which the legislative scheme spoke directly, and every problem that Congress has addressed." *Id.* at 442 (quoting *In re Oswego Barge Corp.,* 664 F.2d 327, 344 (2d Cir. 1981)). Here, OPA provides that "[n]otwithstanding any other provision or rule of law . . . each responsible party . . . is liable for the removal costs and damages specified in subsection (b) of this section that result from" an oil spill. 33 U.S.C. § 2702(a). Claimants must first present their claims to the responsible party, *see id.* § 2713(a), but if the responsible party has not paid the claim within 90 days, the claimant may elect to bring suit against the responsible party or seek repayment from the Fund for those removal expenses that are necessary and reasonable, and that adhere to the relevant statutory criteria for United States payments. *See id.* § 2713(c)(2); *see also* 33 C.F.R. § 136.103(c)(2), 136.105, 136.201, 136.203, 136.205. The Fund may then seek recoupment from the responsible party, having acquired by subrogation all rights of the claimant against the responsible party. *See* 33 U.S.C. § 2712(f); 33 C.F.R. § 136.115(a). The responsible party may then assert defenses to limit its liability for reimbursement, including establishing that the Fund's payments to the claimants were "arbitrary and capricious." *See Buffalo Marine Servs, Inc. v. United States,* 663 F.3d 750, 753 (5th Cir. 2011) ("The Administrative Procedure Act ('APA') allows a federal court to overturn an agency's ruling only if it is arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence on the record taken as a whole." (internal quotation marks omitted)). As found by the district court, "OPA directly speaks to the claims asserted by ACL." Hence we hold that this "balanced and comprehensive remedial scheme" provides the exclusive remedy for a claimant to recover statutory removal costs from a responsible party and forecloses a responsible party from bringing a third-party complaint against a spill responder that has chosen to submit claims to the Fund after 90 days without payment. *See M/V BIG SAM*, 681 F.2d at 441.

In the present case, ES&H and USES both presented their claims to the Fund, rather than bringing suit against ACL. Nothing in OPA authorizes a responsible party to bring a third-party complaint against a claimant that has chosen, under § 2713(c)(2), to submit claims to the Fund after 90 days without payment. As the district court noted, such a third-party complaint would risk "avoid[ing] the strict liability that OPA places on responsible parties to pay the cleanup and removal costs," and frustrate the statutory scheme and its goal of providing rapid cleanup and claim resolution.

Contrary to ACL's assertion, OPA's savings clause at 33 U.S.C. § 2751(e) does not apply. OPA's savings clause provides:

> Except as otherwise provided in this Act, this Act does not affect—
>
> > (1) admiralty and maritime law; or
> >
> > (2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Id. § 2751(e). Statutory construction begins with the language of the statute, and, in the absence of ambiguity, often ends there. *Hardt v. Reliance Standard Life Ins. Co.,* 560 U.S. 242, 251, 130 S. Ct. 2149, 176 L. Ed. 2d 998 (2010). We have previously held that "savings clauses must be read with particularity" and should not be interpreted to "disrupt the ordinary operation of conflict preemption." *In re Deepwater Horizon,* 745 F.3d at 171 (rejecting application of OPA savings clause codified at § 2718(c)); *see also Int'l Paper Co. v. Ouellette,* 479 U.S. 481, 492-93, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987) (rejecting application of two savings provisions of the CWA). The savings clause here begins "except as otherwise provided." 33 U.S.C. § 2751(e). OPA provides a procedure for submission, consideration, and payment of cleanup expenses by the Fund when the responsible party fails to settle such claims within 90 days—the situation presented here. As OPA did "otherwise provide[]," ACL's claims against ES&H and USES for return of payments made by the Fund under OPA cannot be saved by this clause. To interpret § 2751(e) as ACL proposes would be to supersede OPA, and courts cannot, without any textual warrant, expand the operation of savings clauses to modify the scope of displacement under OPA. *See In re Deepwater Horizon,* 745 F.3d at 173.

While we find that OPA displaces ACL's alternative causes of action against ES&H and USES, we note that both ACL and the United States contemplate that ACL may raise its contentions in the district court in defense to the United States' OPA recoupment action. Should ACL establish that the Fund's payments to ES&H and USES were unnecessary, unreasonable, or not in compliance with the relevant statutory criteria for Fund payments and hence were "arbitrary and capricious," it may pursue reduction of its liability to the Fund for reimbursement. Regardless of the outcome of the United States' action against ACL, however, ACL may not seek indemnification from ES&H and USES as the United States "acquir[ed] by subrogation all rights of the claimant" and hence stands in for ES&H and USES in any related action.***

***Gabarick v. Laurin Maritime (America) Inc.*, 623 F. Supp. 2d 741 (E.D. La. 2009)**

Lemelle, District Judge:

BACKGROUND

On July 23, 2008, the M/V TINTOMARA and the barge DM-932, which was being towed by the M/V MEL OLIVER, collided on the Mississippi River, causing oil to spill into the river. ACL, the barge owner, DRD, the towboat operator, and TINTOMARA interests, the owners of the M/V TINTOMARA, each filed limitation complaints in this Court. Numerous claims have been filed in those limitations, including claims for relief pursuant to the Oil Pollution Act of 1990 ("OPA") and other claims for damages as a result of the oil spill.

The Claims Adjudication Division of the United States Coast Guard ("Coast Guard"), in a letter dated July 24, 2008 and addressed to ACL, formally designated the DM-932 as the source of the oil discharge. (*See* Rec. Doc. 444-5, Ex. 2). The letter stated that "[ACL] may be liable as a responsible party for the resulting removal costs and damages." *Id*. The Coast Guard directed ACL to fulfill its statutory obligation to advertise the designation of the DM-932 and to advertise procedures by which claims could be submitted to ACL. ACL responded to the Coast Guard's directive by publishing an "Advertisement of Designation" fourteen times during a thirty-day period in August 2008. (*See* Rec. Doc. 444-5, Exs. 2, 3). In its advertisement, ACL designated Worley Catastrophe Response, LLC ("Worley") as its third party claims administrator to which claims should be submitted. On November 25, 2008, Judge Lance Africk ruled that OPA claims were not subject to the Limitation of Shipowner's Liability Act of 1851 ("Limitation Act"), and that, therefore, they were not subject to the deadlines imposed for filing claims in those proceedings. (Rec. Doc. 251)(*See also* Rec. Doc. 568 at 3)(stating the ruling in Rec. Doc. 251 in Background Facts section).

ACL, DRD, and TINTOMARA filed motions to dismiss OPA claims then pending before Judge Africk. The motions to dismiss were granted, and on January 12, 2009, Judge Africk dismissed without prejudice all OPA claims filed in this Court. (Rec. Doc. 568). The present motions to dismiss seek to dismiss all claims for damages that are recoverable under OPA on the basis of preemption. ACL argues that the mandatory language of OPA requires that damages recoverable under OPA, specifically those enumerated in 33 U.S.C. § 2702(b)(2)(A)-(F), are subject to and must be pursued according to OPA. Claimants argue that OPA is not preemptive but supplemental and assert that they are entitled to choose to pursue their claims under General Maritime Law rather than under OPA.

DISCUSSION

A. Background of Oil Pollution Act of 1990 ("OPA")

Following the Exxon Valdez oil spill, Congress passed the Oil Pollution Act of 1990, comprehensive legislation to address oil spill liability and compensation. *See* 33 U.S.C. §§ 2701, *et seq*. When an oil spill occurs on U.S. navigable waters, the Coast Guard determines the source of the discharge and notifies a responsible party for that source. A responsible party for a vessel from which oil is discharged is strictly liable for removal costs and damages. There are three complete defenses to the strict liability imposed by the Act: if the discharge of oil was caused solely by (1) an act of God; (2) an act of war; or (3) an act or omission of a third party. 33 U.S.C. § 2703(a). A party involved in an incident could be a responsible party, a sole cause third party, or a non-sole cause third party. OPA also creates a statutory right to seek contribution from any liable or potentially liable person, and it establishes its own statute of limitations. 33 U.S.C. §§ 2709, 2717.

B. Mandatory and Exclusive Language of OPA

ACL contends that OPA is the exclusive remedy for any public or private claimant seeking recovery for "covered damages" as defined by OPA in 33 U.S.C. § 2702, which states in pertinent part:

> (a) In general
>
> Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) of this section that result from such incident.
>
> (b) Covered removal costs and damages
>
> . . .
>
> (2) Damages
>
> The damages referred to in subsection (a) of this section are the following:
>
> (A) Natural resources
>
> Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs

of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.

(B) Real or personal property

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

(C) Subsistence use

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

(D) Revenues

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

(E) Profits and earning capacity

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

(F) Public services

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

33 U.S.C. § 2702 (emphasis added). OPA does not cover bodily injury claims or collision damage, thus ACL concedes that those claims, as well as the Exoneration/Limitation Petitions of ACL, DRD, and Tintomara, are not preempted by OPA and are properly before this Court. (Rec. Doc. 576 at 2-3).

The text of OPA implies its mandatory and exclusive nature. Section 2702(a) mandates the strict liability of the responsible party for the damages enumerated in section (b), "[n]otwithstanding any other provision or rule of law, and subject to the provisions of this Act." Section 2713 of the Act specifies the claims procedure and § 2713(a) states:

> (a) Presentation
>
> Except as provided in subsection (b) of this section, all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source designated under section 2714(a) of this title.

Section 2713(a) uses the absolute words "all" and "shall," directing the course of action for "all claims" and mandating that they "shall" be presented first to the responsible party. Section 2713(c) indicates when suit in federal court is appropriate:

> (c) Election
>
> If a claim is presented in accordance with subsection (a) of this section and-
>
> (1) each person to whom the claim is presented denies all liability for the claim, or
>
> (2) the claim is not settled by any person by payment within 90 days after the date upon which (A) the claim was presented, or (B) advertising was begun pursuant to section 2714(b) of this title, whichever is later,
>
> the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.

Judge Africk in the present case and Judge Clement in *Tanguis v. M/V Westchester,* 153 F.Supp. 2d 859, 867 (E.D. La. 2001) have described OPA as comprehensive legislation addressing marine oil spill liability and compensation. (Rec. Doc. 568 at 4). Judge Clement went on to recognize, "This new scheme includes new remedies, which, in many respects, preempt traditional maritime remedies. This result is reflected in the first clause of OPA's admiralty and maritime savings provision: '*Except as otherwise provided in this chapter*, this chapter does not affect . . . admiralty and maritime law . . . .'" *Id.* The savings provision to which Judge Clement refers is set forth in 33 U.S.C. § 2751 and states in pertinent part:

> (e) Admiralty and maritime law
>
> Except as otherwise provided in this Act, this Act does not affect—
>
> (1) admiralty and maritime law; or

(2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Claimants refer to the savings provision as a basis for their argument that OPA is a supplemental rather than exclusive avenue for the damages it covers. However, Claimants' memoranda ignores the first part of section (e) - "except as otherwise provided in this Act." Additionally, Claimants often cloud the issue at bar by arguing that OPA does not preempt general maritime law claims rather than focusing on preemption solely of the damages specifically covered by OPA. This Court, like Judge Clement, recognizes the plain language of the statutory text and its implications. OPA does not affect admiralty and maritime law except as provided in the Act. The Act applies to the damages listed in § 2702, which also specifically references its exclusive nature with respect to other provisions of law: "Notwithstanding any other provision or rule of law, and subject to the provisions of this Act . . . ." 33 U.S.C. § 2702(a). The Act also uses the absolute words "all" and "shall," stating that "all claims for . . . damages shall be presented first to the responsible party," and allows for suit after exhaustion of the claims process as outlined in § 2713(c). 33 U.S.C. § 2713 (emphasis added). Hence, the plain language of the statute indicates its mandatory and exclusive nature with respect to its covered damages.

C. General Maritime Law and the Constitution

CSC presents an argument under Article III, clause 2 of the Constitution and its creation of the basis for admiralty and maritime law of the United States. CSC seems to argue that because the federal courts are constitutionally afforded jurisdiction over maritime law that Congress cannot change, or that there is an extremely, almost unreachably high bar to, changing, i.e. preempting, long standing, judge created general maritime law. However, as recognized by Tintomara, the Constitution reserves jurisdiction. Furthermore, Congress has the power to legislate in the area of maritime law and has created legislation which has affected general maritime law with the passage of such statutes as the Limitation of Liability Act, the Harter Act, the Jones Act, the Oil Pollution Act of 1924, the Federal Water Pollution Control Act, and the Clean Water Act.

The Supreme Court has recognized the court's obligation to recognize the laws established by Congress and stated, "when [Congress] does speak directly to a question, the courts are not free to 'supplement' Congress's answer so thoroughly that the act becomes meaningless." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990)(*citing Mobil Oil Corp v. Higginbottham,* 436 U.S. 618, 625, 98 S. Ct. 2010, 56 L. Ed. 2d 581 (1979). Furthermore, "[w]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis,* 444 U.S. 11, 19, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979). When considering an issue similar to the one sub judice, the Supreme Court recognized the preemption of Federal Common Law and General Maritime Law by Congress's comprehensive legislation in the area of water pollution. *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981). In finding that the Federal Water Pollution Control Act preempted federal common law of nuisance in the area of ocean pollution, the Court stated, "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.* at 15. As recognized in the section of this Order on the mandatory and exclusive language of the Act, OPA explicitly states the damages to which it applies and the remedy to be pursued. The courts are to recognize this direct answer of Congress rather than seek to subvert it by allowing pursuit of the types of claims covered by OPA under the general maritime law prior to proper submission of the claims as articulated in OPA.

D. Preemption - Factors for Consideration

The parties generally argue the issue of preemption by referencing case law and the legislative history of the Act. The Second Circuit in *U.S. v. Oswego Barge Corp.,* 664 F.2d 327 (2nd Cir. 1981) reviewed Supreme Court decisions and gleaned four factors to be considered when analyzing statutory preemption of general maritime law claims. Though *Oswego* is persuasive case law, the Fifth Circuit in *United States v. M/V Big Sam,* 681 F.2d 432, 442 (5th Cir. 1982) adopted the features of the *Oswego* court's analysis. Furthermore, the arguments presented by the parties in the present case address the *Oswego* factors and Claimants, ACL, and Tintomara have discussed preemption under the *Oswego* factors. The *Oswego* factors include the following: (1) legislative history; (2) the scope of the legislation; (3) whether judge made law would fill a gap left by Congress's silence or rewrite rules that Congress enacted; and (4) likeliness of Congress's intent to preempt "long established and familiar principles of the common law or the general maritime law." *Id.* at 344.

(1) Legislative History ***

As previously recognized by this Court, the legislative intent of OPA was to encourage settlement and reduce litigation in oil spill cases. (*See* Rec. Doc. 568 at 7). Consider the portions of legislative history presented by Tintomara: ***

> The billrequires claims to be presented in the first instance to the discharger, where known.
>
> Senate Rpt, p.732.3
>
> Wherever possible, the burden is to be on the discharger to first bear the costs of removal and provide compensation for any damages.

Senate Rpt, p.732.

One intent was to "provid[e] strong incentive to the discharger to undertake removal operations at its own initiative to cooperate with Federal and State authorities, and to provide prompt compensation." Senate Rpt, p.732.

OPA "create[s] a single Federal law providing cleanup authority, penalties, and liability for oil pollution."

Senate Rpt, p.730.

The last statement seems to summarize Congress's intent in enacting OPA, the creation of a single Federal law regarding liability for oil pollution.

(2) Scope of the Legislation

OPA defines its scope explicitly through its statutory text. It defines what damages are covered and the process for pursuing a claim, and allows suit in federal court should that process be unsuccessful. OPA also has accompanying regulations. *See* 33 C.F.R. § 153.101, et seq.

(3) Whether judge made law would fill a gap left by Congress's silence or rewrite rules that Congress enacted;

This issue was basically addressed in the section of this Order on Article III, clause 2, of the Constitution and Congress's powers to enact maritime statutes in the face of existing general maritime law. Claimants argue that "applying the judge-made general maritime law allows the claimant to pursue claims that are not covered under OPA." (Rec. Doc. 615 at 7). When looking at OPA preemption only with respect to the damages it states as covered, there is no gap. Preemption by OPA of the claims covered by OPA still allows the claimant to pursue claims not covered by OPA under general maritime law. OPA expressly leaves claims not addressed by the Act to general maritime and admiralty law. See savings provision of OPA, 33 U.S.C. § 2751.

(4) Likeliness of Congress's intent to preempt "long established and familiar principles of the common law or the general maritime law."

Claimants basically argue that because the statutory language of OPA does not contain an explicit preemption cause or otherwise expressly preempt the general maritime law, that preemption of general maritime claims for the damages covered under OPA was not the intent of Congress. Claimants cite Senate Report No. 101-94 in support of its assertion that OPA is simply a package of complementary laws. This approach ignores other statements of Congress regarding its intent and previous laws preempting maritime rules, specifically law relating to water pollution. *See City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981), and *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981)(both addressing the Federal Water Pollution Control Act, 62 Stat. 1155, *et seq.*); *see also United States v. Dixie Carriers, Inc.*, 462 F.Supp. 1126 (E.D. La. 1978), *aff'd* 627 F.2d 736 (5th Cir. 1980)(finding that recovery under general maritime law would violate the structure of the Clean Water Act, 80 Stat. 1246, *et seq.*). ***

M/V Big Sam is the only Fifth Circuit preemption case cited by the parties. The court found that the Federal Water Pollution Act ("FWPA") did not preempt the maritime tort remedies of the plaintiff, United States. The court based its finding on a provision of the FWPA that expressly stated that the liabilities established by the Act "shall in no way affect any rights which ... the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance." *Big Sam*, 681 F.2d at 434. *M/V Big Sam* is distinguishable from the present case because the FWPA provision and the court's holding were specific to the plaintiff United States Government.

This Court finds that an evaluation of the *Oswego* factors indicates that OPA preempts general maritime law claims that are recoverable under OPA. Furthermore, the Court finds that the intent of Congress, noted by the Supreme Court in *Altria* as "the ultimate touchstone in every pre-emption case" and articulated in both the express language of the statute and the legislative history, was to encourage settlement and reduce litigation in oil spill cases through the enactment of comprehensive federal legislation that provides "cleanup authority, penalties, and liability for oil pollution." *Altria*, 129 S.Ct. at 543; Senate Rpt, p.730.

E. OPA preemption and claims against Tintomara.

Tintomara is regarded as a third party in light of ACL's designation by the Coast Guard as the responsible party. Additionally, ACL is suing Tintomara as a contributor; such action regarding OPA cleanup costs and damages would be regulated under OPA's provisions for the responsible party's recovery from third parties. UMG argues that OPA does not prevent claims against third parties because 33 U.S.C. § 2709 states that a person, rather than the responsible party alone, "may bring a civil action for contribution against any other person who is liable or potentially liable under this Act or another law." AEP argues that since Tintomara is not the responsible party, § 2713 does not apply to it. (Rec. Doc. 617 at 3-4). Further, Weeks Marine argues that in *National Shipping Co. of Saudi Arabia v. Moran Mid-Atlantic Corp.,* 924 F.Supp. 1436, 1448 (E.D.Va.1996), *aff'd*, 122 F.3d 1062 (4th Cir.1997) (table), *cert. denied*, 523 U.S. 1021, 118 S. Ct. 1301, 140 L. Ed. 2d 467 (1998) (cited in *Tanguis*), a party was allowed to pursue its OPA claims alongside general maritime law claims. Tintomara points out that in

National Shipping the general maritime law claims were for contribution, which Tintomara asserts is not being sought by Claimants in the present case. Furthermore, *National Shipping* found that OPA preempted general maritime law and "only preserves admiralty claims which are not addressed in OPA, such as [a] claim for . . . collision damages." *Id.* at 1447.

In light of Congress's intent to minimize piecemeal lawsuits and the mandatory language of OPA discussed earlier, it appears that Claimants should pursue claims covered under OPA only against the responsible party and in accordance with the procedures established by OPA. Then, the responsible party can take action to recover from third parties. Additionally, once claimants have exhausted the OPA administrative remedies, they are then entitled, under the statutory language expressed in OPA, to pursue their claims in federal court. One could interpret this to mean that all actions of claimants that allege damages which are covered by OPA would first go through the OPA claim process prior to any suit against any party. Such an interpretation would be consistent with the plain language interpretation of the statute. For example, 33 U.S.C. § 2709 states that any person can file suit, but it does not say when. Considering the statute as a whole, a person could file suit after exhausting OPA administrative procedures as established in § 2713, which states that "all claims for . . . damages shall be presented first to the responsible party." Additionally, it is important to note that this has no effect on damages not covered under OPA. Therefore, the Court finds that all claims that are recoverable under OPA, specifically those covered damages enumerated in 33 U.S.C. § 2702, are preempted by OPA. ***

***In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 808 F. Supp. 2d 943 (E.D. La. 2011)**

Barbier, District Judge:

***

This multi-district litigation ("MDL") consists of hundreds of consolidated cases, with thousands of claimants, pending before this Court. These cases arise from the April 20, 2010 explosion, fire, and sinking of the DEEPWATER HORIZON mobile offshore drilling unit ("MODU"), which resulted in the release of millions of gallons of oil into the Gulf of Mexico before it was finally capped approximately three months later. The consolidated cases include claims for the death of eleven individuals, numerous claims for personal injury, and various claims for environmental and economic damages.

In order to efficiently manage this complex MDL, the Court consolidated and organized the various types of claims into several "pleading bundles." The "B1" pleading bundle includes all claims for private or "non-governmental economic loss and property damages." There are in excess of 100,000 individual claims encompassed within the B1 bundle. ***

I.
PROCEDURAL HISTORY

In the B1 Master Complaint, the PSC identifies a number of categories of claimants seeking various types of economic damages, including Commercial Fishermen Plaintiffs, Processing and Distributing Plaintiffs, Recreational Business Plaintiffs, Commercial Business Plaintiffs, Recreation Plaintiffs, Plant and Dock Worker Plaintiffs, Vessel of Opportunity ("VoO") Plaintiffs, Real Property Plaintiffs, Real Property/Tourism Plaintiffs, Banking/Retail Business Plaintiffs, Subsistence Plaintiffs, Moratorium Plaintiffs, and Dealer Claimants.

Plaintiffs named the following as Defendants in their B1 Master Complaint: BP Exploration & Production Inc., BP America Production Company and BP p.l.c. (collectively "BP"); Transocean Ltd., Transocean Offshore, Transocean Deepwater, Transocean Holdings (collectively "Transocean"); Halliburton; M-I; Cameron; Weatherford; Anadarko, Anadarko E&P (collectively "Anadarko"); MOEX Offshore, MOEX USA (collectively "MOEX"); and MOECO. All of the Defendants, with the exception of MOECO, have filed Motions to Dismiss. Additionally, Dril-Quip, which was not named as a Defendant in the Master Complaint, has filed a Motion to Dismiss (Rec. Doc. 2107) because of the procedural effect of the *Rule 14(c)* tender in Transocean's Third-Party Complaint.

Plaintiffs allege claims under general maritime law, the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2701, *et seq.*, and various state laws. Under general maritime law, Plaintiffs allege claims for negligence, gross negligence, and strict liability for manufacturing and/or design defect. Under various state laws, Plaintiffs allege claims for nuisance, trespass, and fraudulent concealment, and they also allege a claim for strict liability under the Florida Pollutant Discharge Prevention and Control Act, Fla. Stat. § 376.011, *et seq*. Additionally, Plaintiffs seek punitive damages under all claims and request declaratory relief regarding any settlement provisions that purport to affect the calculation of punitive damages. ***

III.
PARTIES' ARGUMENTS AND DISCUSSION

The subject Motions to Dismiss go to the heart of Plaintiffs' claims in this case. Various Defendants advance somewhat different arguments as to why some or all of the B1 bundle claims should be dismissed. At bottom, however, all Defendants seek dismissal of all non-OPA claims for purely economic damages resulting from the oil spill. Essentially, Defendants move to dismiss all claims brought pursuant to either general maritime law or state law. All parties advance a number of arguments regarding the law that should apply to the Plaintiffs' claims for economic loss. The Defendants' Motions raise a number of issues involving choice of law, and especially the interplay among admiralty, the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § [1331], *et seq.*, OPA, and various state laws.

A. Vessel Status

Although it was unclear prior to oral argument, it is now apparent that only Defendant Cameron suggests that the DEEPWATER HORIZON MODU was not a vessel in navigation at the time of the casualty on April 20, 2010. ***

The B1 Master Complaint alleges that the DEEPWATER HORIZON was a dynamically-positioned semi-submersible deepwater drilling vessel. It employed a satellite global positioning device and complex thruster technology to stabilize itself. At all material times, the vessel was afloat upon the navigable waters of the Gulf of Mexico. Unlike the jack-up drilling rig in *Demette*, the DEEPWATER HORIZON had no legs or anchors connecting it to the seabed. Its only physical "attachment" to the wellhead was the 5,000 foot string of drill pipe. Again, this is no more of a connection than the casing that was being hammered into the seabed by the casing crew in *Demette*. 280 F.3d at 494-95. The DEEPWATER HORIZON was practically capable of maritime transportation, and thus is properly classified as a vessel. *See also Herb's Welding v. Grey*, 470 U.S. 414, 417 n.2, 105 S. Ct. 1421, 84 L. Ed. 2d 406 (1985*)*. Offshore oil rigs are of two general sorts: fixed and floating. Floating structures have been treated as vessels by the lower courts." (citations omitted)); *Diamond Offshore Co. v. A&B Builders, Inc.,* 302 F.3d 531, 545 (5th Cir. 2002) ("because the *Ocean Concorde* is a semi-submersible drilling rig, which is undisputably a vessel . . . ."), *overruled in part, on other grounds by, Grand Isle Shipyard, Inc.,* 589 F.3d at 788 & n.8.

Cameron argues that its blowout preventer ("BOP") was physically attached to the wellhead, located on the seabed some 5,000 feet below the surface of the water, and that the oil spill occurred at the wellhead, not from the DEEPWATER HORIZON. This does not persuade the Court to reach a different conclusion. The B1 Master Complaint alleges that both the BOP and the drill string were part of the vessel's gear or appurtenances. Maritime law "ordinarily treats an 'appurtenance' attached to a vessel in navigable waters as part of the vessel itself." *Grubart, Inc v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 535, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995).

B. OCSLA jurisdiction

All parties agree that at the time of the spill, the DEEPWATER HORIZON was operating in the Gulf of Mexico approximately fifty miles offshore, above the Outer Continental Shelf, triggering OCSLA jurisdiction. Indeed, this Court has already held in this MDL that it has OCSLA jurisdiction pursuant to 43 U.S.C. § 1349 because "(1) the activities causing the injuries in question could be classified as an operation on the OCS involving exploration or production of minerals, and (2) because the case arises in connection with the operation." *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 747 F. Supp. 2d 704 (E.D. La. 2010). In that previous decision, this Court did not address choice-of-law questions, explaining that "having determined that a decision that admiralty jurisdiction applies would not affect the Court's jurisdiction determination, a decision on whether state, admiralty, or other law applies does not need to be addressed at this time." *Id.* at 709.

C. Admiralty jurisdiction

The test for whether admiralty jurisdiction exists in tort cases was outlined by the Supreme Court in *Grubart, Inc v. Great Lakes Dredge & Dock Co.*:

> [A] party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1) over a tort claim must satisfy conditions both of location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water. The connection test raises two issues. A court, first, must assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce. Second, a court must determine whether the general character of the activity giving rise of the incident shows a substantial relationship to traditional maritime activity.

513 U.S. 527, 534, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995)(citations and internal quotations omitted).

The location test, which is satisfied when the tort occurs on navigable water, is readily satisfied here. The B1 Master Complaint alleges that the blowout, explosions, fire, and subsequent discharge of oil, occurred on or from the DEEPWATER HORIZON and its appurtenances, which was operating on waters overlying the Outer Continental Shelf; i.e., navigable waters. The connection test is also met. First, there is no question that the explosion and resulting spill caused a disruption of maritime commerce, which exceeds the "potentially disruptive" threshold established in *Grubart*. Second, the operations of the DEEPWATER HORIZON bore a substantial relationship to traditional maritime activity. *See Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538-39 (5th Cir. 1986) oil and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce"). Further, injuries incurred on land (or in the seabed) are cognizable in admiralty under the Admiralty Extension Act, 46 U.S.C. § 30101.

This case falls within the Court's admiralty jurisdiction. With admiralty jurisdiction comes the "application of substantive admiralty law." *Grubart*, 513 U.S. at 545. "[W]here OCSLA and general maritime law both could apply, the case is to be governed by maritime law." *Tenn. Gas Pipeline v. Houston Cas. Ins. Co.,* 87 F.3d 150, 154 (5th Cir. 1996). ***

E. General Maritime Law Claims

Defendants seek to dismiss all general maritime claims, contending that when Congress enacted OPA, it displaced pre-existing federal common law, including general maritime law, for claims covered by OPA. Defendants argue that OPA provides the sole remedy for private, non-governmental entities asserting economic loss and property damage claims. They urge that when Congress enacts a comprehensive statute on a subject previously controlled by federal common law, the federal statute controls and displaces the federal common law. Defendants further argue that under OPA, Plaintiffs are allowed to pursue their claims for economic damages solely against the designated "Responsible Party" and that OPA does not allow claims directly against non-Responsible Parties.

Prior to the enactment of OPA in 1990, a general maritime negligence cause of action was available to persons who suffered physical damage and resulting economic loss resulting from an oil spill. General maritime law also provided for recovery of punitive damages in the case of gross negligence, *Exxon Shipping Co. v. Baker,* 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008), and strict product liability for defective products, *E. River S.S. Corp., Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986). However, claims for purely economic losses unaccompanied by physical damage to a proprietary interest were precluded under *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S. Ct. 134, 72 L. Ed. 290 (1927). The Fifth Circuit has continuously reaffirmed the straightforward application of the *Robins Dry Dock* rule, explaining that "although eloquently criticized for its rigidity, the rule has persisted because it offers a bright-line application in an otherwise murky area." *Mathiesen v. M/V Obelix,* 817 F.2d 345, 346-47 (5th Cir. 1987) (citing *Louisiana v. M/V Testbank,* 752 F.2d 1019 (5th Cir. 1985)); *see also Wiltz v. Bayer Cropscience, Ltd. P'shp*, 645 F.3d 690, 2011 WL 2535552 (5th Cir. 2011); *Catalyst Old River Hydroelectric Ltd. v. Ingram Barge Co.*, 639 F.3d 207 (5th Cir. 2011) (both reaffirming the applicability of *Robins Dry Dock*).

One relevant exception to the *Robins Dry Dock* rule applies in the case of commercial fishermen. *See Louisiana v. M/V Testbank,* 524 F. Supp. 1170, 1173 (E.D. La. 1981) ("claims for [purely] economic loss [resulting from an oil spill and subsequent river closure] asserted by the commercial oystermen, shrimpers, crabbers, and fishermen raise unique considerations requiring separate attention . . . seamen have been recognized as favored in admiralty and their economic interests require the fullest possible legal protection."). A number of other courts have recognized that claims of commercial fishermen are sui generis because of their unique relationship to the seas and fisheries, treating these fishermen as akin to seamen under general maritime law. *See Yarmouth Sea Prods. Ltd. v. Scully*, 131 F.3d 389 (4th Cir. 1997); *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974).

Accordingly, long before the enactment of OPA, this was the state of general maritime law. Persons who suffered physical damage to their property as well as commercial fisherman had a cause of action under general maritime law to recover losses resulting from unintentional maritime torts. In the case of gross negligence or malicious, intentional conduct, general maritime law provided a claim for punitive or exemplary damages. *Baker*, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570. And, in the case of a defective product involved in a maritime casualty, maritime law imposed strict liability. *E. River S.S. Corp.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986).

In the wake of the EXXON VALDEZ spill in 1989, there were large numbers of persons who suffered actual economic losses but were precluded from any recovery by virtue of the *Robins Dry Dock* rule. At that time, an oil spill caused by a vessel on navigable water was governed by a web of different laws, including general maritime law, the CWA, and the laws of states affected by the spill in question. Various efforts had been made in the past to enact comprehensive federal legislation dealing with pollution from oil spills. With impetus from the EXXON VALDEZ incident, Congress finally enacted OPA in 1990.

OPA is a comprehensive statute addressing responsibility for oil spills, including the cost of clean up, liability for civil penalties, as well as economic damages incurred by private parties and public entities. Indeed, the Senate Report provides that the Act "builds upon section 311 of the Clean Water Act to create a single Federal law providing cleanup authority, penalties, and liability for oil pollution." S. Rep. 101-94, at 730 (1989). One significant part of OPA broadened the scope of private persons who are allowed to recover for economic losses resulting from an oil spill. OPA allows recovery for economic losses "resulting from" or "due to" the oil spill, regardless of whether the claimant sustained physical damage to a proprietary interest. OPA allows recovery for "[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, or natural resources, which shall be recoverable by ***any claimant***." 33 U.S.C. § 2702(b)(2)(E) (emphasis added). Furthermore, the House Report noted that "[t]he claimant need not be the owner of the damaged property or resources to recover for lost profits or income." H.R. Conf. Rep. 101-653, at 781 (1990).

Clearly, one major remedial purpose of OPA was to allow a broader class of claimants to recover for economic losses than allowed under general maritime law. Congress was apparently moved by the experience of the Alaskan claimants whose actual losses were not recoverable under existing law. Another obvious purpose of OPA was to set up a scheme by which a "Responsible Party" (typically the vessel or facility owner) was designated and made strictly liable (in most instances) for clean up costs and resulting economic damages. The intent is to encourage settlement and reduce the need for litigation. Claimants present their claims to the Responsible Party, who pays the claims and is then allowed to seek contribution from other allegedly liable parties. 33 U.S.C. §§ 2709, 2710, 2713. If the Responsible Party refuses or fails to pay a claim after ninety days, the claimant may either pursue its claim against the government-created Oil Spill Liability Trust Fund or file suit in court. *Id.* § 2713. There was much debate in Congress about whether or not this new federal statute should completely preempt or displace other federal or state laws. Ultimately, the statute included two "saving" provisions, one relating to general maritime law and the other to state laws (discussed above). The question arises in this case as to whether, or to what extent, OPA has displaced any claims previously existing under general maritime law, including claims for punitive damages.

Only a handful of courts have had the opportunity to address whether OPA displaces general maritime law. For example, the First Circuit in *South Port Marine, LLC v. Gulf Oil Limited Partnership,* 234 F.3d 58 (1st Cir. 2000), held that punitive damages were not available under OPA. The First Circuit began by noting that in enacting OPA "Congress established a comprehensive federal scheme for oil pollution liability" and "set[] forth a comprehensive list of recoverable damages." *Id.* at 64. "Absent from that list of recoverable damages is any mention of punitive damages." *Id.*

The First Circuit found that the Supreme Court decision of *Miles v. Apex Marine,* 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990), led to the conclusion that OPA did not allow for punitive damages. "The Court [in *Miles*] refused to allow recovery for loss of society when such damages were not provided in [Death on the High Seas Act], reasoning that 'in an area covered by statute, it would be no more appropriate to prescribe a different measure of damage than to prescribe a different statute of limitations, or a different class of beneficiaries.'" *Id.* at 65-66 (internal citations omitted). Likewise, the First Circuit determined that OPA's absence of an allowance for punitive damages was conclusive. In *Clausen v. M/V New Carissa*, the district court adopted the First Circuit's rationale and held that punitive damages were not allowable under OPA. 171 F. Supp. 2d 1127 (D. Or. 2001).

In *Gabarick v. Laurin Maritime (America) Inc.*, 623 F. Supp. 2d 741, 747 (E.D. La. 2009), the district court determined that OPA preempted maritime law claims for economic loss, using the four factors articulated in *In re Complaint of Oswego Barge Corp.,* 664 F.2d 327 (2d Cir. 1981), to analyze whether OPA displaced general maritime law: "(1) legislative history; (2) the scope of legislation; (3) whether judge-made law would fill a gap left by Congress's silence or rewrite rules that Congress enacted; and (4) likeliness of Congress's intent to preempt 'long established and familiar principles of the common law or the general maritime law.'"

However, more recent Supreme Court precedents cause this Court to question the notion that long-standing federal common law can be displaced by a statute that is silent on the issue. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008) (holding that the CWA did not displace a general maritime remedy for punitive damages) and *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009) (holding that the Jones Act did not displace the availability of punitive damages for a seaman's maintenance and cure claim).

In *Baker*, the Court employed a three-part analysis to determine if a statute preempts or displaces federal common law. 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? 554 U.S. at 489. The question presented in *Baker* was whether the CWA preempted or displaced general maritime punitive damages for economic loss. The Court first stated that it saw no clear indication of congressional intent to occupy the entire field of pollution remedies. Next, the Court noted that the CWA made no mention of punitive damages, and that "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law. Finally, the Court did not perceive that punitive damages for private harms would have any frustrating effect on the CWA remedial scheme. Accordingly, the Court concluded that the CWA did not preempt punitive damages under general maritime law.

In *Townsend*, the Supreme Court revisited its prior holding in *Miles v. Apex Marine*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990), on which the *South Port Marine* court hinged its analysis. The *Townsend* Court explained that *Miles* did not allow punitive damages for wrongful death claims because it was ***only*** as a result of federal legislation that a wrongful death cause of action existed. 129 S.Ct. at 2572-73. Accordingly, "to determine the remedies available under the common-law wrongful-death action, 'an admiralty court should look primarily to these legislative enactments for policy guidance.' It would have been illegitimate to create common-law remedies that exceeded those remedies statutorily available under the Jones Act and DOHSA." *Id.* at 2572 (citing *Miles,* 498 U.S. at 27). The Court contrasted the situation in *Miles* with the question before it in *Townsend*, and it concluded that "both the maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act." *Id.* In other words, the Court limited the application of *Miles* when it concluded that punitive damages were available to the seaman asserting a cause of action for maintenance and cure.

The B1 Master Complaint alleges economic loss claims on behalf of various categories of claimants, many of whom have not alleged physical injury to their property or other proprietary interest. Pre-OPA, these claimants, with the exception of commercial fishermen, would not have had a viable cause of action and would be precluded from any recovery by virtue of *Robins Dry Dock*. Accordingly, claims under general maritime law asserted by such claimants are not plausible and must be dismissed.

However, the Court finds that the B1 Master Complaint states a viable cause of action against the non-Responsible Parties under general maritime law on behalf of claimants who either allege physical damage to a proprietary interest and/or qualify for the commercial fishermen exception to *Robins Dry Dock*. In brief, these claims are saved and not displaced by OPA for the following reasons.

First, when reading OPA and its legislative history, it does not appear that Congress intended to occupy the entire field governing liability for oil spills, as it included two savings provisions—one that preserved the application of general maritime law and another that preserved a State's authority with respect to discharges of oil or pollution within the state. 33 U.S.C. §§ 2718, 2751.

Second, OPA does not directly address or speak to the liability of non-Responsible Parties to persons who suffer covered losses. Although OPA contains provisions regarding the Responsible Party's ability to seek contribution and indemnification, *Id.* §§ 2709, 2710, it is silent as to whether a claimant can seek redress directly from non-Responsible Parties. Prior to OPA's enactment, commercial fisherman and those who suffered physical damage had a general maritime law cause of action against these individuals.

Third, there is nothing to indicate that allowing a general maritime remedy against the non-Responsible Parties will somehow frustrate Congress' intent when it enacted OPA. Under OPA, a claimant is required to first present a claim to the Responsible Party. If the claim is not paid within ninety days, the claimant may file suit or file a claim against the Oil Spill Liability Trust Fund. A Responsible Party is strictly liable and damages are capped unless there is gross negligence or violation of a safety statute or regulation that proximately caused the discharge. To allow a general maritime claim against the Responsible Party would serve to frustrate and circumvent the remedial scheme in OPA.

Thus, claimants' maritime causes of action against a Responsible Party are displaced by OPA, such that all claims against a Responsible Party for damages covered by OPA must comply with OPA's presentment procedure. However, as to the non-Responsible Parties, there is nothing in OPA to indicate that Congress intended such parties to be immune from direct liability to persons who either suffered physical damage to a proprietary interest and/or qualify for the commercial fishermen exception. Therefore, general maritime law claims that existed before OPA may be brought directly against non-Responsible parties.

F. Claims for Punitive Damages

OPA is also silent as to the availability of punitive damages. Plaintiffs who could assert general maritime claims pre-OPA enactment may plausibly allege punitive damages under general maritime for several reasons. First, "[p]unitive damages have long been available at common law" and "the common-law tradition of punitive damages extends to maritime claims." *Townsend*, 129 S. Ct. at 2569. Congress has not occupied the entire field of oil spill liability in light of the OPA provision preserving admiralty and maritime law, "[e]xcept as otherwise provided." OPA does not mention punitive damages; thus, while punitive damages are not available under OPA, the Court does not read OPA's silence as meaning that punitive damages are precluded under general maritime law. Congress knows how to proscribe punitive damages when it intends to, as it did in the commercial aviation exception under the Death on the High Seas Act, 46 U.S.C. § 30307(b) ("punitive damages are not recoverable").

There is also nothing to indicate that allowing a claim for punitive damages in this context would frustrate the OPA liability scheme. As stated above, claims against the Responsible Party must comply with OPA's procedure, regardless of whether there is also cause of action against the Responsible Party under general maritime law. However, the behavior that would give rise to punitive damages under general maritime law—gross negligence—would also break OPA's limit of liability. *See* 33 U.S.C. § 2704(a). Thus, the imposition of punitive damages under general maritime law would not circumvent OPA's limitation of liability.

Finally on this issue, the Court notes Justice Stevens' concurrence in *Baker* in which he wrote that the Trans-Alaska Pipeline Authorization Act ("TAPAA"), which provided "the liability regime governing certain types of Alaskan oil spills, imposing strict liability but also capping recovery," "did not restrict the availability of punitive damages." 554 U.S. at 518. Although the issue of whether TAPAA precluded an award of punitive damages was not squarely before the Court in *Baker*, Justice Stevens' concurrence adds further support for this Court's conclusion. OPA, like TAPAA, creates a liability regime governing oil spills, imposes strict liability on the Responsible Parties, includes liability limits, and is silent on the issue of punitive damages.

Thus, OPA does not displace general maritime law claims for those Plaintiffs who would have been able to bring such claims prior to OPA's enactment. These Plaintiffs assert plausible claims for punitive damages against Responsible and non-Responsible parties. ***

H. Presentment under OPA.

Defendants also seek to dismiss all OPA claims because the B1 Master Complaint does not properly allege that the B1 Claimants have complied with the "presentment" requirements of OPA. Defendants argue that presentment to the Responsible Party is either a jurisdictional requirement or, alternatively, a mandatory condition precedent before filing suit.

The Court finds that the text of OPA clearly requires that OPA claimants must first "present" their OPA claim to the Responsible Party before filing suit. The "Claims Procedure" section of OPA reads:

> (a) Presentation
>
> > Except as provided in subsection (b) of this section, ***all claims for*** removal costs or ***damages shall be presented first to the responsible party*** or guarantor of the source designated under section 2714 (a) of this title . . . .
>
> (c) If a claim is presented in accordance with subsection (a) of this section and—
>
> > (1) each person to whom the claim is presented denies all liability for the claim, or
> >
> > (2) the claim is not settled by any person by payment within 90 days after the date upon which
> >
> > > (A) the claim was presented, or
> > >
> > > (B) advertising was begun pursuant to section 2714 (b) of this title, whichever is later,
>
> the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.

33 U.S.C. § 2713 (emphasis added).

The text of the statute is clear. Congress intended presentment to be a mandatory condition precedent to filing suit. *See Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., Inc.,* 51 F.3d 235 (11th Cir. 1995) (presentment is a mandatory condition precedent to filing suit under OPA); *Gabarick v. Laurin Maritime (America), Inc.,* 2009 U.S. Dist. LEXIS 20974, 2009 WL 102549 (E.D. La. 2009) (noting that the purpose of the claim presentation procedure is to promote settlement and avoid litigation).

Defendants argue that the B1 Master Complaint does not sufficiently allege that claimants have presented their claims to BP as the Responsible Party. There are likely large numbers of B1 claimants who have completely bypassed the OPA claim presentation requirement, others who have attempted to present their claims but may not have complied with OPA, and others who have properly presented their claims but have been denied for various reasons. Claimants who have not complied with the presentment requirement are subject to dismissal without prejudice, allowing them to exhaust the presentment of their claims before returning to court. In the ordinary case, the Court would simply dismiss those claims without prejudice. However, as the Court has previously noted, this is no ordinary case. A judge handling an MDL often must employ special procedures and case management tools in order to have the MDL operate in an orderly and efficient manner. In this massive and complex MDL, the Court is faced with a significant practical problem. It would be impractical, time-consuming, and disruptive to the orderly conduct of this MDL and the current scheduling orders if the Court or the parties were required to sort through in excess of 100,000 individual B1 claims to determine which ones should be dismissed at the current time. Moreover, such a diversion at this time would be unproductive and would not advance towards the goal of allowing the parties and the Court to be ready for the limitation and liability trial scheduled to commence in February 2012. No matter how many of the individual B1 claims might be dismissed without prejudice, the trial scheduled for February would still go forward with essentially the same evidence.

In summary on this issue, the Court finds that presentment is a mandatory condition-precedent with respect to Plaintiffs' OPA claims. The Court finds that Plaintiffs have sufficiently alleged presentment in their B1 Master Complaint, at least with respect to some of the Claimants. For the reasons stated above, the Court does not intend to engage in the process of sorting through thousands of individual claims at the present time to determine which claims have or have not been properly presented.

I.
VESSEL OF OPPORTUNITY AND MORATORIUM CLAIMS

The parties disagree as to whether the Vessel of Opportunity ("VoO") and Moratorium Plaintiffs have stated plausible B1 claims. Plaintiffs argue that OPA may apply to some of the claims presented by VoO claimants because OPA provides for liability on the part of Responsible Parties for damages that ***"result from"*** discharges of oil. At least some of the VoO claimants allege property damage to their vessels. Moratorium Plaintiffs argue that they have stated a viable OPA claim because there are some losses that would have been incurred regardless of the Moratorium and further because the Moratorium was a foreseeable response to the spill. Defendants counter that OPA does not apply to claims alleged by VoO Plaintiffs because their injuries occurred as a result of their participation in the VoO program, not as a result of the spill. Defendants also argue that Moratorium claims must be dismissed for failure to state an OPA claim because the imposition of the Moratorium was an intervening or superseding cause of damage that could not reasonably have been anticipated.

Few courts have had occasion to address the question of OPA causation. *See, e.g., Gatlin Oil Co. v. United States*, 169 F.3d 207 (4th Cir. 1999) (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); *In re Settoon Towing LLC*, 2009 U.S. Dist. LEXIS 113530, 2009 WL 4730969 (E.D. La. Dec. 4, 2009) (explaining that it was potentially possible for an injured party to recover for damages incurred as the result of a shutdown of the Gulf Intracoastal Waterway in the wake of a spill). The parties acknowledge that these claims are fact specific and present a more attenuated causation analysis than the other claims for economic loss, and they compare and contrast the instant Moratorium claims and VoO claims with the facts in the few cases that have been decided.

The Court reminds the parties that the issue before the Court on a Motion to Dismiss is simply whether Plaintiffs have stated a plausible claim for relief. A claim is facially plausible when the plaintiff pleads facts that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949. A court "must . . . accept all factual allegations in the complaint as true" and "must draw all reasonable inferences in the plaintiff's favor." *Lormand*, 565 F.3d at 232.

The Court notes that OPA does not expressly require "proximate cause," but rather only that the loss is "due to" or "resulting from" the oil spill. While the Court need not define the precise contours of OPA causation at this time, it is worth noting that during oral argument both counsel for BP and the PSC conceded that OPA causation may lie somewhere between traditional "proximate cause" and simple "but for" causation. *See CSX Transp. Inc. v. McBride*, 131 S. Ct. 2630, 2642-43, 180 L. Ed. 2d 637 (2011) ("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,' . . . 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.").

The Court need not define causation under OPA—necessarily a highly factual analysis— at this stage of the pleadings. The Court is satisfied that the VoO and Moratorium Plaintiffs have alleged sufficient facts to state plausible claims in the B1 bundle. ***

IV.
SUMMARY

In summary, the Court finds as follows:

1. The DEEPWATER HORIZON was at all material times a vessel in navigation.
2. Admiralty jurisdiction is present because the alleged tort occurred upon navigable waters of the Gulf of Mexico, disrupted maritime commerce, and the operations of the vessel bore a substantial relationship to traditional maritime activity. With admiralty

jurisdiction comes the application of substantive maritime law.

3. OCSLA jurisdiction is also present because the casualty occurred in the context of exploration or production of mineral on the Outer Continental Shelf.
4. The law of the adjacent state is not adopted as surrogate federal law under OCSLA, 43 U.S.C. § 1333(a)(2)(A).
5. State law, both statutory and common, is preempted by maritime law, notwithstanding OPA's savings provisions. All claims brought under state law are dismissed.
6. General maritime law claims that do not allege physical damage to a proprietary interest are dismissed under the *Robins Dry Dock* rule, unless the claim falls into the commercial fishermen exception. OPA claims for economic loss need not allege physical damage to a proprietary interest.
7. OPA does not displace general maritime law claims against non-Responsible parties. As to Responsible Parties, OPA does displace general maritime law claims against Responsible Parties, but only with regard to procedure (i.e., OPA's presentment requirement).
8. Presentment under OPA is a mandatory condition precedent to filing suit against a Responsible Party.
9. There is no presentment requirement for claims against non-Responsible Parties.
10. Claims for punitive damages are available for general maritime law claimants against Responsible Parties (provided OPA's presentment procedure is satisfied) and non- Responsible Parties.
11. All general maritime negligence claims against Anadarko and MOEX are dismissed, as Plaintiffs have failed to state a plausible claim against the Non-Operating lessees/Defendants.
12. Plaintiffs have plausibly alleged OPA claims for VoO claimants and Moratorium claimants.***

Further Reading:

Kenneth G. Engerrand, *The Relationship Among General Maritime Law, OPA, and OCSLA*, 25 U. San Francisco Mar. L.J. 253 (2012-13) (addressing displacement of federal law and preemption of state law)

Chapter 7: Preemption of State Law

Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973)

Justice Douglas delivered the opinion of the Court.

This action was brought by merchant shipowners and operators, world shipping associations, members of the Florida coastal barge and towing industry, and owners and operators of oil terminal facilities and heavy industries located in Florida, to enjoin application of the Florida Oil Spill Prevention and Pollution Control Act, Fla. Laws 1970, c. 70-244, Fla. Stat. Ann. § 376.011 et seq. (Supp. 1973) (hereinafter referred to as the Florida Act). Officials responsible for enforcing the Florida Act were named as defendants, but the State of Florida intervened as a party defendant, asserting that its interests were much broader than those of the named defendants. A three-judge court was convened pursuant to 28 U. S. C. § 2281.

The Florida Act imposes strict liability for any damage incurred by the State or private persons as a result of an oil spill in the State's territorial waters from any waterfront facility used for drilling for oil or handling the transfer or storage of oil (terminal facility) and from any ship destined for or leaving such facility. Each owner or operator of a terminal facility or ship subject to the Act must establish evidence of financial responsibility by insurance or a surety bond. In addition, the Florida Act provides for regulation by the State Department of Natural Resources with respect to containment gear and other equipment which must be maintained by ships and terminal facilities for the prevention of oil spills.

Several months prior to the enactment of the Florida Act, Congress enacted the Water Quality Improvement Act of 1970, 84 Stat. 91, 33 U.S.C. § 1161 *et seq*. (hereinafter referred to as the Federal Act). This Act subjects shipowners and terminal facilities to liability without fault up to $ 14,000,000 and $ 8,000,000, respectively, for cleanup costs incurred by the Federal Government as a result of oil spills. It also authorizes the President to promulgate regulations requiring ships and terminal facilities to maintain equipment for the prevention of oil spills. It is around that Act and the federally protected tenets of maritime law evidenced by *Southern Pacific Co*. v. *Jensen,* 244 U.S. 205, and its progeny that the controversy turns. The District Court held that the Florida Act is an unconstitutional intrusion into the federal maritime domain. It declared the Florida Act null and void and enjoined its enforcement. 335 F. Supp. 1241.

The case is here on direct appeal. We reverse. We find no constitutional or statutory impediment to permitting Florida, in the present setting of this case, to establish any "requirement or liability" concerning the impact of oil spillages on Florida's interests or concerns. To rule as the District Court has done is to allow federal admiralty jurisdiction to swallow most of the police power of the States over oil spillage -- an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent.

I.

It is clear at the outset that the Federal Act does not preclude, but in fact allows, state regulation. Section 1161 (o) provides that:

> "(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency *under any provision of law for damages to any publicly-owned or privately-owned property* resulting from a discharge of any oil or from the removal of any such oil.
>
> "(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing *any requirement or liability* with respect to the discharge of oil into any waters within such State.
>
> "(3) Nothing in this section shall be construed . . . to affect any State or local law not in conflict with this section." (Emphasis added.)

According to the Conference Report, "any State would be free to provide requirements and penalties similar to those imposed by this section or *additional requirements and penalties*. These, however, would be separate and independent from those imposed by this section and would be enforced by the States through its courts." (Emphasis added.) The Florida Act covers a wide range of "pollutants," § 3 (7), and a restricted definition of pollution. § 3 (8). We have here, however, no question concerning any pollutant except oil.

The Federal Act, to be sure, contains a pervasive system of federal control over discharges of oil "into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone." § 1161 (b)(1). So far as liability is concerned, an owner or operator of a vessel is liable to the United States for actual costs incurred for the removal of oil discharged in violation of § 1161 (b)(2) in an amount "not to exceed $ 100 per gross ton of such vessel or $ 14,000,000, whichever is lesser," § 1161 (f)(1), except for discharges caused solely by an act of God, act of war, negligence of the United States, or act or omission of another party. With like exceptions the owner or operator of an onshore or offshore facility is liable to the United States for the actual costs incurred by the United States in an amount not to exceed $ 8,000,000. § 1161 (f)(2)-(3). But in each case the owner or operator is liable to the United States for the full amount of the costs where the United States can show that the discharge of oil was "the result of willful negligence or willful misconduct within the privity and knowledge of the owner."

Comparable provisions of liability spell out the obligations of "a third party" to the United States for its actual costs incurred in the removal of the oil. § 1161 (g).

So far as vessels are concerned the federal Limited Liability Act, 46 U. S. C. §§ 181-189, extends to damages caused by oil spills even where the injury is to the shore. *Richardson v. Harmon,* 222 U.S. 96, 106. That Act limits the liabilities of the owners of vessels to the "value of such vessels and freight pending." 46 U. S. C. § 189.

Section 12 of the Florida Act makes all licensees of terminal facilities "liable to the state for all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others," it not being necessary for the State to plead or prove negligence. There is no conflict between § 12 of the Florida Act and § 1161 of the Federal Act when it comes to damages to property interests, for the Federal Act reaches only costs of cleaning up. As respects damages, § 14 of the Florida Act requires evidence of financial responsibility of a terminal facility or vessel--a provision which does not conflict with the Federal Act.

The Solicitor General says that while the Limited Liability Act, *so far as vessels are concerned*, would override § 12 of the Florida Act by reason of the *Supremacy Clause*, the Limited Liability Act has no bearing on "facilities" regulated by the Florida Act. Moreover, § 12 has not yet been construed by the Florida courts and it is susceptible of an interpretation *so far as vessels are concerned* which would be in harmony with the Federal Act. Section 12 does not *in terms* provide for unlimited liability.

Moreover, while the Federal Act determines damages measured by the cost to the United States for cleaning up oil spills, the damages specified in the Florida Act relate in part to the cost to the State of Florida in cleaning up the spillage. Those two sections are harmonious parts of an integrated whole. Section 1161 (c)(2) directs the President to prepare a National Contingency Plan for the containment, dispersal, and removal of oil. The plan must provide that federal agencies "shall" act "in coordination with State and local agencies." Cooperative action with the States is also contemplated by § 1161 (e), which provides that "in addition to any other action taken by a State or local government" the President may, when there is an imminent and substantial threat to the public health or welfare, direct the United States Attorney of the district in question to bring suit to abate the threat. The reason for the provision in § 1161 (o)(2), stating that nothing in § 1161 pre-empts any State "from imposing any requirement or liability with respect to the discharge of oil into any waters within such State," is that the scheme of the Act is one which allows--though it does not require--cooperation of the federal regime with a state regime.

If Florida wants to take the lead in cleaning up oil spillage in her waters, she can use § 12 of the Florida Act and recoup her costs from those who did the damage.

Whether the amount of costs she could recover from a wrongdoer is limited to those specified in the Federal Act and whether in turn this new Federal Act removes the pre-existing limitations of liability in the Limited Liability Act are questions we need not reach here. Any opinion on them is premature. It is sufficient for this day to hold that there is room for state action in cleaning up the waters of a State and recouping, at least within federal limits, so far as vessels are concerned, her costs.

Beyond that is the potential claim under § 12 of the Florida Act for "other damage incurred by the state and for damages resulting from injury to others." The Federal Act in no way touches those areas. A State may have public beaches ruined by oil spills. Shrimp may be destroyed, and clam, oyster, and scallop beds ruined and the livelihood of fishermen imperiled. The Federal Act takes no cognizance of those claims but only of costs to the Federal Government, if it does the cleaning up. ***

While the Federal Act is concerned only with actual cleanup costs incurred by the Federal Government, the State of Florida is concerned with its own cleanup costs. Hence there need be no collision between the Federal Act and the Florida Act because, as noted, the Federal Act presupposes a coordinated effort with the States, and any federal limitation of liability runs to "vessels," not to shore "facilities." That is one of the reasons why the Congress decided that the Federal Act does not pre-empt the States from establishing either "*any requirement or liability*" respecting oil spills.

Moreover, since Congress dealt only with "cleanup" costs, it left the States free to impose "liability" in damages for losses suffered both by the States and by private interests. The Florida Act imposes liability without fault. So far as liability without fault for damages to state and private interests is concerned, the police power has been held adequate for that purpose. ***

Nor can we say at this point that regulations of the Florida Department of Natural Resources requiring "containment gear" pursuant to § 7 (2)(a) of the Florida Act would be *per se* invalid because the subject to be regulated requires uniform federal regulation. Cf. *Huron Cement Co.* v. *Detroit,* 362 U.S. 440. Resolution of this question, as well as the question whether such regulations will conflict with Coast Guard regulations promulgated on December 21, 1972, pursuant to § 1161 (j)(1) of the Federal Act, 37 Fed. Reg. 28250, should await a concrete dispute under applicable Florida regulations. Finally, the provision of the Florida Act requiring the licensing of terminal facilities, a traditional state concern, creates no conflict *per se* with federal legislation. Section 1171 (b)(1) of the Federal Act provides that federal permits will not be issued to terminal facility operators or owners unless the applicant first supplies a certificate from the State that his operation "will be conducted in a manner which will not violate applicable water quality standards." And Tit. I, § 102 (b), of the recently enacted Ports and Waterways Safety Act of

1972, Pub. L. 92-340, 86 Stat. 426, 33 U.S.C. § 1222 (b) (1970 ed., Supp. II), provides that the Act does not prevent "a State or political subdivision thereof from prescribing for structures only higher safety equipment requirements or safety standards than those which may be prescribed pursuant to this title."

II.

And so, in the absence of federal pre-emption and any fatal conflict between the statutory schemes, the issue comes down to whether a State constitutionally may exercise its police power respecting maritime activities concurrently with the Federal Government.

The main barriers found by the District Court to the Florida Act are *Southern Pacific Co*. v. *Jensen,* 244 U.S. 205, and its progeny. *Jensen* held that a maritime worker on a vessel in navigable waters could not constitutionally receive an award under New York's workmen's compensation law, because the remedy in admiralty was exclusive. Later, in *Knickerbocker Ice Co*. v. *Stewart*, 253 U.S. 149, after Congress expressly allowed the States in such cases to grant a remedy, the Court held that Congress had no such power.

But those decisions have been limited by subsequent holdings of this Court. As stated by Mr. Justice Frankfurter in *Romero v. International Terminal Co*., 358 U.S. 354, 373, *Jensen* and its progeny mark isolated instances where "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system." Mr. Justice Frankfurter added, however: "But this limitation still leaves the States a wide scope. State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance --all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity." *Id*. at 373-374.

Moreover, in *Just v. Chambers*, 312 U.S. 383, we gave our approval to *The City of Norwalk*, 55 F. 98, written by Judge Addison Brown, holding that a State may modify or supplement maritime law even by creating a liability which a court of admiralty would recognize and enforce, provided the state action is not hostile "to the characteristic features of the maritime law or inconsistent with federal legislation," 312 U.S. at 388. ***

Mr. Chief Justice Hughes added that our decisions as of 1941, the date of *Just* v. *Chambers*, gave broad "recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction." *Id.* at 391.

Historically, damages to the shore or to shore facilities were not cognizable in admiralty. *See, e. g., The Plymouth,* 3 Wall. 20; *Martin v. West,* 222 U.S. 191. Mr. Justice Story wrote in 1813, "In regard to torts I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide." *Thomas v. Lane*, 23 F. Cas. 957, 960 (No. 13,902) (CC Me.).

On June 19, 1948, Congress enacted the Admiralty Extension Act, 46 U. S. C. § 740. The Court considered the Act in *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202. In that case, the Court held that the Admiralty Extension Act did not apply to a longshoreman performing loading and unloading services on the dock. The longshoreman was relegated to his remedy under the state workmen's compensation law. *Id.* at 215. The Court said, "At least in the absence of explicit congressional authorization, we shall not extend the historic boundaries of the maritime law." *Id.* at 214.

The Admiralty Extension Act has survived constitutional attack in the lower federal courts and was applied without question by this Court in *Gutierrez v. Waterman S. S. Corp.,* 373 U.S. 206. The Court recognized in *Victory Carriers*, however, that the Act may "intrude on an area that has heretofore been reserved for state law." *Id.* at 212. It cautioned that under these circumstances, "we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts." *Ibid.* While Congress has extended admiralty jurisdiction beyond the boundaries contemplated by the Framers, it hardly follows from the constitutionality of that extension that we must sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the States. One can read the history of the Admiralty Extension Act without finding any clear indication that Congress intended that sea-to-shore injuries be exclusively triable in the federal courts.

Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law. Thus in *Kelly v. Washington*, 302 U.S. 1, it appeared that, while Congress had provided a comprehensive system of inspection of vessels on navigable waters, *id.* at 4, the State of Washington also had a comprehensive code of inspection. Some of those state standards conflicted with the federal requirements, *id.* at 14-15; but those provisions of the Washington law relating to safety and seaworthiness were not in conflict with the federal law. So the question was whether the absence of congressional action and the need for uniformity of regulation barred state action. Mr. Chief Justice Hughes, writing for the Court, ruled in the negative, saying:

"A vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of that principle. The State may treat it as it may treat a diseased animal or unwholesome food. In such a matter, the State may protect its people without waiting for federal action providing the state action does not come into conflict with federal rules. If, however, the State goes farther and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises." *Id.* at 15.

That decision was rendered before the Admiralty Extension Act was passed.

Huron Cement Co. v. *Detroit,* 362 U.S. 440, however, arose after that Act became effective. Ships cruising navigable waters and inspected and licensed under federal acts were charged with violating Detroit's Smoke Abatement Code. The company and its agents were, indeed, criminally charged with violating that Code. The Court in sustaining the state prosecution said:

"The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government." *Id.* at 442.

The Court reasoned that there was room for local control since federal inspection was "limited to affording protection from the perils of maritime navigation," while the Detroit ordinance was aimed at "the elimination of air pollution to protect the health and enhance the cleanliness of the local community." *Id.* at 445. The Court, in reviewing prior decisions, noted that a federally licensed vessel was not exempt (1) "from local pilotage laws"; (2) "local quarantine laws"; (3) "local safety inspections"; or (4) "local regulation of wharves and docks." *Id.* at 447.

It follows, *a fortiori*, that sea-to-shore pollution--historically within the reach of the police power of the States--is not silently taken away from the States by the Admiralty Extension Act, which does not purport to supply the exclusive remedy.

As discussed above, we cannot say with certainty at this stage that the Florida Act conflicts with any federal Act. We have only the question whether the waiver of pre-emption by Congress in § 1161 (o)(2) concerning the imposition by a State of "any requirement or liability" is valid.

It is valid unless the rule of *Jensen* and *Knickerbocker Ice* is to engulf everything that Congress chose to call "admiralty," pre-empting state action. *Jensen* and *Knickerbocker Ice* have been confined to their facts, *viz*., to suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews. The fact that a whole system of liabilities was established on the basis of those two cases, led us years ago to establish the "twilight zone" where state regulation was permissible. *See Davis v. Department of Labor,* 317 U.S. 249, 252-253. Where there was a hearing by a federal agency and a conclusion by that agency that the case fell within the federal jurisdiction, we made its findings final. *Ibid*. Where there were no such findings, we presumed state law, in terms applicable, was constitutional. *Id*. at 257-258. That is the way the "twilight zone" has been defined.

Jensen thus has vitality left. But we decline to move the *Jensen* line of cases shoreward to oust state law from situations involving shoreside injuries by ships on navigable waters. The Admiralty Extension Act does not pre-empt state law in those situations.

***International Paper Co. v. Ouellette*, 479 U.S. 481 (1987)**

Justice Powell delivered the opinion of the Court.

This case involves the pre-emptive scope of the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq*. (CWA or Act). The question presented is whether the Act pre-empts a common-law nuisance suit filed in a Vermont court under Vermont law, when the source of the alleged injury is located in New York.

I.

Lake Champlain forms part of the border between the States of New York and Vermont. Petitioner International Paper Company (IPC) operates a pulp and paper mill on the New York side of the lake. In the course of its business, IPC discharges a variety of effluents into the lake through a diffusion pipe. The pipe runs from the mill through the water toward Vermont, ending a short distance before the state boundary line that divides the lake.

Respondents are a group of property owners who reside or lease land on the Vermont shore. In 1978 the owners filed a class action suit against IPC, claiming, *inter alia*, that the discharge of effluents constituted a "continuing nuisance" under Vermont common law. Respondents alleged that the pollutants made the water "foul, unhealthy, smelly, and . . . unfit for recreational use," thereby diminishing the value of their property. App. 29. The owners asked for $20 million in compensatory damages, $100 million in punitive damages, and injunctive relief that would require IPC to restructure part of its water treatment system. The action was filed in State Superior Court, and then later removed to Federal District Court for the District of Vermont.

IPC moved for summary judgment and judgment on the pleadings, claiming that the CWA pre-empted respondents' state-law suit. With the parties' consent, the District Judge deferred a ruling on the motion pending the decision by the Court of Appeals for the Seventh Circuit in a similar case involving Illinois and the city of Milwaukee. In that dispute, Illinois filed a nuisance action against the city under Illinois statutory and common law, seeking to abate the alleged pollution of Lake Michigan. *Illinois v. Milwaukee*, 731 F.2d 403 (1984) (Milwaukee III), *cert. denied*, 469 U.S. 1196 (1985). The Court of Appeals ultimately remanded the case for dismissal of Illinois' claim, finding that the CWA precluded the application of one State's law against a pollution source located in a different State. The decision was based in part on the court's conclusion that the application of different state laws to a single "point source"[4] would interfere with the carefully devised regulatory system established by the CWA. 731 F.2d, at 414. The court also concluded that the only suits that were *not* pre-empted were those alleging violations of the laws of the polluting, or "source," State. *Id.* at 413-414.

IPC argued that the holding in *Milwaukee III* was dispositive in this case. The Vermont District Court disagreed and denied the motion to dismiss. 602 F. Supp. 264 (1985). The court acknowledged that federal law normally governs interstate water pollution. It found, however, that two sections of the CWA explicitly preserve state-law rights of action. First, § 510 of the Act provides:
"Except as expressly provided . . . , nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U. S. C. § 1370.

In addition, § 505(e) states:

"Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief. . . ." 33 U. S. C. § 1365(e).

TheDistrict Court held that these two provisions (together, "the saving clause") made it clear that federal law did not pre-empt entirely the rights of States to

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[4] A "point source" is defined by the CWA as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U. S. C. § 1362(14)*; see* 40 CFR § 122.2 (1986). It is not disputed that IPC is a point source within the meaning of the Act.

control pollution. Therefore the question presented, said the court, was which *types* of state suits Congress intended to preserve. It considered three possibilities: first, the saving clause could be construed to preserve state law only as it applied to waters not covered by the CWA. But since the Act applies to virtually all surface water in the country, the District Court rejected this possibility. Second, the saving clause might preserve state nuisance law only as it applies to discharges occurring within the source State; under this view a claim could be filed against IPC under New York common law, but not under Vermont law. This was the position adopted by the Court of Appeals for the Seventh Circuit in *Milwaukee III*. The District Court nevertheless rejected this option, finding that "there is simply nothing in the Act which suggests that Congress intended to impose such limitations on the use of state law." 602 F. Supp. at 269.

The District Court therefore adopted the third interpretation of the saving clause, and held that a state action to redress interstate water pollution could be maintained under the law of the State in which the injury occurred. . . . The court also found that the use of state law did not conflict with the ultimate goal of the CWA, since in each case the objective was to decrease the level of pollution. *Ibid.*
***

II.

A brief review of the regulatory framework is necessary to set the stage for this case. Until fairly recently, federal common law governed the use and misuse of interstate water. See, *e. g., Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (water apportionment); *Missouri v. Illinois*, 200 U.S. 496 (1906) (water pollution). This principle was called into question in the context of water pollution in 1971, when the Court suggested in dicta that an interstate dispute between a State and a private company should be resolved by reference to state nuisance law. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 499, n. 3 (1971) ("[An] action such as this, if otherwise cognizable in federal district court, would have to be adjudicated under state law") (citing *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938)).

We had occasion to address this issue in the first of two Supreme Court cases involving the dispute between Illinois and Milwaukee. In *Milwaukee I*, the State moved for leave to file an original action in this Court, seeking to enjoin the city from discharging sewage into Lake Michigan. *Illinois v. Milwaukee*, 406 U.S. 91 (1972). The Court's opinion in that case affirmed the view that the regulation of interstate water pollution is a matter of federal, not state, law, thus overruling the contrary suggestion in *Wyandotte*. 406 U.S. at 102, n. 3. The Court was concerned, however, that the existing version of the Act was not sufficiently comprehensive to resolve all interstate disputes that were likely to arise. *Milwaukee I* therefore held that these cases should be resolved by reference to federal common law; the implicit corollary of this ruling was that state common law was preempted. *See id.* at 107, n. 9; *Milwaukee III*, 731 F.2d at 407. The Court noted, though, that future action by Congress to regulate water pollution might pre-empt federal common law as well. 406 U.S. at 107.

Congress thereafter adopted comprehensive amendments to the Act. We considered the impact of the new legislation when Illinois and Milwaukee returned to the Court several years later. *Milwaukee v. Illinois*, 451 U.S. 304 (1981) *(Milwaukee II)*. There the Court noted that the amendments were a "'complete rewriting'" of the statute considered in *Milwaukee I*, and that they were "'the most comprehensive and far reaching'" provisions that Congress ever had passed in this area. 451 U.S. at 317-318 (citations to legislative history omitted). Consequently, the Court held that federal legislation now occupied the field, pre-empting all *federal* common law. The Court left open the question of whether injured parties still had a cause of action under *state* law. ***

One of the primary features of the 1972 amendments is the establishment of the National Pollutant Discharge Elimination System (NPDES), a federal permit program designed to regulate the discharge of polluting effluents. 33 U.S.C. § 1342; *see generally EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205-208 (1976) (describing NPDES system). Section 301(a) of the Act, 33 U.S.C. § 1311(a), generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit from the Environmental Protection Agency (EPA). The permits contain detailed effluent limitations, and a compliance schedule for the attainment of these limitations.

The amendments also recognize that the States should have a significant role in protecting their own natural resources. 33 U. S. C. § 1251(b). The Act provides that the Federal Government may delegate to a State the authority to administer the NPDES program with respect to point sources located within the State, if the EPA Administrator determines that the proposed state program complies with the requirements set forth at 33 U. S. C. § 1342(b). ***

While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States). Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders. Before a federal permit may be issued, each affected State is given notice and the opportunity to object to the proposed standards at a public hearing. 33 U. S. C. § 1341(a)(2); *Milwaukee III, supra*, at 412. An affected State has similar rights to be consulted before the source State issues its own permit; the source State must send notification, and must consider the objections and recommendations submitted by other States before taking action. § 1342(b). Significantly, however, an affected State does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. An affected

State's only recourse is to apply to the EPA Administrator, who then has the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters. § 1342(d)(2). Also, an affected State may not establish a separate permit system to regulate an out-of-state source . . . . Thus the Act makes it clear that affected States occupy a subordinate position to source States in the federal regulatory program.

III.

With this regulatory framework in mind, we turn to the question presented: whether the Act pre-empts Vermont common law to the extent that law may impose liability on a New York point source. We begin the analysis by noting that it is not necessary for a federal statute to provide explicitly that particular state laws are pre-empted. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). Although courts should not lightly infer pre-emption, it may be presumed when the federal legislation is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Ibid.* (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)). In addition to express or implied pre-emption, a state law also is invalid to the extent that it "actually conflicts with a . . . federal statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). Such a conflict will be found when the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillsborough County v. Automated Medical Laboratories, Inc., supra,* at 713 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

A

As we noted in *Milwaukee II*, Congress intended the 1972 Act amendments to "establish an all-encompassing program of water pollution regulation." 451 U.S. at 318. We observed that congressional "views on the comprehensive nature of the legislation were practically universal." *Id.* at 318, n. 12 (citing legislative history). An examination of the amendments amply supports these views. The Act applies to all point sources and virtually all bodies of water, and it sets forth the procedures for obtaining a permit in great detail. The CWA also provides its own remedies, including civil and criminal fines for permit violations, and "citizen suits" that allow individuals (including those from affected States) to sue for injunctions to enforce the statute. In light of this pervasive regulation and the fact that the control of interstate pollution is primarily a matter of federal law, *Milwaukee I*, 406 U.S. at 107, it is clear that the only state suits that remain available are those specifically preserved by the Act.

Although Congress intended to dominate the field of pollution regulation, the saving clause negates the inference that Congress "left no room" for state causes of action. Respondents read the language of the saving clause broadly to preserve both a State's right to regulate its waters, 33 U.S.C. § 1370, and an injured party's right to seek relief under "any statute *or common law*," § 1365(e) (emphasis added). They claim that this language and selected portions of the legislative history compel the inference that Congress intended to preserve the right to bring suit under the law of any affected State. We cannot accept this reading of the Act.

To begin with, the plain language of the provisions on which respondents rely by no means compels the result they seek. Section 505(e) merely says that "[nothing] *in this section," i.e.*, the citizen-suit provisions, shall affect an injured party's right to seek relief under state law; it does not purport to preclude pre-emption of state law by other provisions of the Act. Section 510, moreover, preserves the authority of a State "with respect to the waters (including boundary waters) of such [State]." This language arguably limits the effect of the clause to discharges flowing *directly* into a State's own waters, *i.e.*, discharges from within the State. The savings clause, then, does not preclude pre-emption of the law of an affected State.

Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action based on the law of an affected State. *Cf. City of Rome v. United States,* 446 U.S. 156, 199 (1980) (Powell, J., dissenting) ("We resort to legislative materials only when the congressional mandate is unclear on its face"). After examining the CWA as a whole, its purposes and its history, we are convinced that if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the "full purposes and objectives of Congress." *See Hillsborough County v. Automated Medical Laboratories, Inc., supra*, at 713. Because we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause, we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source.

B

In determining whether Vermont nuisance law "stands as an obstacle" to the full implementation of the CWA, it is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal. *See Michigan Canners & Freezers Assn*. v. *Agricultural Marketing & Bargaining Bd*., 467 U.S. 461, 477 (1984). In this case the application of Vermont law against IPC would allow respondents to circumvent the NPDES permit system, thereby upsetting the balance of public and private interests so carefully addressed by the Act. ***

An interpretation of the saving clause that preserved actions brought under an affected State's law would disrupt this balance of interests. If a New York source were liable for violations of Vermont law, that law could effectively override both the permit requirements and the policy choices made by the source State. The affected State's nuisance laws would subject the point source to the threat of legal and equitable penalties if the permit standards were less stringent than those imposed by the affected State. Such penalties would compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA, even though the affected State had not engaged in the same weighing of the costs and benefits. This case illustrates the problems with such a rule. If the Vermont court ruled that respondents were entitled to the full amount of damages and injunctive relief sought in the complaint, at a minimum IPC would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability. In suits such as this, an affected-state court also could require the source to cease operations by ordering immediate abatement. Critically, these liabilities would attach even though the source had complied fully with its state and federal permit obligations. The inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly--regulate the conduct of out-of-state sources. ***

Our conclusion that Vermont nuisance law is inapplicable to a New York point source does not leave respondents without a remedy. The CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act. The saving clause specifically preserves other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State. By its terms the CWA allows States such as New York to impose higher standards on their own point sources, and in *Milwaukee II* we recognized that this authority may include the right to impose higher common-law as well as higher statutory restrictions. 451 U.S. at 328 (suggesting that "States may adopt more stringent limitations . . . through state nuisance law, and apply them to in-state dischargers"); see also *Committee for Jones Falls Sewage System v. Train,* 539 F.2d 1006, 1009, and n. 9 (CA4 1976) (CWA preserves common-law suits filed in source State). ***

IPC asks the Court to go one step further and hold that all state-law suits also must be brought in source-state *courts*. As petitioner cites little authority or justification for this position, we find no basis for holding that Vermont is an improper forum. Simply because a cause of action is pre-empted does not mean that judicial jurisdiction over the claim is affected as well; the Act pre-empts laws, not courts. In the absence of statutory authority to the contrary, the rule is settled that a district court sitting in diversity is competent to apply the law of a foreign State. ***

The application of affected-state laws would be incompatible with the Act's delegation of authority and its comprehensive regulation of water pollution. The Act pre-empts state law to the extent that the state law is applied to an out-of-state point source. ***

***Oppen v. Aetna Insurance Co.*, 485 F.2d 252 (9th Cir. 1973)**

Wright, Circuit Judge:

In this appeal we must decide whether plaintiffs may recover certain damages caused by the Santa Barbara oil spill disaster of 1969. Preliminary questions are whether general maritime law applies to plaintiffs' claims and, if so, whether the application of maritime law precludes the plaintiffs from recovering under state law. A panel of three special masters took the evidence by stipulation and concluded that the claims involved should be determined by reference to maritime law, that the maritime remedy was exclusive, and that under maritime law plaintiffs' damages were not compensable.

Subsequently, the Supreme Court substantially altered what had theretofore been the standard used by lower federal courts in determining whether a tort was a maritime one, *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 34 L. Ed. 2d 454, 93 S. Ct. 493 (1972) and also broadened the power of the states to apply their own laws to certain maritime torts occurring within their territorial waters, *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 36 L. Ed. 2d 280, 93 S. Ct. 1590 (1973). This court asked the parties for additional briefs considering the effect of those decisions. We now conclude that the decision of the special masters was correct and the judgment of the district court entered thereon should be affirmed.

I.

On January 28, 1969 large amounts of crude oil escaped from the ocean floor underneath and near Platform "A" maintained by appellee Union Oil Company of California (Union) for the benefit of itself and other oil companies. Platform "A" was on the outer Continental Shelf of the United States in the Santa Barbara Channel. Escaping oil floated to the surface of the ocean and was carried by wind and tide until it virtually permeated the waters of the Santa Barbara Channel and harbor.

Not surprisingly, many lawsuits were brought against the oil companies and their insurers. Certain of these suits brought in the United States District Court for the Central District of California were, by stipulation, consolidated under the caption "Oppen v. Union Oil Co. of California, Civil No. 69-576-ALS."

The parties to the consolidated action agreed to proceed before the special masters with the trial of the claims of seven representative boat owners in order to obtain rulings on certain legal issues prior to trial of the other claims. Before this hearing could be held five of the boat owners' claims were settled.

Trial was held on the claims of the other two owners, appellants Henry and Luck. Each owned a private pleasure boat which had sustained physical damage from contact with the oil slick. The boats had also been rendered unusable in the Santa Barbara Channel for a period of time as a result of the spill. The special masters concluded that federal maritime law was applicable to the plaintiffs' claim and thereunder loss of use of a private pleasure craft was not a compensable item of damage. A judgment was rendered accordingly and the district court granted leave to appeal that we might render an opinion prior to the trial of the remaining claims.

II.

Plaintiffs' initial contention was that California law applied to their claims by virtue of the Outer Continental Shelf Lands Act ("Lands Act"), 43 U.S.C. § 1301 *et seq*. and *Rodrigue v. Aetna Casualty & Surety Co.,* 395 U.S. 352, 23 L. Ed. 2d 360, 89 S. Ct. 1835 (1969). In our view plaintiffs read too much into the statute and the decision.

Section 1333(a) of Title 43 provides:

> "(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . . .
>
> "(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953, are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . ."

In *Rodrigue* the Supreme Court was faced with the question of whether the Death on the High Seas Act or the Louisiana wrongful death statute applied to suits resulting from two accidents occurring on fixed platforms on the outer Continental Shelf off the Louisiana coast.

Both accidents had their primary locus on fixed platforms. In one the decedent was performing a test high on a derrick rising above the platform and fell to his death on the floor of the structure. In the other the decedent was working on a crane mounted on the platform and being used to unload a barge. As the crane lifted a load from the barge it collapsed and toppled over onto the barge, killing the worker.

In both cases the Court held that under admiralty principles the Seas Act did not apply. Therefore there was no federal law inconsistent with the Louisiana wrongful death statute and, by virtue of the Lands Act, the latter applied. The Court went on to state categorically that federal maritime law had no more application to accidents occurring on these fixed structures than it would to accidents occurring on natural islands or on piers extending from the mainland. 395 U.S. at 366.

It is clear that the Court by its holding in *Rodrigue* did not intend to imply that every occurrence arising out of operations conducted on a fixed platform attached to the outer Continental Shelf would necessarily be governed by state law rather than federal maritime law.

There are well recognized situations where admiralty jurisdiction and maritime law apply to a tort whose locus is on land. For example, the Admiralty Extension Act provides that admiralty jurisdiction applies to any injury *caused* by a vessel on navigable water though the injury may be consummated on land. And in *Continental Oil Co. v. London Steam-Ship Owners' Mutual Ins. Ass'n,* 417 F.2d 1030 (5th Cir. 1969), the court found that the Louisiana Direct Action Statute was not applicable to a suit arising from the collision of an oceangoing vessel with a fixed drilling platform on the outer Continental Shelf. Although by traditional standards, the "locus" of the tort was on the platform, the court found that the Admiralty Extension Act placed this tort within admiralty jurisdiction and that federal maritime law rather than state law applied. ***

Directly in point is *Armstrong v. Chambers & Kennedy*, 340 F. Supp. 1220 (S.D. Tex. 1972). In that case an explosion and fire on an offshore drilling platform resulted in injury to persons and property on a vessel tied alongside the platform. The court held that maritime law rather than Texas law applied to these claims. *Id.* at 1233.

These decisions indicate that the Outer Continental Shelf Lands Act, as interpreted in *Rodrigue,* does not preclude the application of maritime law to claims with a maritime nexus wholly apart from the location of the platform on the navigable waters.

III.

The locus of a tort is the place where injury takes effect. *T. Smith & Son, Inc. v. Taylor,* 276 U.S. 179, 72 L. Ed. 520, 48 S. Ct. 228 (1928); *Bible v. Chevron Oil Co.,* 308 F. Supp. 312 (E.D.La. 1969), *aff'd*, 460 F.2d 1218 (5th Cir. 1972).

Here, the injuries were the physical damage to plaintiffs' boats incurred while they were on the water and the interference with the plaintiffs' alleged navigational rights in the Santa Barbara Channel. Necessarily these injuries "took effect" in the navigable waters of the United States. *See Sound Marine & Machine Corp. v. Westchester County,* 100 F.2d 360 (2d Cir. 1938); *State Dep't of Fish and Game v. S.S. Bournemouth,* 307 F. Supp. 922 (C.D. Cal. 1969); *see also Marine Cooks & Stewards v. Panama Steamship Co.,* 265 F.2d 780 (9th Cir. 1959), *rev'd on other grounds*, 362 U.S. 365, 4 L. Ed. 2d 797, 80 S. Ct. 779 (1960); *Maier v. Publicker Commercial Alcohol Co.*, 62 F. Supp. 161 (E.D. Pa. 1945), *aff'd,* 154 F.2d 1020 (3d Cir. 1946).

Initially, defendants took the position that a finding that the injury took effect on navigable water was dispositive of the choice of law issue in their favor. Had not the *Executive Jet* decision come down since oral argument we would have agreed. *See Hess v. United States,* 259 F.2d 285 (9th Cir. 1958), *vacated on other grounds*, 361 U.S. 314, 80 S. Ct. 341, 4 L. Ed. 2d 305 (1960); *United States v. Matson Navigation Co.,* 201 F.2d 610 (9th Cir. 1953). But in light of *Executive Jet* a resolution of the choice of law issue based on locality alone is not sufficient. We must also decide whether the wrong bears "a significant relationship to traditional maritime activity." 409 U.S. at 268.

The plaintiff in *Executive Jet* owned a jet aircraft used for charter hire. In July 1968 it took off from Burke Lakefront Airport in Cleveland on a flight to Portland, Maine. Shortly after takeoff and while over land the aircraft ingested a flock of seagulls into its engines and suffered almost a total loss of power. It descended toward the airport, struck a fence and truck and then settled into the navigable waters of Lake Erie, becoming a total loss. The major part of the damage was done by water.

Plaintiff sued the air traffic controller, the airport operator and its manager for negligence in United States District Court for Northern Ohio on the basis of the admiralty jurisdiction. 28 U.S.C. § 1333(1); *see Weinstein v. Eastern Airlines, Inc.,* 316 F.2d 758 (3d Cir. 1963). The district court dismissed the complaint, holding that "the tort in this case did not occur upon navigable waters and the action is not cognizable in admiralty." The Court of Appeals for the Sixth Circuit affirmed in a 2-1 decision. 448 F.2d 151 (1971).

While the Supreme Court affirmed the judgment of dismissal it did so on altogether different grounds. The Court declined to decide whether the tort "occurred" upon the navigable waters. Rather, as we have noted, it held that more was required than mere maritime locality in order to involve admiralty jurisdiction. It then found that, upon the facts of this case, the additional requirement that the wrong bear a significant relationship to traditional maritime activity had not been met.

Executive Jet does not compel reversal in the present case. Neither the tort there alleged (negligent failure to clear the runway) nor the resulting injury (property damage to the aircraft) bore any relationship to traditional maritime activity. In our case plaintiffs sought damages for physical injury to maritime vessels and for interference with their right of navigation. Such claims do bear a significant relationship to traditional maritime activity. It is precisely plaintiffs' alleged rights to engage in "traditional maritime activity" that they are seeking to protect.

In their supplemental brief plaintiffs contend vigorously that defendants were not engaging in "traditional maritime activity." However, the nature of defendants' activities is not dispositive. *See Philadelphia, Wilmington & Baltimore Railroad Company v. Philadelphia & Havre De Grace Steam Towboat Co.,* 23 How. 209, 64 U.S. 209, 16 L. Ed. 433 (1859); *Firemen's Fund Ins. Co. v. Standard Oil of California,* 339 F.2d 148 (1964); *Sound Marine & Machine Corp. v. Westchester County, supra*; *The America,* 34 F. Supp. 855 (E.D.N.Y. 1940). We hold that plaintiffs' claims for property damage to their vessels and for interference with their right of navigation sound in maritime tort. *Accord*: *American Waterways Operators, Inc. v. Askew,* 335 F. Supp. 1241 (M. D. Fla. 1971), *rev'd on other grounds*, 411 U.S. 325, 93 S. Ct. 1590, 36 L. Ed. 2d 280 (1973); *Salaky v. Atlas Barge No. 3,* 208 F.2d 174 (2d Cir. 1953).

IV.

Under federal maritime law loss of use of a private pleasure boat is not a compensable item of damages. *The Conqueror,* 166 U.S. 110, 41 L. Ed. 937, 17 S. Ct. 510 (1897). *A fortiori* no cause of action sounding in maritime tort can be maintained when the alleged injury is interference with plaintiffs' use of their boats in the Santa Barbara Channel.

V.

The special masters assumed that their holding that plaintiffs' injury was caused by a "maritime tort" committed by defendant precluded the application of California law to plaintiffs' claim. At the time it was made this assumption was based on good authority, and was consistent with the holding of the court in *American Waterways Operators, Inc. v. Askew,* 335 F. Supp. 1241 (M.D. Fla. 1971). However, since that time, *Askew* was reversed by the Supreme Court, *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 93 S. Ct. 1590, 36 L. Ed. 2d 280 (1973). ***

The Supreme Court reversed the judgment of the three-judge court and indicated, first, that it found no conflict between the Water Quality Improvement Act and the Florida Pollution Control Act. Second, the Court noted that actions to recover for property damage on shore caused by pollution emanating from vessels on the water were not within the traditional admiralty jurisdiction, *The Plymouth,* 3 Wall. 20, 70 U.S. 20, 18 L. Ed. 125 (1865), but were within the admiralty jurisdiction only by virtue of the Admiralty Extension Act, 46 U.S.C. § 740. The Court concluded that, at least for injuries actionable in admiralty only by reason of the Admiralty

Extension Act, such jurisdiction was not intended to be exclusive and Florida could enact rules of decision of its own to apply to these injuries. On this basis the Court reversed the judgment of the district court holding the Florida Act unconstitutional in its entirety.

Askew had an unusual procedural posture. The ship and terminal operators had sued various state officials for declaratory judgment that the Florida Act was unconstitutional and an injunction against its enforcement. Although there had been no oil spill when suit was brought the operators claimed a sufficient adverse interest on the ground that they were immediately subject to various licensing, regulatory and financial responsibility provisions of the act. The three-judge court agreed and, after holding the various remedies afforded public and private interests by the Florida Act were unconstitutional, found further that these licensing and financial responsibility provisions were so interwoven with and dependent upon the substantive provisions that they, too, were invalid. 335 F. Supp. at 1250.

As noted, the Supreme Court held that Florida could provide remedies for persons suffering injury on shore from pollution emanating from ships at sea, so-called "ship-to-shore" pollution. It followed that the licensing and financial responsibility provisions of the Florida-enactment, those parts of the Act really at issue in *Askew*, were likewise valid ancillary measures. But the Court in *Askew* was not presented with the issue and did not decide whether other aspects of the Florida law were constitutional. Specifically, the court did not decide whether "ship-to-sea" or "shore-to-sea" pollution were also proper subjects of state concern.

VI.

In the present case we need not decide whether *Askew* is authority for applying California law to the present case of shore-to-ship pollution. Even assuming that the California statutes providing a remedy for nuisance were intended to apply to injuries occurring within the navigable waters, and that, under *Askew*, such application would be constitutional, it would not help the plaintiffs in the present case. There is no right under California law to recover for damage to the navigational rights enjoyed by these plaintiffs.

Plaintiffs argue strenuously that "loss of use" of a private pleasure vehicle or vessel is a compensable item of recovery under California law, citing Valencia v. Shell, 23 Cal.2d 840, 147 P.2d 558 (1944); *Johnson v. Central Aviation*, 103 Cal. App.2d 102, 229 P.2d 114 (1951); *Story v. Gateway Chevrolet*, 237 Cal. App.2d 705, 47 Cal. Rptr. 267 (1965), and *Malinson v. Black,* 83 Cal. App.2d 375, 188 P.2d 788 (1948).

No doubt this is true. But in each of the cases cited the chattel itself was unavailable for use because of physical damage thereto or wrongful detention thereof.

In the present case plaintiffs' claim is not for "loss of use" of their boats; the boats themselves were perfectly usable. Rather, the claim is for loss of "navigation rights" in the Santa Barbara Channel. Thus their claim is, under California law, a claim for damages arising out of a public nuisance. *People v. Mack*, 19 Cal. App.3d 1040, 97 Cal. Rptr. 448 (1971). ***

Interference with the public's right of navigation in the navigable waters of California is a public nuisance. *People v. Mack, supra*. A civil action for damages arising out of a public nuisance cannot be brought by a private litigant unless he has been specially injured. Cal. Civ. Code § 3493. *See Yolo County v. City of Sacramento,* 36 Cal. 193 (1868). In *Venuto, supra* at 355, the court said:

"Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public. Under this rule the requirement is that the plaintiff's damage be different in kind, rather than in degree, from that shared by the general public." (citations omitted).

The plaintiffs' physical damages are recoverable in negligence and probably also constitute such special injury as to present them with a cause of action for these damages in nuisance. But the damage suffered on account of their loss of navigation rights in the Santa Barbara Channel and harbor is no different in kind from that suffered by the public generally.[16] As Dean Prosser summarized the law:

"One group of cases has arisen where an established business made commercial use of the public right with which the defendant interfered. Thus when a river is blocked, a steamboat line operating boats upon it, or a company engaged in rafting logs or collecting tolls for passage, has been permitted almost without question to maintain the action. There are several cases in which commercial fisheries making a localized use of public waters have been allowed to recover where the ordinary citizen deprived of his occasional Sunday piscatorial pleasure could not do so." Prosser, "Private Action for Public Nuisance," 52 Va. L. Rev. 997, 1013-1014 (1966). (footnotes omitted).

These plaintiffs were deprived of no more than their "occasional Sunday piscatorial pleasure." For this deprivation there is no recovery either under California law or general maritime law. ***

[16] "It is not, however, necessary that the entire community be affected, so long as the nuisance will interfere with those who come in contact with it in the exercise of the public right. The obvious illustration, of course, is the obstruction of a public highway which inconveniences only those who are travelling upon it." Prosser, "Private Action for Public Nuisance," 52 Va. L. Rev. 997, 1001-1002 (1966) (footnote omitted).

***Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623 (1st Cir. 1994)**

Boudin, Circuit Judge:

This appeal presents the question whether federal maritime law preempts Rhode Island legislation affording expanded state-law remedies for oil pollution damage. In an able opinion, the district court held that the remedies were preempted. Discerning the law in this area is far from easy; one might tack a sailboat into a fog bank with more confidence. Yet guided in part by an important Supreme Court decision rendered after the district court's decision, we are constrained to reverse in part and to remand for further proceedings.

The basic facts of the case are not in dispute. On June 23, 1989, the M/V World Prodigy, an oil tanker owned by Ballard Shipping Co., ran aground in Narragansett Bay, Rhode Island, spilling over 300,000 gallons of heating oil into the bay. The wreck occurred when the ship strayed from the designated shipping channel and collided with a rock near Brenton Reef, about a mile south of Newport at the mouth of the bay. The oil slick prompted the State of Rhode Island to close Narragansett Bay to all shellfishing activities for a period of two weeks during and after cleanup operations.

State authorities charged the captain of the ship with entering the bay without a local pilot on board in violation of state law. Both the captain and Ballard also pleaded guilty to criminal violations of the Federal Water Pollution Control Act, *see* 33 U.S.C. § 1319(c). The captain and owner were fined a total of $30,500 and $500,000, respectively. In addition, Ballard agreed to pay $3.9 million in compensation for federal cleanup costs, $4.7 million for state cleanup costs and damage to natural resources, $500,000 of which was to be available to compensate individuals, and $550,000 to settle claims for lost wages by local shellfishermen.

A number of claimants filed suit against Ballard in Rhode Island. Ballard responded on December 22, 1989, by bringing a petition in admiralty for limitation or exoneration from liability. 46 U.S.C. § 185. "The court of admiralty in [a limitation of liability] proceeding acquires the right to marshal all claims, whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the res and by judgment in personam against the owner, so far as the court may decree." *Just v. Chambers*, 312 U.S. 383, 386, 85 L. Ed. 903, 61 S. Ct. 687 (1941). In the present case, several claimants reasserted their claims in the admiralty action.

The claimants in the present appeal are a group of shellfish dealers who allege severe economic losses arising from the two-week hiatus in shellfishing activities, which suspended their operations during the busiest time of the shellfishing season. They alleged negligence under the general maritime law and the common law of Rhode Island, as well as a claim for economic losses pursuant to the Rhode

Island Environmental Injury Compensation Act, R.I. Gen. Laws ch. 46-12.3 et seq. ("the Compensation Act").

On June 17, 1992, Ballard moved to dismiss the shellfish dealers' claims on the basis of the Supreme Court's decision in *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 72 L. Ed. 290, 48 S. Ct. 134 (1927), which held that compensation for economic losses standing alone is unavailable in admiralty cases. The district court granted the motion, holding that Robins preempted the contrary provisions of the state's Compensation Act, which expressly provides for recovery of purely economic losses arising from an oil spill. *In re Complaint of Ballard Shipping Co.*, 810 F. Supp. 359 (D.R.I. 1993). The dealers now appeal from that dismissal.

We first address the federal claims brought under the general maritime law. The Constitution grants the federal courts authority to hear "all Cases of admiralty and maritime Jurisdiction." U.S. Const. Art. III, § 2. The parties agree that the dealers' federal claims fall within this group because the spill occurred on navigable waters and arose out of traditional maritime activity. *See Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 34 L. Ed. 2d 454, 93 S. Ct. 493 (1972). Admiralty jurisdiction brings with it a body of federal jurisprudence, largely uncodified, known as maritime law. *See East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864, 90 L. Ed. 2d 865, 106 S. Ct. 2295 (1985).

The dealers assert that their businesses were injured when the World Prodigy spill prevented local fishermen from harvesting shellfish in Narragansett Bay and thereby precluded the dealers from purchasing the shellfish and reselling them to restaurants and other buyers. The dealers' maritime-law claims are thus purely for economic losses, unaccompanied by any physical injury to their property or person. Those federal claims, as the district court held, are squarely foreclosed by *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 72 L. Ed. 290, 48 S. Ct. 134 (1927).

In *Robins*, the charterer of a vessel sued a repair company that negligently damaged the vessel while it was in dry dock, alleging that the resulting delay caused the charterer to lose profits that it would have otherwise derived from the use of the ship. Justice Holmes wrote for the Court in holding that the suit could not be maintained:

> No 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, unknown to the doer of the wrong. . . . The law does not spread its protection so far.

275 U.S. at 309.

Justice Holmes's pronouncement could have been read merely as negating a claim of negligent interference with contract. *See Getty Refining and Marketing Co. v. MT FADI B*, 766 F.2d 829, 831-32 (3d Cir. 1985). Instead, *Robins* has generally been taken to establish the broader rule that purely economic losses arising from a tort, but unaccompanied by physical injury to anything in which the plaintiff has a proprietary interest, are not compensable under federal maritime law. *See, e.g.*, *State of Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1022 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903, 91 L. Ed. 2d 562, 106 S. Ct. 3271 (1986). Our circuit adopted this broader reading in *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 51-52 (1st Cir. 1985), and, in any event, the secondary nature of the economic injury here--which is akin to interference with contract--would likely bring this case within even a narrow reading of Robins.

Several courts have recognized exceptions to *Robins*, but none of the familiar examples apply in this case.[4] The district court so held, and the dealers do not challenge that conclusion on appeal. Accordingly, we agree that plaintiffs' federal claims for purely economic losses under the general maritime law are barred. The appeal thus turns upon the extent to which Robins bars the states from permitting a different result under state law pursuant to the exercise of the state's police powers.

Although the Judiciary Act of 1789 vested "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" in the federal courts, the act added a provision "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." 1 Stat. 76-77. The modern version of the statute saves "all other remedies to which [suitors] are otherwise entitled." 28 U.S.C. § 1333. The upshot is that an injured party may have claims arising from a single accident both under federal maritime law and under state law, whether legislation or common law. *See* G. Gilmore & C. Black, Jr., The Law of Admiralty § 1-13, at 37 (2d ed. 1975). State remedies under the savings to suitors clause may be pursued in state court or, where there is a basis for federal jurisdiction, in federal court.

Whether a state claim is litigated in a federal court or a state forum, "the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-Erie' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223, 91 L. Ed. 2d 174, 106 S. Ct. 2485

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[4] The classic exceptions include claims brought by fishermen as "favorites of admiralty," *see Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974), and claims for economic losses that are intentionally caused, *see Dick Meyers Towing Service, Inc. v. United States*, 577 F.2d 1023, 1025 (5th Cir. 1978), *cert. denied*, 440 U.S. 908, 58 L. Ed. 2d 455, 99 S. Ct. 1215 (1979).

(1986) (citations omitted). How far this conformity requirement extends, and whether it preempts the dealers' state-law claims, are the central issues in this case.

On appeal, the dealers mainly stress their claims under Rhode Island's Compensation Act. The Compensation Act provides generally that owners or operators of seagoing vessels may be held liable for harms arising from negligence of the owner, operator or agents or from the violation of Rhode Island pilotage and water pollution laws. *See* R.I. Gen. Laws §§ 46-12.3-2, 12.3-3. ***

For the purposes of this appeal only, Ballard concedes that the dealers would have a valid cause of action under this statute, and that the Compensation Act, which became effective on September 30, 1990, may be applied retroactively to cover the 1989 M/V World Prodigy spill. We think that the statutory claims effectively subsume state common law claims since the Compensation Act appears to go as far and further than common law in departing from Robins. Thus, we focus upon the statute.

The shipowner and captain insist, and the district court agreed, that the state claims are preempted under the doctrine of *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 61 L. Ed. 1086, 37 S. Ct. 524 (1917). *Jensen*, in a now famous passage, held that state legislation affecting maritime commerce is invalid "if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 216.

Jensen, however, was by its own terms something less than a rule of automatic and mechanical preemption. "It would be difficult, if not impossible," said the Court, "to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied." 244 U.S. at 216 (emphasis added). What is even more telling is that the Supreme Court after *Jensen*, without ever repudiating its language, upheld the application of state law in a number of maritime-related cases despite the existence of a direct conflict between maritime rules and state law.

This saga is recounted in Professor Currie's classic article, aptly titled "Federalism and the Admiralty: 'The Devil's Own Mess,'" 1960 Sup. Ct. Rev. 158. A familiar example is *Just v. Chambers*, 312 U.S. 383, 85 L. Ed. 903, 61 S. Ct. 687 (1941), where the Court permitted a state law claim for personal injury occurring on board a ship against the estate of the vessel's owner, despite a contrary maritime rule that a shipowner's liability does not survive his death. This year, in *American Dredging Co. v. Miller*, 127 L. Ed. 2d 285, 114 S. Ct. 981 (1994), the Court upheld a Louisiana open-forum statute, making the forum non conveniens doctrine unavailable in savings clause cases, even though forum non conveniens is a part of federal maritime law.

American Dredging assertedly reaffirms *Jensen's* three-prong test for preemption quoted above. Since no act of Congress directly governs our case, the first prong (contravention) is irrelevant to our case. The third prong ("proper harmony and uniformity") we reserve for consideration below. What is of immediate concern is the second ("material prejudice") prong; and here, *American Dredging* gave the famous language a twist that could not easily have been anticipated by the litigants in this case or by the district court.

Judged by the bare language of *Jensen*, the Compensation Act might easily seem to do "material prejudice" to a "characteristic feature" of maritime law, since *Robins* is the governing maritime rule and the Compensation Act rejects *Robins* in everything but name. But the word "characteristic" has different shadings, and *American Dredging*, in its first and most important holding, gives the "characteristic feature" language a definitive meaning: it reads the phrase to apply--and apparently only to apply--to a federal rule that either "originated in admiralty" or "has exclusive application there." 114 S. Ct. at 987.

Indeed, Justice Scalia goes on to say that the doctrine at issue in *American Dredging*, the doctrine of forum non conveniens, "is and has been a doctrine of general application" and that "therefore" its disregard by Louisiana does not prejudice "[a] characteristic feature" of general maritime law." 114 S. Ct. at 987. Further, only so narrow a reading of the characteristic feature test comports with the result in *American Dredging*. Since the forum non conveniens doctrine had long and widespread application in admiralty cases, *id*. at 986, a broad reading of the characteristic feature test would have resulted in preemption.

Although it is easier to identify the origins of a doctrine recognizing liability than one denying it, we have found no evidence that *Robins'* denial of recovery for purely economic losses originated in admiralty. Justice Holmes's opinion in *Robins* presents the rule as a virtual truism for which "no authority need be cited," 275 U.S. at 309, and refers the reader to three other opinions in which "[a] good statement [of the rule] will be found." *Id.* (citing *Elliot Steam Tug Co., Ltd. v. The Shipping Controller*, 1 K.B. 127, 139, 140 (1922); *Byrd v. English*, 117 Ga. 191, 192, 43 S.E. 419 (1903); and *The Federal No. 2*, 21 F.2d 313 (2d Cir. 1927)). Although *Elliot Steam Tug* and *The Federal No. 2* are both maritime cases, *Byrd* involved a suit against a defendant who had negligently damaged the lines supplying power to plaintiff's printing company. Justice Holmes also cited another case, *National Savings Bank v. Ward,* 100 U.S. 195, 25 L. Ed. 621 (1879), which involved a suit by a plaintiff who had relied upon a certificate of title prepared by the defendant attorney for a third party.

The rule applied in *Robins* is also sometimes traced to *Cattle v. Stockton Waterworks Co.*, 10 Q.B. 453 (1875), which concerned liability for delays suffered by plaintiff's construction company caused by water leaking from defendant's pipes. The admiralty cases thus reflect a traditional, if not invariable, "general principle denying liability for purely economic loss in the law of negligence." Atiyah, "Negligence and Economic Loss," 83 L.Q. Rev. 248, 248-51 (1967). In sum, "*Robins* broke no new ground but instead applied a principle, then settled both in the United States and England, which refused recovery for negligent interference with 'contractual rights.'" *Testbank*, 752 F.2d at 1022.

Nor has the doctrine forbidding recovery of such losses had "exclusive" application in admiralty. *State of Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1022 (5th Cir. 1985) (en banc), *cert. denied*, 477 U.S. 903 (1986). Rather, courts have denied liability for purely economic harm in a variety of land-based contexts. Such cases rest on a concern about extending the scope of tort liability beyond the generally limited class of individuals who suffer physical damage to person or property. *See* Rabin, "Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment," 37 Stan. L. Rev. 1513, 1528 (1985). This concern stretches landward quite as much as seaward. Thus, we hold that Rhode Island's decision to depart from *Robins* does not materially prejudice a rule that originated in or is exclusive to general maritime law.

Even absent prejudice to a characteristic feature of admiralty, state legislation is preempted if (under *Jensen*'s third test) it "interferes with the proper harmony and uniformity" of maritime law. *Jensen*, 244 U.S. at 216. As Justice Scalia observed in considering this question, "it would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence." *American Dredging*, 114 S. Ct. at 987. He did not, however, articulate a definitive test of harmony and uniformity, holding only that there is no preemption where the relevant state law is procedural rather than substantive. *Id.* at 988. In our case, the Rhode Island statute is indisputably substantive.

Where substantive law is involved, we think that the Supreme Court's past decisions yield no single, comprehensive test as to where harmony is required and when uniformity must be maintained. Rather, the decisions however couched reflect a balancing of the state and federal interests in any given case. *See, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 738-42, 6 L. Ed. 2d 56, 81 S. Ct. 886 (1961); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442-48, 4 L. Ed. 2d 852, 80 S. Ct. 813 (1960). Our circuit has acknowledged that "the Supreme Court . . . no longer construes the Admiralty Clause as requiring 'rigid national uniformity in maritime legislation,'" *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 207 (1st Cir. 1988), and that the preemption issue "ordinarily requires a delicate accommodation of federal and state interests." *Id.* As Professor Currie summed up the matter:

> The maritime nature of an occurrence does not deprive a state of its legitimate concern over matters affecting its residents or the conduct of persons within its borders; but the federal admiralty powers were granted to protect certain federal interests in maritime and commercial affairs. An issue created by such a conflict of interests can be resolved only by reference to those interests and by an attempt to maximize the effectuation of the proper concerns of both state and nation.

1960 Sup. Ct. Rev. at 169.

In balancing the state interest in regulation against a potential overriding federal need for harmony or uniformity, we start with Rhode Island's interest in implementing its Compensation Act. No one can doubt that the state's interest in avoiding pollution in its navigable waters and on its shores, and in redressing injury to its citizens from such pollution, is a weighty one. In *Huron Portland Cement*, the Supreme Court described state air pollution laws as a classic example of police power, and continued: "In the exercise of that power, the states . . . may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government." 342 U.S. at 442 (emphasis added).

In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 36 L. Ed. 2d 280, 93 S. Ct. 1590 (1973), the Court sustained, against a maritime-law preemption challenge, a Florida statute that imposed no-fault liability on vessel owners and operators for damages to private parties caused by oil spills in territorial waters. Justice Douglas described oil spillage as "an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and lives of the coastal people are greatly dependent." *Id.* at 328-29. *See also id.* at 332-43.

Claimants in this case argue flatly that *Askew*, without more, sustains the Rhode Island statute; and perhaps it does. The difficulty is that Justice Douglas rejected the maritime law preemption claim on the ground that *Jensen* had nothing to do with "shoreside injury by ships on navigable waters." 411 U.S. at 344. "Historically," said Justice Douglas, "damages to the shore or to shore facilities were not cognizable in admiralty." *Id.* at 340. Although Congress had by statute extended admiralty jurisdiction shoreword in 1948, the Court said that this extension did not carry *Jensen* with it. *Id.* at 341.

If Justice Douglas meant to avoid preemption for physical damage to the shore or shore facilities, as his words seem to suggest, this might easily not embrace damage to bay waters or the beds beneath them. If instead *Askew* meant to allow a state remedy for any intangible impact or loss ultimately felt on shore, it is hard to see what would be left of preemptive federal authority since the most traditional of admiralty events--for example, a ship collision or a seaman's death-- has such intangible effects ashore. However the riddle of *Askew* is solved, we think it safest to take it here merely to show, as it assuredly does, the importance of the state's interest in providing remedies for vessel-caused oil pollution damage.

The federal interest in limiting remedies is more subtle but also not without importance. The Compensation Act does not regulate the out-of-court behavior of ships or sailors--what is sometimes called "primary conduct"; rather the act is concerned with the liability imposed for conduct that is already unlawful. State regulation of primary conduct in the maritime realm is not automatically forbidden, *e.g., Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 179-80, 55 L. Ed. 2d 179, 98 S. Ct. 988 (1978), but such regulation presents the most direct risk of conflict between federal and state commands, or of inconsistency between various state regimes to which the same vessel may be subject.

Instead, the question here is the familiar one of burden. At some point, a regime of liability, or a diversity of regimes, could impose or threaten such heavy costs that maritime commerce may itself be impaired. Initially such costs are borne by shipowners but in the end they affect every business that uses ships or receives raw materials by ship and every citizen who, as a worker or consumer, depends upon such commerce. A regime may also be so difficult to administer as to prevent the efficient and predictable resolution of maritime disputes. These are not trivial or irrelevant concerns, for "the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce."

Indeed, these very concerns--with the burden of liability and of administration--underpin the *Robins* rule itself and are discussed at length in *Barber Lines*, 754 F.2d 49, 54-55. But it is one thing to say that a federal court, largely responsible for shaping the common law of admiralty, should follow a longstanding liability rule to govern a federal cause of action. It is quite another to say that a state remedy, presumptively preserved under the savings to suitors clause, is potentially so disruptive as to be unconstitutional. Where as here the state remedy is aimed at a matter of great and legitimate state concern, a court must act with caution.

The question, then, is whether absent the *Robins* rule there remain limitations on the scope of recovery under the Compensation Act adequate to limit the burden it imposes on maritime commerce. The Compensation Act has yet to be construed by the Rhode Island courts. We nevertheless assume that its extension of liability to cover all "loss of income or diminution of profit . . . as a result of damage to the natural resources of the state of Rhode Island caused by the violation of [Rhode Island pilotage or pollution laws]," R.I. Gen. Laws § 46-12.3-4 (emphasis supplied), incorporates the familiar tort limitations of foreseeability and proximate cause. These principles do in some measure limit the burden imposed on maritime shipping.

Foreseeability may extend some distance, *cf. Barber Lines*, 764 F.2d at 52, and "remoteness" is scarcely a sharply defined concept. *Compare Petitions of Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968) (rejecting *Robins* but excluding economic losses suffered by the owner of a vessel prevented from unloading its cargo above a bridge that collapsed as a result of defendant's negligence as too remote to permit recovery). We cannot be sure how Rhode Island courts will develop these concepts in the context of oil pollution cases. Depending on Rhode Island's solutions, the burdens imposed by the Compensation Act, financial and administrative, may be substantial but they may also be tolerable. One might say that the case for preemption at this stage is subject to the *Scotch* verdict--not proven.

Having said all this, we think one final consideration tips the scales in favor of the Compensation Act's validity. Congress has recently enacted the Oil Pollution Act, 33 U.S.C. § 2701 *et seq.*, which almost certainly provides for recovery of purely economic damages in oil spill cases. Section 2702(b)(2)(E) of the act provides that "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, . . . shall be recoverable by any claimant." The House Conference Report makes clear that, under section 2702(b)(2)(E), "the claimant need not be the owner of the damaged property or resources to recover for lost profits or income". H.R. Conf. Rep. No. 101-653, 101st Cong., 2d Sess. 103 (1990). The act also expressly provides that it does not preempt state imposition of additional liability requirements. 33 U.S.C. § 2718(a).

The statute contains another substantial piece of evidence that Congress means to allow recovery of economic losses from injury to natural resources even though the claimant's own property was not damaged. In another subsection of the damage provision, there is an explicit provision for recovery of "economic losses resulting from destruction of real or personal property" by a claimant "who owns or leases that property." 33 U.S.C. § 2707(b)(2)(B). If the "natural resources" injury provision in subsection (E) were limited to those owned by the claimant, the recovery thus provided would be already covered by subsection (B) and subsection (E) would be redundant. *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985) (readings that create redundancies are not favored).

The new federal statute does not apply retroactively to govern the present case. *See* Pub. L. No. 101-380, § 1020 (providing that the statute "shall apply to an incident occurring after the date the enactment of this Act [August 18, 1990]."). But we think that the statute is compelling evidence that Congress does not view either expansion of liability to cover purely economic losses or enactment of comparable state oil pollution regimes as an excessive burden on maritime commerce. Given the Congress' superior ability to weigh the very practical considerations relating to such a judgment, we give Congress' conclusion substantial weight. For this purpose, the non-retroactivity of the statute is irrelevant.

We hold, then, that the Rhode Island's Compensation Act as reasonably construed and applied is not preempted by the admiralty clause of the Constitution. We express no judgment on whether claimants' particular injuries were reasonably foreseeable or proximately caused by the grounding of the M/V World Prodigy, or whether claimants' claims are otherwise viable under the Rhode Island statute. That determination is for the district court in the first instance or for the state courts. *Robins Dry Dock* remains the rule in this circuit for federal claims; we simply hold that Rhode Island is free to chart a different course.

Because of the Oil Pollution Act, it may well be that the immediate problem with which we have wrestled at length in this case is a transient one; the legal regime for oil pollution accidents after August 18, 1990, will largely be a creature of the new statute. But the case before us, like all cases, is important to the litigants, and the governing legal standards have application elsewhere. Applying an imprecise federal preemption standard to a little construed state statute is no easy task. For the present, assuming that the Rhode Island statute is providently construed and applied, we think that it is not unconstitutional. ***

In re Deepwater Horizon, 745 F.3d 157 (5th Cir. 2014)

Edith H. Jones, Circuit Judge:

Eleven Louisiana coastal parishes (the "Parishes") filed suits against BP and other defendants ("Appellees") involved in the Deepwater Horizon oil spill to recover penalties under The Louisiana Wildlife Protection Statute ("Wildlife Statute") for the pollution-related loss of aquatic life and wildlife. La. R.S. 56:40.1. [2] Suits filed originally in state court were removed to federal court, which denied the Parishes' motions to remand and then dismissed all of the Parishes' claims as preempted by federal law. Both decisions are challenged in the Parishes' appeal. We concur with the district court that the state law claims were removable pursuant to the jurisdictional provision of the Outer Continental Shelf Lands Act ("OCSLA"). We also affirm their dismissal as preempted by federal law.

BACKGROUND

The Macondo well, which was being drilled by the mobile offshore drilling rig Deepwater Horizon, experienced a catastrophic blowout and explosion in April 2010 and caused hydrocarbon, mineral, and other contaminant pollution all along the shores and estuaries of the Gulf Coast states, inflicting billions of dollars in property and environmental damage and spawning a litigation frenzy. Among the thousands of cases transferred for consolidated management by the Judicial Panel on Multidistrict Litigation to the Eastern District of Louisiana were the Parishes' lawsuits, some of which had been removed from state court. The district court handled cases filed by government entities, like the Parishes, in various groups according to their common issues. Considering first the remand motions filed by three of these Parishes, the court upheld its removal jurisdiction notwithstanding that the cases alleged only penalties accruing under state law for pollution damage that occurred in state waters or along the coastline. The court predicated federal court jurisdiction on 43 U.S.C. § 1349(b)(1)(A). *See In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010 (In re: Oil Spill)*, 2010 AMC 2937, 2942-43, 747 F. Supp.2d 704, 708-09 (E.D. La. 2010). Next, considering various defendants' Motions to Dismiss the "B1" pleading bundle cases, filed for private or "non-governmental economic loss and property damages," the district court held that admiralty jurisdiction was present because the alleged tort occurred upon navigable waters and disrupted maritime commerce, and the operations of the Deepwater Horizon, the vessel, bore a substantial relationship to maritime activity. *In re: Oil Spill*, 2011 AMC 2220, 2228, 808 F. Supp.2d 943, 951 (E.D. La. 2011). The district court also held that state law was preempted by maritime law. 2011 AMC at 2233-34, 808 F. Supp.2d at 953-55. In a subsequent order concerning the "C" pleading bundle cases, brought by the states of Alabama and Louisiana, the court drew from its decision concerning the "B1" pleading bundle to hold that the states' wildlife actions are preempted by federal law. *See In re: Oil Spill*, MDL No. 2179, 2011 WL 5520295, at *3, 8 (E.D.La. Nov. 14, 2011). Finally, when considering the Local Government Entity Master Complaint and certain other cases within pleading bundle "C," the district court held, inter alia, that because the Parishes only asserted state law claims, which the district court already deemed preempted, the cases failed to state claims upon which relief could be granted and must be dismissed. *In re: Oil Spill*, 835 F. Supp.2d 175, 179-80 (E.D. La. 2011). ***

DISCUSSION

I. Removal Jurisdiction

The Appellees principally rely on OCSLA's broad jurisdictional grant in petitioning for federal court removal jurisdiction. Defendants may generally remove a case from state court if the federal court would have had original jurisdiction over it. 28 U.S.C. § 1441(a). The defendants bear the burden of establishing the basis for removal, and operative facts and pleadings are evaluated at the time of removal. *City of Chicago v. Int'l Coll, of Surgeons*, 522 U.S. 156, 163 (1997). The pertinent provision, OCSLA § 23(b)(l), states:

. . . the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with . . . any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals. . . .

The Fifth Circuit has interpreted this language as straightforward and broad. *See Tenn. Gas Pipeline v. Hous. Cas. Ins. Co*., 1996 AMC 2296, 2301, 87 F.3d 150, 154 (5 Cir. 1996); *EP Operating Ltd. P'ship v. Placid Oil Co*., 26 F.3d 563, 569 (5 Cir. 1994) ("[A] broad reading of the jurisdictional grant of § 1349 is supported by the expansive substantive reach of the OCSLA."). Moreover, because jurisdiction is invested in the district courts by this statute, "[a] plaintiff does not need to expressly invoke OCSLA in order for it to apply." *Barker v. Hercules Offshore, Inc.*, 2013 AMC 946, 950, 713 F.3d 208, 213 (5 Cir. 2013). Courts typically assess jurisdiction under this provision in terms of whether (1) the activities that caused the injury constituted an "operation" "conducted on the outer Continental Shelf" that involved the exploration and production of minerals, and (2) the case "arises out of, or in connection with" the operation. *See, e.g., EP Operating Ltd. P'ship*, 26 F.3d at 568-69. As the district court noted, the fact that the oil spill occurred because of the Appellees' "operations" in exploring for and producing oil on the Outer Continental Shelf ("OCS") cannot be contested.

The Parishes do not concede, however, that, under the second half of the inquiry, their statutory wildlife claims arose out of or in connection with the oil production operation. Following the migration of contaminants from the well, the injury to wildlife and aquatic life was wholly situated in state territorial waters and on land. The statutory wildlife claims, they assert, have no effect on the "efficient exploitation of resources from the OCS," nor do they "threaten the total recovery of federally-owned resources." *Id.* at 570. "Mere connection" to activities on the OCS, in other words, is insufficient to meet the jurisdictional test.

This argument, however, cannot be squared with applicable Fifth Circuit law or the facts before us. Even though one can hypothesize a "mere connection" between the cause of action and the OCS operation too remote to establish federal jurisdiction, this court deems § 1349 to require only a "but-for" connection. *See, e.g., Hufnagel v. Omega Serv. Indus., Inc.,* 182 F.3d 340, 350 (5 Cir. 1999) (applying the "but-for" test and finding § 1349 jurisdiction where a worker on a stationary drilling platform in the OCS was injured); *Tenn. Gas Pipeline*, 1996 AMC at 2302, 87 F.3d at 155 (using "but-for" test to find jurisdiction when a boat collided with a platform, even though the accident was argued to be a "navigational" error and the mineral operation in question did nothing to cause the accident); *Recar v. CNG Producing Co.*, 1989 AMC 1323, 1325, 853 F.2d 367, 369 (5 Cir. 1988) (applying OCSLA to a personal injury suit when a platform worker was injured because a rope broke and caused him to fall to the deck of an adjacent transport vessel). The but-for test does not include a purposive element as the Parishes advocate. It is undeniable that "the oil and other contaminants would not have entered into the State of Louisiana's territorial waters 'but-for' [Appellees'] drilling and exploration operation." *In re:*

Oil Spill, 2010 AMC at 2942, 747 F. Supp.2d at 708. This is not, in short, a challenging case for asserting original federal jurisdiction, and therefore removal jurisdiction, under OCSLA.

Undeterred by this reasoning, the Parishes raise additional but flawed arguments. First, their attempt to intertwine the Section 1349 jurisdictional inquiry with OCSLA's choice of law provision, 43 U.S.C. § 1333, fails because the provisions and the issues they raise are distinct. *See, e.g., Dahlen v. Gulf Crews, Inc.*, 2002 AMC 566, 569-70, 281 F.3d 487, 491-92 (5 Cir. 2002); *Recar*, 1989 AMC at 1324-26, 853 F.2d at 368-70. Federal courts may have jurisdiction to adjudicate a dispute under OCSLA, but they must then turn to the OCSLA choice of law provision to ascertain whether state, federal, or maritime law applies to a particular case. (Choice of law will be addressed in the next section of this opinion.) Any contrary implication in *Golden v. Omni Energy Servs. Corp.*, 242 Fed. Appx. 965, 967 (5 Cir. 2007), is not precedential because the case was unpublished; we reference Golden here only because the Parishes erroneously relied on it. Second, the Parishes contend that there is a situs requirement for OCSLA jurisdiction under the language of Section 1349. We disagree. Because federal jurisdiction exists for cases "arising out of, or in connection with" OCS operations, 43 U.S.C. § 1349, the statute precludes an artificial limit based on situs and the Parishes' formulation conflicts with this court's but-for test. *See* cases cited supra. Third, the Parishes misapprehend 28 U.S.C. § 1441 (b) in urging that diversity of citizenship is necessary to support the removal of an OCSLA claim. The version of Section 1441(b) in effect at the time of the district court's ruling required instead that a federal basis for original jurisdiction exist (OCSLA) and that no defendant be a citizen of the forum state. Because both of those preconditions were met here, removal jurisdiction existed.

II.
CHOICE OF LAW

The more difficult question in this appeal is whether the Wildlife Statute's penalties can be applied against the Appellees. The Parishes' arguments are easily summarized. Both briefs submitted by the Parishes (authored on behalf of Orleans Parish, et al. and New Iberia Parish, *et al.*) acknowledge that the mobile offshore drilling unit Deepwater Horizon is a vessel. *Demette v. Falcon Drilling Co.*, 2002 AMC 686, 691-92, 280 F.3d 492, 498-99 (5th Cir. 2002), *overruled in part, on other grounds*, by *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 2010 AMC 808, 589 F.3d 778 (5th Cir. 2009 en banc); *Offshore Co. v. Robison*, 1959 AMC 2049, 2058, 266 F.2d 769, 776 (5th Cir. 1959). Both briefs assert that, for this reason, the OCSLA choice of law provisions cannot apply to their claims. ("Since, as the District Attorneys have consistently maintained, OCSLA situs is lacking, OCSLA cannot apply.") The Parishes thus foreswear any reliance on 43 U.S.C. § 1333(a)(2)(A), which borrows state law as surrogate federal law to regulate certain OCSLA activity. As Orleans Parish puts it, "[i]t is not the adoption of state law as federal surrogate law that allows for penalties under Title 56, but the fact that the harm to wildlife made subject of the District Attorneys' suit occurred exclusively within Louisiana state waters, and Louisiana has the right to exercise its traditional police power . . . by pursuing penalty claims under Louisiana state law."

While they purport to abjure the application of federal law, however, the Parishes also rely on savings clauses in federal statutes that regulate water pollution (Clean Water Act ("CWA")), 33 U.S.C. § 1321(o), and oil pollution (Oil Pollution Act ("OPA")), 33 U.S.C. § 2718(c), and preserve some state remedies. Of course, if the instate location of wildlife injury alone suffices to support Louisiana's exercise of its police power, why resort to federal savings clauses?

The Parishes' inconsistent positions reveal a basic flaw. The question here is not whether federal law plays a role in remediating the effects of the Macondo well blowout, but how extensive the role is. The Parishes cannot prove Appellees' responsibility, or respective shares of responsibility, for wildlife injuries without alluding to the blowout's physical source, emissions from a well drilled in the OCS, or its human source, errors or omissions related to the Deepwater Horizon's production activity on the high seas above the OCS. The Parishes' pleadings expressly allege, inter alia, that Appellees caused the Macondo well oil spill and violated federal regulations in so doing.

Analysis of federal law thus inevitably precedes the Parishes' simplistic *lex loci delicti* theory. Federal law covers the disaster in two ways. First, pursuant to OCSLA, "[a]ll law applicable to the outer Continental Shelf is federal law," and all cases "involving events occurring on the Shelf [are] governed by federal law. . . ." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480-81, 1981 AMC 2033, 2038 (1981); see 43 U.S.C. § 1333(a)(l) ("The . . . laws . . . of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all . . . devices permanently or temporarily attached to the seabed . . . [for the purpose of resource exploitation].") Federal law governs injuries arising from activity on an OCSLA situs even if the injury occurs elsewhere. *See Alleman*, 2009 AMC at 1825, 580 F.3d at 286 (OCSLA applies to helicopter accident although victims fell into the sea after the helicopter crashed into an offshore platform). OCSLA allows the borrowing of state law as surrogate federal law only when state law is "not inconsistent with . . . other Federal laws and regulations. . . ." 43 U.S.C. § 1333(a)(2)(A). The borrowing provision does not apply here, however, either because, as the district court stated, the disaster is governed by maritime law or because the broader language of Section 1333(a)(1), which extends explicitly to devices temporarily attached to the OCS (as Section 1333(a)(2)(A) does not), clearly controls. In sum, even if the Parishes had not attempted to waive reliance on OCSLA, the federal law articulated by OCSLA displaces state law. Further, as the Supreme Court has ruled, Section 1333(a) "supersede[s] the normal choice-of-law rules that the forum would apply." *Gulf Offshore*, 453 U.S. at 482, 1981 AMC at 2039 n.8.

Alternatively, maritime law applies here because the Deepwater Horizon is a vessel. A strong argument exists for the proposition that the disaster occurred while the vessel was engaged in the maritime activity of conducting offshore drilling operations, and the disaster had a significant effect on maritime commerce. *Cf. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 1995 AMC 913 (1995) (maritime law applies to damages where drill barge flooded underwater tunnel and buildings on river bank); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538-39 (5th Cir. 1986).

OCSLA Section 1333(a)(1) and admiralty law constitute alternative, not overlapping, regimes of federal law. *See Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 361, 1969 AMC 1082, 1089 (1969); *Texaco Exploration & Prod., Inc. v. AmClyde Engineered Prods. Co.*, 2006 AMC 1297, 1312, 448 F.3d 760, 772-73 (5th Cir. 2006). For present purposes, however, the exact dichotomy is irrelevant as either regime includes the federal statutes regulating water pollution and oil pollution, to which we now turn.

A. General Principles

The Federal Water Pollution Control Act (aka Clean Water Act, "CWA"), 33 U.S.C. § 1251-1376, and its implementing regulations comprehensively govern oil exploration and development on the OCS, including BP's conduct of the Macondo well operations pursuant to National Pollutant Discharge Elimination System ("NPDES") Permit No. GMG290000. *Gulf Restoration Network v. Salazar*, 683 F.3d 158, 164-66 (5 Cir. 2012). Under the regulations, states like Louisiana that might be affected by offshore pollutant discharges may offer comments before permits are issued, but they have no other express regulatory role. Id. at 165. Nevertheless, the Parishes assert the right to pursue state law penalties against the Appellees for pollution that migrated from nearly fifty miles offshore. We will examine their arguments in detail but first explain further the pertinent background law.

Put in starkest terms, had the blowout occurred in Texas state waters and caused pollution in Louisiana, the Parishes' Louisiana law claims would be squarely foreclosed. Federal preemption of interstate water pollution claims has been a feature of United States law for over a hundred years. *See, e.g., Missouri v. Illinois*, 200 U.S. 496 (1906). Since 1987, the issue has been settled by the Supreme Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). In *Ouellette*, the Court resolved conflicting circuit court decisions on the question whether a state could enforce its laws against pollution that migrated into its environment from a neighboring state. . . . The Court then applied the standards of conflict preemption, concluding that the "CWA precludes a court from applying the law of an affected State against an out-of-state source." 479 U.S. at 494. ***

Notably, *Ouellette* also confronted and rejected the contention that two provisions of the CWA, which preserved a State's right to regulate its waters and an injured party's right to seek relief under "any statute or common law," authorized the nuisance suit under the affected state's law rather than that of the point source state. According to the Court, neither savings clause, carefully read, would stand for so broad a proposition. 479 U.S. at 492-93. The citizen suit savings clause was preceded by the qualifier, "[n]othing in this section," while the states' authority was saved for regulation only of their own waters. *Id.* ***

Because the CWA was inadequate to provide complete remedies for the Valdez, Alaska oil spill catastrophe, Congress passed the Oil Pollution Act ("OPA") in 1990. 33 U.S.C. §§ 2701-62. Congress intended that the OPA would "build [] upon § 311 of the Clean Water Act [§ 1321] to create a single Federal law providing cleanup authority, penalties, and liability for oil pollution." S. Rep. No. 101-94, at 9 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 730. The OPA prescribes a supplemental, comprehensive federal plan for handling oil spill responses, allocating responsibility among participants and prescribing reimbursement for cleanup costs and injuries to third parties. The remedial efforts for the Macondo well blowout occurred under the auspices of both the CWA, 33 U.S.C. § 1321(b)(1) (the CWA applies to oil discharges in connection with activities above the OCS), and the OPA, 33 U.S.C. § 2701(32)(C) (extending the OPA to offshore facilities above the OCS).

Both the CWA and the OPA contain provisions that save state law causes of action, including penalty claims, under certain circumstances. The CWA clause involved in this case is 33 U.S.C. § 1321(o), which states in pertinent part:

> (o) Obligation for damages unaffected, local authority not preempted; existing Federal authority not modified or affected
>
> > (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator . . . or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance. . . .
> >
> > (2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance <u>into any waters within such State</u>, or with respect to any removal activities related to such discharge.
> >
> > (3) Nothing in this section shall be construed . . . to affect any State or local law not in conflict with this section.

(Emphasis added [by the court]).

The OPA's provision is differently worded:

> Section 2718(a). Relationship to Other Law
>
> (a) Preservation of State authorities; Solid Waste Disposal Act Nothing in this Act . . . shall --
>
> (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—
>
> (A) the discharge of oil or other pollution by oil within such State; or
>
> (B) any removal activities in connection with such a discharge; or
>
> (2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under . . . State law, including common law.
>
> ...
>
> (c) Additional requirements and liabilities; penalties
>
> Nothing in this Act. . . shall in any way affect, or be construed to affect, the authority of the United States or . . . any State or political subdivision thereof—
>
> (1) to impose additional liability or additional requirements; or
>
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge ... of oil.

33 U.S.C. § 2718(a), (c) (emphasis added [by the court]).

B. Application of General Principles

The Parishes make two basic arguments. First, they assert that their historic police powers to deter oil pollution in their waters and protect their aquatic life and wildlife are preserved notwithstanding the application of federal law. Second, they assert that both above-cited federal savings clauses expressly protect their ability to levy Wildlife Statute fines. Each argument must be carefully considered.

1. Does *Ouellette* control?

The Parishes' first proposition depends on whether the states maintained historic police powers to apply their local law to interstate water pollution even if the pollution originated outside the state. The Supreme Court's discussion of the issue in *Milwaukee I* contradicts the Parishes' position. 406 U.S. at 105-06. A federal common law of nuisance, not the competing laws of each affected jurisdiction, was applied to interstate water pollution cases from an early period. 406 U.S. at 106-07. This is not to say the states were deprived of rights and remedies in such cases, but only that they had to rely on the common body of federal law to do so. The claim by the states (and their localities) to apply their historic police power in these situations is therefore dubious.

Even assuming the Parishes have some residual police power to apply local law to this OCSLA-originated discharge, however, they must overcome federal preemption under the CWA. As the Supreme Court predicted in *Milwaukee I*, 406 U.S. at 107, Congress could and did supplant federal common law with an overarching regulatory framework to protect the nation's waters. To effectuate the full purposes of the regulations, *Ouellette* held that the states' ability to apply local law to out-of-state point sources of alleged water pollution was in conflict with the CWA. 479 U.S. at 494.

The Parishes contend that *Ouellette* is distinguishable. First, it applies only to the CWA's permitting provision (33 U.S.C. § 1342), not to the oil discharge prohibition (33 U.S.C. § 1321(o)). Relatedly, the savings provisions that *Ouellette* found inapposite are different from the provisions the Parishes rely on. Second, since *Ouellette* considered only interstate water pollution, the decision has no bearing on discharges from the OCS. We find these distinctions unpersuasive.

The Supreme Court's subsequent interpretation of *Ouellette* substantially undermines any cramped reading of the case. The Court reiterated *Ouellette's* holding that "the Clean Water Act taken 'as a whole, its purposes and its history' pre-empted an action based on the law of the affected State and that the only state law applicable to an interstate discharge is 'the law of the State in which the point source is located.'" *Arkansas*, 503 U.S. at 100 (citing *Ouellette*, 479 U.S. at 493, 487) (emphasis added). This statement is not limited to the specific provisions of the CWA at issue in *Ouellette*; in fact, *Arkansas* refers to "interstate discharge" irrespective of type or permit status. The Fourth Circuit confirmed Ouellette's reach by applying it to an interstate pollution dispute arising under the Clean Air Act. *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 306-07 (4 Cir. 2010). That court concluded, "[t]here is no question that the law of the states where emissions sources are located . . . applies in an interstate nuisance suit. The Supreme Court's decision in Ouellette is explicit: a 'court must apply the law of the State in which the point source is located.'" *Id.* at 306 (citation omitted). ***

In sum, *Ouellette* forms a controlling backdrop for resolving claims caused by the blowout. Federal law, the law of the point source, exclusively applies to the claims generated by the oil spill in any affected state or locality.

2. Effect of Savings Clauses

With *Ouellette* as the controlling law, there are no state remedies to "save." The OPA applies as the law of the OCSLA point source and, along with the CWA penalties, furnishes a comprehensive remedial regime for affected states' governmental and private claims. Just because the Parishes are located in the most closely adjacent state, they fare no better than the "down-current" states of Texas, Mississippi, Alabama, and Florida. The CWA and the OPA "savings" clauses preserve but do not create state law claims. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 162 (1920); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 224-25, 1986 AMC 2113, 2127-28 (1986) (Death on the High Seas Act savings clause only preserves state courts' jurisdiction to provide remedies for fatalities in state waters).

Nevertheless, for additional reasons, each savings clause is powerless to "save" the Parishes' claims under the Wildlife Statute. In general, the savings clauses must be read with particularity and, as *Ouellette* demonstrates, a savings clause does not disrupt the ordinary operation of conflict preemption. *See Ouellette*, 479 U.S. at 492-93 (rejecting application of two savings provisions of the CWA); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000).

a. CWA § 1321(o)

Most closely on point in the CWA is Section 1321(o)(2), which provides that, "[n]othing in this Section shall [preempt any state or local] requirement or liability with respect to the discharge of oil . . . into any waters within such state. . . ." The provision only saves state laws imposing liability or additional requirements with respect to the "discharge" of oil "into any waters within such State." The provision does not save a state's laws where the discharge did not occur "within" the state. The Parishes contend that the term "discharge" should be read to include "any means by which oil enters state waters." According to the statute, however, "discharge" "includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping. . . ." 33 U.S.C. § 1321(a)(2). These gerunds connote active conduct or movement from a point source to a place within the state rather than the mere passive migration or floating of oil into state waters. Contrary to the Parishes' view, the word "emitting" does not change this analysis. "Emit" means to send out or release. Webster's Third New International Dictionary 742 (3d ed.1986). The principle of noscitur a sociis, that words grouped in a list should be given related meaning, reinforces our interpretation because, taken in context with the other gerunds, "emitting" must take on an active cast. *See Third Nat'l Bank in Nashville v. Impac Ltd., Inc.*, 432 U.S. 312, 322-23 (1977).

The other subsections of Section 1321(o) afford no benefit to the Parishes. Section 1321 (o)(1) expressly saves damage claims, not penalties under the Wildlife Statute. Section 1321(o)(3), a catch-all provision, saves state laws not in conflict with the section itself. To construe the catch-all harmoniously with Section 1321(o)(2), which is limited to discharges within state waters, and avoid rendering the companion provision superfluous, the catch-all must be similarly limited.

b. Section 2718(c)

The Parishes place the most emphasis on this savings clause from the OPA. The section states that "[n]othing in this Act [OPA] . . . shall in any way affect... the authority of the United States or any State [or locality] . . . to impose . . . any fine or penalty . . ." relating to an oil discharge. 33 U.S.C. § 2718(c). First, they assert, the OPA was enacted to supplement the older CWA apparatus for redressing the consequences of oil pollution. Second, the Parishes urge that the OPA, being specific with regard to oil pollution, controls over the more general requirements of the CWA, which applies to both illegal oil and hazardous substance discharges into navigable waters. Third, the exact language of Section 2718(c) differs critically from the CWA's Section 1321 (o) because it lacks the narrowing reference to state waters. Finally, a construction of Section 2718(c) that limits its effect to discharges within state waters would allegedly render the OPA savings clause superfluous. Section 2718(c), from their standpoint, preserves "all state penalty provisions 'relating to' oil spills in any way, not just those originating in state waters." On balance, however, we conclude that the Parishes place more weight on this savings provision than it can bear.

To begin, the canon of construction that mandates application of a specific over a general statutory provision is not easily adapted to this statutory scheme. As all parties acknowledge, the CWA, the fountainhead of clean water regulation, contains the provisions that prohibit oil discharges and set penalties for illegal discharges. 33 U.S.C. § 1321(b)(3),(6) ("Administrative penalties"), (7) ("Civil penalty actions"), (f) ("Liability for actual costs of removal"). These provisions led the district court to declare the CWA's savings provision more specific than those in the OPA. The Parishes, in contrast, characterize Section 2718(c) as plainly more specific both because it resides in the OPA and it preserves state penalty actions. We do not, however, perceive the applicability of these provisions to be an either/or proposition. Instead, each requires interpretation within a statutory framework in which the OPA was designed to complement, not compete with the CWA. That the OPA was enacted more recently than the CWA means little where there is no fundamental conflict with provisions of the CWA. The statutes, in other words, must be construed, as the district court noted, *in pari materia*.

Moving to the specific language of Section 2718(c), the provision more precisely states, "Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. § 183 *et seq.*), or § 9509 of Title 26, [shall affect] the authority of the United States or any State or political subdivision thereof. . . ." Statutory construction begins with the language of the statute, *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010), and, in the absence of ambiguity, often ends there. Two features of this prefatory language are notable. The savings provision does not apply beyond the OPA itself and two other laws. Further, Congress did not refer to the CWA. Courts are not at liberty to expand the language chosen by Congress, and the omission here is telling. Thus, while Section 2718(c) saves from the OPA's diminution the ability of the United States or state entities to impose requirements relating to oil discharges, it does not save those powers from the effects of the CWA or any other non-identified federal law. Consistent with this conclusion, the Supreme Court in Ouellette held that a savings clause commencing with "nothing in this section" is by its terms limited to preemption caused by that section alone. *See* 479 U.S. at 493 (such a clause "does not purport to preclude pre-emption of state law by other provisions of the Act"); *see also United States v. Locke*, 529 U.S. 89, 106, 2000 AMC 913, 926-27 (2000) (Section 2718 does not extend to subjects addressed in other Titles of the OPA or other acts).

Other principles of statutory construction are relevant because of the prefatory language here. If Section 2718(c) were interpreted, as the Parishes contend, to "supersede" the CWA and *Ouellette* by allowing all affected states to layer their unique penalty and regulatory laws on top of those governing this OCSLA blowout, the result would be an implied repeal of CWA preemption. Implied repeals, however, are disfavored. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987); *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1335 (5 Cir. 1994). Apart from omitting reference to waters within the state, however, there is no indication in Section 2718(c) or the OPA that Congress intended to repeal the point-source primacy ordained by the CWA. That the OPA in fact amended CWA Section 1321(o)(2) to add the phrase "or with respect to any removal activities related to such discharge" without also amending the immediately preceding phrase "into any waters within such State" signals Congressional intent not to modify this portion of the CWA. *See* OPA Sec. 4202, Pub.L. No. 101-380, 104 Stat. 484, 532 (codified as 33 U.S.C. § 1321(o)(2)). Courts cannot, without any textual warrant, expand the operation of Section 2718(c) to, in effect, modify the scope of preemption under the CWA.

It is also possible to understand why Section 2718(c) omits a reference to waters within the affected state. Simply, the provision saves remedies available to the United States as well as the states, rendering a geographic limitation to state waters meaningless. Viewed in light of Congress' presumed awareness of *Ouellette* when the OPA was passed, and Congress' failure to change the scope of CWA preemption despite its intent generally to broaden remedies against oil pollution, this omission cannot be controlling on the scope of this savings provision.

Nor does this construction deprive the savings provision of utility, as the Parishes assert. For any oil pollution whose point source is on the land or navigable waters within a state, Section 2718(c) authorizes the point source state and its political subdivisions to impose any additional liability, requirements, fines, and penalties. Preemption is limited to situations in which the affected state is not the point source jurisdiction; affected states may still pursue relief based on the OPA and the CWA or the law of the point-source.

Finally, we note that this interpretation does not diminish the incentives for compliance with the CWA or the OPA or the point source states' additional laws concerning oil pollution. The federal laws' extravagant penalties, fines, criminal liability, and damage exposure that may be imposed on entities associated with oil pollution, even in the absence of the layering of multiple affected states' laws, evidence a clear congressional policy of deterrence and retribution.

CONCLUSION

For the reasons stated above, the district court had removal jurisdiction over the Parishes' Wildlife Statute claims. Further, it correctly concluded that the claims are preempted by the CWA as interpreted in *Ouellette*, and that Congress did not reject that interpretation explicitly or by negative implication in the CWA or when it passed the OPA. The judgment of the court dismissing the Parishes' claims is affirmed.

National Shipping Co. of Saudi Arabia v. Moran Mid-Atlantic Corp., **924 F. Supp. 1436 (E.D. Va. 1996),** ***aff'd***, **122 F.3d 1062 (4th Cir. 1997)**

Rebecca Beach Smith, District Judge:

This controversy began on December 1, 1993, when the HARRIET MORAN, a tug owned by Defendant Moran Trade Corporation of Delaware and operated by Defendant Moran Towing of Virginia (Defendants referred to collectively as "Moran"), 1 collided with the M/V SAUDI DIRIYAH, a vessel owned and operated by Plaintiff National Shipping Company of Saudi Arabia ("NSCSA"). As a result of the collision, approximately 9,000 gallons of fuel oil spilled into the Elizabeth River. NSCSA accepted immediate responsibility for the spill and coordinated its cleanup under the Oil Pollution Act of 1990 ("OPA"). NSCSA then brought this action against Moran, claiming that the oil spill was caused by Moran's negligence. It argues that Moran is obligated to reimburse NSCSA for the cost of the cleanup and the expenses it incurred compensating victims of the spill. Moran filed a counterclaim against NSCSA, alleging that the oil spill was caused by NSCSA's negligence and seeking indemnity from NSCSA for any liability Moran faces from third party claimants.

In its Second Amended Verified Complaint, NSCSA asserts four causes of action pursuant to: (1) general maritime law; (2) Virginia's State Water Control Law, Va. Code Ann. § 62.1-44.34:18(C)(4); (3) Virginia common law; and (4) the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. On June 15, 1995, Moran filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. By order filed August 14, 1995, this Court granted in part Moran's motion. The Court dismissed NSCSA's claim for recovery of removal costs and the cost of compensating victims of the spill under the State Water Control Law, Va. Code Ann. 62.1-44.34:18(C)(4), and NSCSA's claim, in its original complaint, for recovery under the Clean Water Act. The Court, however, retained NSCSA's right to proceed under the State Water Control Law to recover damages to its own property resulting from the collision. ***

I.
FINDINGS OF FACT

***

A. The Collision

On December 1, 1993, the M/V SAUDI DIRIYAH was docked at Container Berth One at the Norfolk International Terminals ("NIT") in Norfolk, Virginia. She faced due north with her starboard side against the berth. The Master of the M/V SAUDI DIRIYAH was Captain Mario Grech. The vessel was scheduled to undock and shift to Lambert's Point Docks ("Lambert's Point") at 11:00 p.m. that evening. Lambert's Point is three to four miles upstream from NIT on the Elizabeth River.

NSCSA hired Captain John R. Morey, a docking pilot, to direct the shift to Lambert's Point. NSCSA contracted with Moran to provide tug assistance. Moran provided two tugs for the shift, the CAPE HENRY and the HARRIET MORAN. The Captain of the CAPE HENRY was Alvin Doucet; the Captain of the HARRIET MORAN was William Lusk. Moran tugs had docked and undocked the M/V SAUDI DIRIYAH and her sister ships with identical hull designs on other occasions. Captain Lusk himself, on one previous occasion, docked the M/V SAUDI DIRIYAH. Captain Lusk was an experienced tug master, and he was well aware of the flared hull design of the M/V SAUDI DIRIYAH. ***

At 11:16 p.m., in accordance with Captain Morey's order, Captain Lusk maneuvered the HARRIET MORAN alongside the port quarter of the M/V SAUDI DIRIYAH. Captain Lusk intended to land with the starboard shoulder of his tug against the port quarter of the ship. Instead, the stern of the tug made first contact. One of the tug's starboard quarter bitts struck the M/V SAUDI DIRIYAH and put a nine inch gash in her hull. The gash was in the flared portion of the vessel's stern near the "Dutch" chock, a place on the vessel where tugs customarily either push or pull the vessel with a rope. The collision punctured the M/V SAUDI DIRIYAH's fuel oil settling tank. Fuel oil immediately began spilling into the Elizabeth River. ***

As a result of the collision, NSCSA lost $3,250 in fuel oil. In addition, NSCSA spent $16,050 to repair the hole which the HARRIET MORAN punctured into the hull of the M/V SAUDI DIRIYAH.

B. The Cleanup ***

On December 2, 1993, the USCG designated NSCSA as the "responsible party" for the spill under OPA. ***

Cleanup efforts ended on January 6, 1994. The next day the USCG approved the termination of response activities. NSCSA spent $ 868,356.80 to cleanup the oil which spilled from the M/V SAUDI DIRIYAH on December 1-2, 1993. The total expense consisted of the following: (1) $758,265.21 to IMS; (2) $1,724.82 to the City of Norfolk; (3) $ 524.32 to TC Analytics; (4) $57,146.47 to Woodward-Clyde; (5) $27,031.51 to Brian Pringle; (6) $ 16,741.97 to Kenneth Meyers; (7) $2,670.00 to marine surveyors Stott & Ogram; and (8) $4,252.50 to Martinair. In addition, the United States Navy and the USCG have asserted combined claims of approximately $300,000 for expenses incurred during their participation in the cleanup. The final amounts of these claims are, for now, undetermined. ***

C. Third Party Complaints

The oil that spilled from the M/V SAUDI DIRIYAH soiled over 200 private vessels along the Elizabeth River. To handle complaints from those affected by the spill, NSCSA retained Turnaboat Services, Ltd. ("Turnaboat"). Turnaboat set-up and advertised a toll-free telephone number for those affected by the spill to call and report claims. A total of 240 claims were reported to Turnaboat. Of those claims, 209 were negotiated to a settlement and approximately thirty were denied. Only one reported claim, by Tidewater Yacht Agency, resulted in litigation. NSCSA paid a total of $ 106,806.12 in third party claims, mostly to pleasure boat owners for oil staining. ***

II.
CONCLUSIONS OF LAW

This matter falls within the Court's federal question and admiralty jurisdiction. *See* 28 U.S.C. §§ 1331 and 1333.

A. Relationship between OPA Contribution and State Common Law

From its inception, when the HARRIET MORAN collided with the M/V SAUDI DIRIYAH, this case has been governed by the Oil Pollution Act of 1990. Immediately after the M/V SAUDI DIRIYAH arrived at Lambert's Point, the USCG took control of the cleanup operations. Just hours after the spill began, the USCG designated NSCSA as the "responsible party," under the terms of OPA. NSCSA coordinated cleanup efforts in accordance with its obligations under the Act, and it compensated the victims of the spill to the extent it believed it was liable under

OPA. It is not surprising, therefore, that when NSCSA brought this action against Moran it sued under the contribution provision of OPA. In addition, however, NSCSA asserts three other claims against Moran pursuant to: (1) general maritime law; (2) Virginia's State Water Control Law, Va. Code Ann. § 62.1-44.34:18(C)(4); and (3) the Virginia common law theories of subrogation, indemnity, contribution, and restitution.

Counsel for NSCSA candidly admits that these additional claims were added to allow NSCSA to recover the full amount of its cleanup expenses despite OPA's liability limitation provision. Under section 2704 of OPA, a person's liability under the Act is limited in accordance with the type and size of vessel or facility involved in the spill. 33 U.S.C. § 2704(a). Although section 2704 applies specifically to "responsible parties," *id.*, the liability of a third party that causes an oil spill, like Moran, is also subject to the liability limits established in that section. 33 U.S.C. § 2702(d)(2)(A). In this case, Moran's liability for a spill caused by the HARRIET MORAN, a non-tank vessel, is limited by the greater of $ 600 per gross ton or $ 500,000. Id. The HARRIET MORAN is 252 gross tons, so Moran's liability under OPA is limited to $ 500,000, unless one of the exceptions to limitation applies.

NSCSA seeks to escape OPA's limitation provision by bringing multiple counts under general maritime law, state statutory law, and state common law. First, OPA clearly preempts maritime law as to recovery of cleanup expenses and the cost of compensating injured persons. A Court exercising its admiralty jurisdiction will apply the general maritime law only in the absence of a relevant federal statute. *See East River S.S. Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 864, 90 L. Ed. 2d 865, 106 S. Ct. 2295 (1986). In this case, OPA provides NSCSA with a remedy against Moran; it, therefore, preempts the general maritime law as to recovery of cleanup expenses and the cost of compensating third parties. NSCSA argues that its maritime claim for recovery of these damages is preserved by section 2751 of OPA. That section states: "Except as otherwise provided in this chapter, this chapter does not affect . . . admiralty and maritime law." 33 U.S.C. § 2751. However, section 2751 only preserves admiralty claims which are not addressed in OPA, such as NSCSA's claim against Moran for its collision damages. Because OPA provides a comprehensive scheme for the recovery of oil spill cleanup costs and the compensation of those injured by oil spills, the general maritime law does not apply to recovery of these types of damages.

Second, this Court has already ruled, in its order granting in part Moran's Motion to Dismiss, that NSCSA may not recover its response costs and amounts paid to third parties under Virginia's State Water Control Law. The only claims left to be considered, therefore, are those brought pursuant to Virginia common law.

Neither the Court nor counsel for the parties discovered any reported case interpreting OPA's contribution provision. The relationship between OPA's contribution provision and state common law, therefore, has not been determined. NSCSA argues that OPA's "savings clause" preserves its right to seek contribution from Moran under both OPA and state law. Section 2718(a), the savings clause, provides:

Nothing in this chapter . . . shall—

> (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to--
>
> > (A) the discharge of oil or other pollution by oil within such State; or
> > (B) any removal activities in connection with such a discharge; or
>
> (2) affect or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under ... State law, including common law.

33 U.S.C. § 2718(a).

The purpose behind the savings clause is to allow the states to impose liability upon oil polluters above the liability imposed through OPA. Congress wanted to give the states the power to force polluters to cleanup completely oil spills and to compensate the victims of oil spills, even if their liability for these remediation expenses is limited under OPA. The legislative history of the Act makes this point:

> The theory behind the [savings clause] is that the Federal statute is designed to provide basic protection for the environment and victims damaged by spills of oil. Any State wishing to impose a greater degree of protection for its own resources and citizens is entitled to do so.

S. Rep. No. 94, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 728. At the time Congress enacted OPA, twenty-four states had oil spill liability and compensation laws. *Id.* Of these twenty-four, seventeen did not set any liability limitation. *Id.* Unlimited liability for polluters is based on two principles: "a polluter should pay in full for the costs of oil pollution caused by that polluter; and, a victim should be fully compensated." *Id.*

The savings clause was added to allow the states to enact legislation protecting their citizens and their resources to a greater extent than the protection offered by OPA. It was meant to allow the states to go beyond the basic protection of the federal law. The beneficiaries of the savings clause, therefore, are the victims of oil spills. The savings clause was clearly not intended to affect liability between two vessels involved in an oil spill. Congress never intended for a party in NSCSA's position to benefit from the savings clause; companies whose ships spill oil in the waters of the United States, like NSCSA, were meant to be the victims of the savings clause, not its beneficiaries. NSCSA's interpretation of section 2718, therefore, is a distortion of the purpose behind that section's enactment.

NSCSA also argues that its state common law claims are preserved by section 2710(c) of OPA. Subsection (c) of section 2710, concerning indemnification agreements, states: "Nothing in this chapter . . . bars a cause of action that a responsible party subject to liability under this chapter, or a guarantor, has or would have, by reason of subrogation or otherwise, against any person." The Court rejects NSCSA's argument. Subrogation would allow NSCSA to stand in the place of those third parties who were compensated by NSCSA for losses resulting from the oil spill. However, in this case, no third party has filed any state law claim. NSCSA's liability has been circumscribed completely by OPA. For this reason, and because NSCSA has a remedy against Moran under OPA, it may not hold Moran liable to an extent greater than that allowable under the Act.

From its inception, this case has been controlled by OPA. NSCSA's liability for cleaning up the oil spill and compensating its victims derived exclusively through OPA. NSCSA spent close to one and a half million dollars as a result of the spill. This amount does not even approach the liability limitation under OPA for a ship the size of the M/V SAUDI DIRIYAH. As a non-tank vessel, NSCSA's liability for a spill caused by the M/V SAUDI DIRIYAH is limited under the Act to $600 per gross ton. 33 U.S.C. § 2704(a). The M/V SAUDI DIRIYAH is 25,036 gross tons, so NSCSA's liability limitation under OPA for a spill from that vessel is $ 15,021,600. Therefore, Virginia's State Water Control Law, which is meant to impose liability above that imposed through OPA, never was invoked by the state or by any claimant. Likewise, neither the state nor any third party sued NSCSA under Virginia common law.

OPA set NSCSA's liability in this case; OPA also provides NSCSA with a remedy against Moran. Section 2709 provides: "A person may bring a civil action for contribution against any other person who is liable or potentially liable under this chapter or another law." 33 U.S.C. § 2709. As discussed in detail below, Moran is liable to NSCSA under "another law," i.e., general maritime law. *See infra* § II(B). Under section 2709, therefore, NSCSA may recover from Moran money it was forced to spend as a result of Moran's negligence. Because OPA has controlled this action from the beginning, and because Congress provided in OPA a vehicle for a party in NSCSA's position to recover from negligent third parties, NSCSA must proceed under OPA. The Court will not allow NSCSA to distort the intent of the savings clause and seek contribution from Moran under a state common law theory when NSCSA's liability in no way was dependant upon state law. In this case, therefore, where NSCSA's liability was imposed exclusively under OPA, NSCSA is restricted to the contribution scheme provided in the Act. Because Moran is liable to NSCSA through section 2709 of OPA, Moran's liability is limited to $500,000 under section 2704(a), so long as no exception to limitation applies.

There may be a case, however, where a responsible party under OPA is allowed to seek contribution against a negligent third party under both OPA and state law. Consider, for example, a case where an oil spill causes one million dollars of damage, but the responsible party's liability under OPA is limited to $ 500,000. If the spill occurred in Virginia, the responsible party may have to pay for the full cost of the spill despite the liability limitation contained in OPA because a person's liability under Virginia's State Water Control Law may be higher than its liability under OPA. *See* Va. Code Ann. §§ 62.1-44.34:16, 62.1-44.34:18(C) and (H). If the spill was caused by the negligence of a third party, as it was in this case, it is reasonable to assume that the responsible party may: (1) sue the third party for contribution under section 2709 of OPA; and (2) be subrogated to the rights of the state and of other claimants under the State Water Control Law. In this way, the responsible party, whose ultimate liability was not restrained by OPA, could recover the full cost of the spill from the third party despite any liability limitation the third party might enjoy under OPA.

It would be manifestly unfair, in this hypothetical case, to allow the negligent third party to benefit from the protection of OPA's limitation provision while the responsible party receives no such protection. In fact, there is evidence in the legislative history that Congress intended to allow contribution actions in addition to actions brought under section 2709. *See* H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 779, 789 (stating that section 2709 is not meant to bar contribution actions under other law). The hypothetical case outlined above is a perfect example where contribution or subrogation under both OPA and state common law should be allowed.

It is important to note, however, that this hypothetical presents a very different case from the one before the Court. In the case at bar, NSCSA's liability derived exclusively from OPA. State law was never imposed to force NSCSA to cleanup the spill or to compensate its victims. This is a pure OPA case. NSCSA may not go beyond the law which defined its own liability, and which provides it with a remedy, in order to circumvent the restrictions of that law.

B. Moran's Liability Under Section 2709

Having determined that this case must be analyzed under section 2709 of OPA, at least with regard to NSCSA's claim for recovery of its cleanup costs and money it paid to third party claimants, the Court must now decide whether Moran is liable to NSCSA under OPA's contribution clause. As discussed above, section 2709 allows a person to seek contribution against another person who is liable under OPA or under "another law." Other than through section 2709, Moran is not liable under OPA because it had a contractual relationship with the responsible party, NSCSA . . . . The question then is whether Moran is liable to NSCSA under "another law."

This case involves a collision between two vessels on the navigable waters of the United States. This Court, therefore, has admiralty jurisdiction over the matter. *See* 28 U.S.C. § 1333. "With admiralty jurisdiction comes the application of substantive admiralty law. Absent a relevant statute, the general maritime law, as developed by the judiciary, applies." *East River S.S. Corp.*, 476 U.S. at 864 (citations omitted). Other than OPA, therefore, the law which controls Moran's liability to NSCSA is the general maritime law. ***

If Captain Lusk had maneuvered his tug with more caution, he could have landed his tug as he intended, shoulder first, and the oil spill would not have happened. His failure to properly control his vessel constitutes a lack of due care; and, therefore, is negligence under maritime law. *See* Benedict on Admiralty, *supra* at 28, § 3.02[B][4]. Captain Lusk's negligence was the proximate cause of the collision between the HARRIET MORAN and the M/V SAUDI DIRIYAH and the proximate cause of the resulting oil spill.

In its answer and counterclaim, Moran asserts that the collision between the HARRIET MORAN and the M/V SAUDI DIRIYAH was caused by the negligence of Captains Grech and Morey. Moran maintains that either Captain Grech or Captain Morey should have advised Captain Lusk to land his vessel forward from the flared portion of the M/V SAUDI DIRIYAH. Moran also claims that Captain Grech should have advised the tug captain of the location of the fuel oil settling tank, so that he could have avoided that section of the ship. Finally, Moran argues that NSCSA should have painted a sign on the side of the M/V SAUDI DIRIYAH such as "Tugs Here," indicating where tugs should land on the vessel. ***

A shipowner is not required under the law to take every precaution imaginable to avoid an accident, it simply must exercise reasonable care, and a shipowner may certainly rely upon the expertise of a tug captain in docking and undocking maneuvers. NSCSA acted reasonably in this case.

C. Damages

1. OPA Damages

Because the collision between the HARRIET MORAN and the M/V SAUDI DIRIYAH was caused solely by the negligence of Moran's agent, Captain Lusk, in performing the undocking maneuver, NSCSA is entitled to recover from Moran, under OPA's contribution provision, the money it spent cleaning up the resulting oil spill and the money it spent compensating victims of the spill. NSCSA proved that it incurred $868,356.80 in removal expenses. In addition, the USCG and the United States Navy have outstanding claims, for approximately $300,000, for their role in the cleanup. Finally, NSCSA spent $106,806.12 to compensate victims of the oil spill. . . . Not including the sums owned to the USCG and the United States Navy, which are not liquidated at this time, NSCSA has proved a total of $975,162.92 in removal and compensation expenses.

Under section 2704 of OPA, however, Moran's liability in this case is limited to $ 500,000, unless one of the exceptions contained in the act applies. 33 U.S.C. § 2704; . . . . Moran's liability is not limited under OPA, if the oil spill was proximately caused by gross negligence, willful misconduct, or the violation of a federal regulation. 33 U.S.C. § 2704(c). In this case, no evidence was presented suggesting that the collision was caused by gross negligence or willful misconduct. This is simply a case of ordinary negligence, a failure to exercise reasonable care. NSCSA argues that the collision was caused by Moran's violation of the proper lookout statute, 33 U.S.C. § 2005, and the Vessel Bridge-to-Bridge Radiotelephone Act, 33 U.S.C. §§ 1201-1208; 33 C.F.R. § 26.04. As discussed above, Moran did not violate either of these statutes, and, even if it did violate the Radio-telephone Act, that violation did not cause the collision. . . . . None of the exceptions to liability under section 2704(c) apply in this case; therefore, Moran's liability under OPA is limited to $500,000.

2. Collision Damages

In addition to the damages NSCSA may recover under OPA, NSCSA is also entitled to recover the damages it directly incurred as a result of the collision under general maritime law. OPA does not regulate recovery of these types of damages. *See* 33 U.S.C. § 2751 ("Except as otherwise provided in this chapter, this chapter does not affect . . . admiralty and maritime law."). The collision between the HARRIET MORAN and the M/V SAUDI DIRIYAH falls within the admiralty jurisdiction of this Court, 28 U.S.C. § 1333; therefore, the rights between the parties, with regard to direct collision damages, must be determined in accordance with the general maritime law. *See East River S.S. Corp.,* 476 U.S. at 864.

The collision was caused solely by the negligence of Captain Lusk. . . . . Under its admiralty claim, therefore, NSCSA is entitled to recover the full amount of the damages it incurred as a direct result of the collision. At trial, NSCSA proved that it lost $3,250 in fuel oil and spent $16,050 to repair the hull of the M/V SAUDI DIRIYAH. NSCSA did not prove any economic damages. NSCSA may, therefore, recover $19,300 from Moran under its admiralty claim. ***

Chapter 8: Marine Insurance Policies

Comprehensive General Liability and Marine General Liability Policies

WATERCRAFT EXCLUSION
Bodily injury or **property damage** arising out of or relating to the ownership, maintenance, operation, use, loading, unloading or entrustment of any watercraft, boat equipment, or trailers, owned or operated by, or rented or loaned to or chartered by or on behalf of an **Named Insured;** provided however, that this exclusion shall not apply to the extent that coverage is provided in an Endorsement to this policy.

Protection and Indemnity Insurance: SP-23

American Institute Hull Clauses (September 29, 2009)
PROTECTION AND INDEMNITY **SP23 (Revised 1/56)**

Amount Insured $______________________ **Policy No. ____________________**
Premium $_________________________
Rate _______________________________

____
____ hereinafter called the Assured.
Loss, if any, payable to ____
____ or order.
In the sum of ____ Dollars. at and from the ______________ day of _________________________, 19 ________, at __________ time against the liabilities of the Assured as hereinafter described, and subject to the terms and conditions hereinafter set forth, in respect of the vessel called the ____________________ (Tonnage ________________) or by whatsoever other names the said vessel is or shall be named or called.

In consideration of the Stipulations Herein Named and of ____ _________________________________ Dollars, being premium at the rate of ________________________________

The Assurer hereby undertakes to make good to the Assured or the Assured's executors, administrators and/or successors, all such loss and/or damage and/or expense as the Assured shall as owners of the vessel named herein have become liable to pay and shall pay on account of the liabilities, risks, events and/or happenings herein set forth:

Loss of Life, injury and Illness

(1) Liability for loss of life of, or personal injury to, or illness of, any person, <u>excluding, however, unless otherwise agreed by endorsement hereon</u>, liability under any Compensation Act to any employee of the Assured, (other than a seaman) or in case of death to his beneficiaries or others. Protection hereunder for loss of life or personal injury arising in connection with the handling of cargo of the vessel named herein shall commence from the time of receipt by the Assured of the cargo on dock or wharf or on craft alongside the said vessel for loading thereon and shall continue until delivery thereof from dock or wharf of discharge or until discharge from the said vessel on to another vessel or craft.

Hospital, medical, or other expenses

(2) Liability for hospital, medical, or other expenses necessarily and reasonably incurred in respect of loss of life of, personal injury to, or illness of any member of the crew of the vessel named herein or any other person. Liability hereunder shall also include burial expenses not exceeding Two Hundred ($200) Dollars, when necessarily and reasonably incurred by the Assured for the burial of any seaman of said vessel.

Repatriation expenses

(3) Liability for repatriation expenses of any member of the crew of the vessel named herein, necessarily and reasonably incurred, under statutory obligation, excepting such expenses as arise out of or ensue from the termination of any agreement in accordance with the terms thereof, or by mutual consent, or by sale of the said vessel, or by other act of the Assured. Wages shall be included in such expenses when payable under statutory obligation, during unemployment due to the wreck or loss of the said vessel.

Damage to other vessel or property on board caused by collision

(4) Liability for loss of, or damage to, any other vessel or craft, or to the freight thereof, or property on such other vessel or craft, caused by collision with the vessel named herein, insofar as such liability would not be covered by full insurance under the __________________________ ___________________________________ (including the four-fourths running-down clause).

Principle of cross-liabilities to prevail

(a) Claims under this clause shall be settled on the principle of cross-liabilities to the same extent only as provided in the running-down clause above mentioned.
(b) Claims under this clause shall be divided among the several classes of claims enumerated in this policy and each class shall be subject to the deduction and special conditions applicable in respect of such class.
(c) Notwithstanding the foregoing, if any one or more of the various liabilities arising from such collision has been compromised, settled or adjusted without the written consent of the Assurer, the Assurer shall be relieved of liability for any and all claims under this clause.

Damage to other vessel or property onboard not caused by collision

(5) Liability for loss of or damage to any other vessel or craft, or to a property on such other vessel or craft, not caused by collision, provided such liability does not arise by reason of a contract made by the assured.
Where there would be a valid claim hereunder but for the fact that the damaged property belongs to the Assured, the Assurer shall be liable as if such damaged property belonged to another, but only for the excess over any amount recoverable under any other insurance application on the property.

Damage to docks, piers, etc.

(6) Liability for damage to any dock, pier, harbor, bridge, jetty, buoy, lighthouse, breakwater, structure, beacon, cable, or to any fixed or movable object or property whatsoever, except another vessel or craft, or property on another vessel or craft.
Where there would be a valid claim hereunder but for the fact that the damaged property belongs to the Assured, the Assurer shall be liable as if such damaged property belonged to another, but only for the excess over any amount recoverable under any other insurance applicable on the property.

Removal of wreck

(7) Liability for cost or expenses of, or incidental to, the removal of the wreck of the vessel named herein when such removal is compulsory by law, provided, however, that:
(a) There shall be deducted from such claim for cost or expenses, the value of any salvage from or which might have been recovered from the wreck, inuring, or which might have inured, to the benefit of the Assured.
(b) The Assurer shall not be liable for such costs or expenses which would be covered by full insurance under the ___________ or claims arising out of hostilities or war-like operations, whether before or after declaration of war.

Cargo

(8) Liability for loss of, or damage to, or in connection with cargo or other property, excluding mail and parcel post, including baggage and personal effects of passengers, to be carried, carried, or which has been carried on board the vessel named herein:

Specie, bullion, precious stones, etc.

Provided, however, that no liability shall exist under this provision for:

(a) Loss, damage or expense arising out of or in connection with the custody, care, carriage or delivery of specie, bullion, precious stones, precious metals, jewelry, silks, furs, bank notes, bonds or other negotiable documents or similar valuable property, unless specially agreed to and accepted for transportation under a form of contract approved, in writing, by the Assurer.

Refrigeration

(b) Loss of, or damage to, or in connection with cargo requiring refrigeration unless the space, apparatus and means used for the care, custody, and carriage thereof have been surveyed by a classification surveyor or other competent disinterested surveyor under working conditions before the commencement of each voyage and found in all respects fit, and unless accepted for transportation under a form of contract approved, in writing, by the Assurer.

Passengers' effects

(c) Loss, damage, or expense in connection with any passenger's baggage or personal effects, unless the form of ticket issued to the passenger shall have been approved, in writing, by the Assurer.

Stowage in improper places

(d) Loss, damage, or expense arising from stowage of underdeck cargo on deck or stowage of cargo in spaces not suitable for its carriage, unless the Assured shall show that every reasonable precaution has been taken by him to prevent such improper stowage.

Deviation

(e) Loss, damage, or expense arising from any deviation, or proposed deviation, not authorized by the contract of affreightment, known to the Assured in time to insure specifically the liability therefor, unless notice thereof is given to the Assurer and the Assurer agrees, in writing, that such insurance is unnecessary.

Freight on cargo short delivered

(f) Freight on cargo short delivered, whether or not prepaid or whether or not included in the claim and paid by the Assured.

Misdescription of goods

(g) Loss, damage, or expense arising out of or as a result of the issuance of Bills of Lading which, to the knowledge of the Assured, improperly describe the goods or their containers as to condition or quantity.

Failure to surrender Bill of Lading

(h) Loss, damage, or expense arising out of delivery of cargo without surrender of Bill of Lading.

And provided further that

Protective clauses required in contract of affreightment

(aa) Liability hereunder shall in no event exceed that which would be imposed by law in the absence of contract.

(bb) Liability hereunder shall be limited to such as would exist if the Charter Party, Bill of Lading or Contract of Affreightment contained the following clause (in substitution for the clause commonly known as the Jason Clause):

"In the event of accident, danger, damage or disaster before or after commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequences of which, the shipowner is not responsible, by statute or contract or otherwise, the shippers, consignees or owners of the cargo shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the cargo,"

When cargo is carried by the vessel named herein under a bill of lading or similar document of title subject or made subject to the Carriage of Goods by Sea Act, April 16, 1936, liability hereunder shall be limited to such as is imposed by said Act, and if the Assured or the vessel named herein assumes any greater liability or obligation than the minimum liabilities and obligations imposed by said Act, such greater liability or obligation shall not be covered hereunder.

Limit per package

When cargo is carried by the vessel named herein under a charter party, bill of lading or contract of affreightment not subject or made subject to the Carriage of Goods by Sea Act, April 16, 1936, liability hereunder shall be limited to such as would exist if said charter party, bill of lading, or contract of affreightment contained the following clauses: a clause limiting the Assured's liability for total loss or damage affreightment contained the following clauses: a clause limiting the Assured's liability for total loss or damage to goods shipped to Two Hundred and Fifty ($250) Dollars per package, or in case of goods not shipped in packages, per customary freight unit, and providing for pro rata adjustment on such basis for partial loss or damage; a clause exempting the Assured and the vessel named herein from liability for losses arising from unseaworthiness, even though existing at the beginning of the voyage, provided that due diligence shall have been exercised to make the vessel seaworthy and properly manned, equipped, and supplied; a clause providing that the carrier shall not be liable for claims in respect of cargo unless notice of claim is given within the time limited in such Bill of Lading and suit is brought thereon within the limited time prescribed therein; and such other protective clauses as are commonly in use in the particular trade; provided the incorporation of such clauses is not contrary to law.

The foregoing provisions as to the contents of the Bill of Lading and the limitation of the Assurer's liability may, however, be waived or altered by the Assurers on terms agreed, in writing.

Assured's own cargo

(cc) Where cargo on board the vessel named herein is the property of the Assured, such cargo shall be deemed to be carried under a contract containing the protective clauses described in the preceding paragraph, and such cargo shall be deemed to be fully insured under the usual form of cargo policy, and in case of loss thereof or damage thereto the Assured shall be insured hereunder in respect of such loss or damage only to the extent that they would have been covered if said cargo had belonged to another, but only in the event and to the extent that the loss or damage would not be recoverable under a cargo policy as hereinbefore specified.

Cotton Bills of Lading

(dd) The Assured's liability for claims under Custody Cotton Bills of Lading issued under the conditions laid down by the Liverpool Bill of Lading Conference Committee, is covered subject to previous notice of contract and payment of an extra premium of two (2) cents per ton gross register per voyage, but such additional premium shall be waived provided every bale is re-marked at a port of shipment on another portion of the bale.

Land transportation not included

(ee) No liability shall exist hereunder for any loss, damage or expense in respect of cargo or other property being transported on land or on another vessel. No liability shall exist hereunder for any loss, damage or expense in respect of cargo before loading on or after discharge from the vessel named herein caused by flood, tide, windstorm, earthquake, fire, explosion, heat, cold, deterioration, collapse of wharf, leaky shed, theft or pilferage unless such loss, damage or expense is caused directly by the vessel named herein, her master, officers or crew.

Customs, immigration or other fines or penalties

(9) Liability for fines and penalties, including expenses necessarily and reasonably incurred in avoiding or mitigating same, for the violation of any of the laws of the United States, or of any State thereof, or of any foreign country; provided, however, that the Assurer shall not be liable to indemnify the Assured against any such fines or penalties resulting directly or indirectly from the failure, neglect, or default of the Assured or his managing officers or managing agents to exercise the highest degree of diligence to prevent a violation of any such laws.

Mutiny or other Misconduct

(10) Expenses incurred in resisting any unfounded claim by the master or crew or other persons employed on the Vessel named herein, or in prosecuting such persons in case of mutiny or other misconduct.

Extraordinary expenses in case of quarantine, etc.

(11) Liability for extraordinary expenses resulting from outbreak of plague or other contagious disease, including such expenses incurred for disinfection of the vessel named herein or persons on board, or for quarantine, but excluding the ordinary expenses of loading and/or discharging and the wages and provisions of crew and passengers; each claim under this provision is subject to a deduction of Two Hundred ($200) Dollars. It is provided further, however, that if the vessel named herein be ordered to proceed to a port when it is or should be known that calling there will subject the vessel to the extraordinary expenses above mentioned, or to quarantine or disinfection there or elsewhere, the Assurer shall be under no obligation to indemnify the Assured for any such expenses.

Deviation for purpose of landing injured

(12) Net loss due to deviation incurred solely for the purpose of landing an injured or sick seaman in respect of port charges incurred, insurance, bunkers, store, and provisions consumed as a result of the deviation.

Cargo's proportion of general average

(13) Liability for, or loss of, cargo's proportion of general average, including special charges, in so far as the Assured cannot recover same from any other source; subject however, to the exclusions of Section (8) and provided, that if the Charter Party, Bill of Lading or Contract of Affreightment does not contain the quoted clause under Section 8 (bb) the Assurer's liability hereunder shall be limited to such as would exist if such clause were contained therein.

Costs and charges

(14) Costs, charges, and expenses, reasonably incurred and paid by the Assured in defense against any liabilities insured against hereunder in respect of the vessel named herein, subject to the agreed deductibles applicable, and subject further to the conditions and limitations hereinafter provided.

GENERAL CONDITIONS AND/OR LIMITATIONS

Prompt notice of claim

Warranted that in the event of any occurrence which may result in loss, damage and/or expense for which this Assurer is or may become liable, the Assured will use due diligence to give prompt notice thereof and forward to the Assurer as soon as practicable after receipt thereof, all communications, processes, pleadings and other legal papers or documents relating to such occurrences.

Settlement of claims

The Assured shall not make any admission of liability, either before or after any occurrence which may result in a claim for which the Assurer may be liable. The Assured shall not interfere in any negotiations of the Assurer, for settlement of any legal proceedings in respect of any occurrences for which the Assurer is liable under this policy; provided, however, that in respect of any occurrence likely to give rise to a claim under this policy, the Assured are obligated to and shall take steps to protect their (and/or the Assurer's) interests as would reasonably be taken in the absence of this or similar insurance. If the Assured shall fail or refuse to settle any claim as authorized by Assurer's, the liability of the Assurer to the Assured shall be limited to the amount for which settlement could have been made.

Assured to assist with evidence in defense, etc.

Whenever required by the Assurer the Assured shall aid in securing information and evidence and in obtaining witnesses and shall cooperate with the Assurer in the defense of any claim or suit or in the appeal from any judgment, in respect of any occurrence as hereinbefore provided.

Law costs

The Assurer shall not be liable for the cost or expense of prosecuting or defending any claim or suit unless the same shall have been incurred with the written consent of the Assurer, or the Assurer shall be satisfied that such approval could not have been obtained under the circumstances without unreasonable delay, or that such costs and charges were reasonably and properly incurred, such cost or expense being subject to the deductible. The cost and expense of prosecuting any claim in which the Assurer shall have an interest by subrogation or otherwise, shall be divided between the Assured and the Assurer, proportionately to the amounts which they would be entitled to receive respectively, if the suit should be successful.

The Assurer shall be liable for the excess where the amount deductible under this policy is exceeded by (A) the cost of investigating and/or successfully defending any claim or suit against the Assured based on a liability or an alleged liability of the Assured covered by this insurance, or (B) the amount paid by the Assured either under a judgment or an agreed settlement based on the liability covered herein including all costs, expenses of defense and taxable disbursements.

Subrogation

The Assurer shall be subrogated to all the rights which the Assured may have against any other person or entity, in respect of any payment made under this policy, to the extent of such payment, and the Assured shall, upon the request of the Assurer, execute all documents necessary to secure to the Assurer such rights.

The Assurer shall be entitled to take credit for any profit accruing to the Assured by reason of any negligence or wrongful act of the Assured's servants or agents, up to the measure of their loss, or to recover for their own account from third parties any damage that may be provable by reason of such negligence or wrongful act.

Cover elsewhere

Provided that where the Assured is, irrespective of this insurance, covered or protected against any loss or claim which would otherwise have been paid by the Assurer, under this policy, there shall be no contribution by the Assurer on the basis of double insurance or otherwise.

Assignments

No claim or demand against the Assurer under this policy shall be assigned or transferred, and no person, excepting a legally appointed receiver of the property of the Assured, shall acquire any right against the Assurer by virtue of this insurance without the expressed consent of the Assurer.

Actions against Assurers

No action shall lie against the Assurer for the recovery of any loss sustained by the Assured unless such action is brought against the Assurer within one year after the final judgment or decree is entered in the litigation against the Assured, or in case the claim against the Assurer accrues without the entry of such final judgment or decree, unless such action is brought within one year from the date of the payment of such claim.

Time limitation

The Assurer shall not be liable for any claim not presented to the Assurer with proper proofs of loss within six (6) months after payment thereof by the Assured.

Lay-up Returns

At the expiration of this policy, the Assurer is to return _________________ for each thirty (30) consecutive days during the term of this insurance the vessel may be laid up in a safe port; or ____________________ for each thirty (30) consecutive days during the term of this insurance the vessel may be laid up in a safe port without loading and/or discharging and without crew or cargo on board, provided the Assured give written notice to the Assurer as soon as practicable after the commencement and the termination of such lay-up period.

Cancellation provisions:

(a) If the vessel named herein should be sold or requisitioned and this policy be cancelled and surrendered, the Assurer to return ___________ for each thirty (30) consecutive days of the unexpired term of this insurance.

(b) In the event of non-payment of premium within sixty (60) days after attachment, this policy may be canceled by the Assurer upon five (5) days' written notice being given the Assured.

(c) In the event that Sections 182 to 189, both inclusive, of U.S. Code, Title 46, or any other existing law or laws determining or limiting liability of shipowners and carriers, or any of them, shall, while this policy is in force, be modified, amended or repealed, or the liabilities of shipowners or carriers be increased in any respect by legislative enactment, the Assurer shall have the right to cancel said insurance upon giving thirty (30) days' written notice of their intention so to do, and in the event of such cancellation, make return of premium upon a pro rata daily basis.

Notwithstanding anything to the contrary contained in this policy, no liability attaches to the Answer:

For any loss, damage, or expense which would be payable under the terms of the ______________ ____________________________ form of policy on hull and machinery, etc., if the vessel were fully covered by such insurance sufficient in amount to pay such loss, damage, or expense.

For any loss, damage or expense sustained by reason of capture, seizure, arrest, restraint or detainment, or the consequence thereof or of any attempt thereat; or sustained in consequence of military, naval or air action by force of arms, including mines and torpedoes or other missiles or engines of war, whether of enemy or friendly origin; or sustained in consequence of placing the vessel in jeopardy as an act or measure of war taken in the actual process of a military engagement, including embarking or disembarking troops or material of war in the immediate zone of such engagement; and any such loss, damage and expense shall be excluded from this policy without regard to whether the Assured's liability therefor is based on negligence or otherwise, and whether before or after a declaration of war.

For any loss, damage, or expense arising from the cancellation or breach of any charter, bad debts, fraud of agents, insolvency, loss of freight hire or demurrage, or as a result of the breach of any undertaking to load any cargo, or in respect of the vessel named herein engaging in any unlawful trade or performing any unlawful act, with the knowledge of the Assured.

For any loss, damage, expense, or claim arising out of or having relation to the towage of any other vessel or craft, whether under agreement or not, unless such towage was to assist such other vessel or craft in distress to a port or place of safety, provided, however, that this clause shall not apply to claims under this policy for loss of life or personal injury to passengers and/or members of the crew of the vessel named herein arising as a result of towing.

For any claim for loss of life or personal injury in relation to the handling of cargo where such claim arises under a contract of indemnity between the Assured and his sub-contractor.

It is expressly understood and agreed if and when the Assured under this policy has any interest other than as a shipowner in the vessel or vessels named herein, in no event shall the Assurer be liable hereunder to any greater extent than if such Assured were the owner and were entitled to all the rights of limitation to which a shipowner is entitled.

Unless otherwise agreed by endorsement to this policy, liability hereunder shall in no event exceed that which would be imposed on the Assured by law in the absence of contract.

Liability hereunder in respect of any one accident or occurrence is limited to the amount hereby insured.

Attached to and forming part of Policy No. ______________ of __________________________________.

American Institute Hull Clauses (September 29, 2009)

To be attached to and form a part of Policy No.____
of the ____.

The terms and conditions of the following clauses are to be regarded as substituted for those of the policy form to which they are attached, the latter being hereby waived, except provisions required by law to be inserted in the Policy. All captions are inserted only for purposes of reference and shall not be used to interpret the clauses to which they apply.

ASSURED

This Policy insures ____
____
____ hereinafter referred to as the Assured.

If claim is made under this Policy by anyone other than the Owner of the Vessel, such person shall not be entitled to recover to a greater extent than would the Owner, had claim been made by the Owner as an Assured named in this Policy.

Underwriters waive any right of subrogation against affiliated, subsidiary or interrelated companies of the Assured, provided that such waiver shall not apply in the event of a collision between the Vessel and any vessel owned, demise chartered or otherwise controlled by any of the aforesaid companies, or with respect to any loss, damage or expense against which such companies are insured.

LOSS PAYEE

Loss, if any, payable to ____
____ or order.

Provided, however, Underwriters shall pay claims to others as set forth in the Collision Liability clause and may make direct payment to persons providing security for the release of the Vessel in Salvage cases.

VESSEL

The Subject Matter of this insurance is the Vessel called the ____________________________________
or by whatsoever name or names the said Vessel is or shall be called, which for purposes of this insurance shall consist of and be limited to her hull, launches, lifeboats, rafts, furniture, bunkers, stores, supplies, tackle, fittings, equipment, apparatus, machinery, boilers, refrigerating machinery, insulation, motor generators and other electrical machinery. Each vessel deemed to be separately insured. In the event that more than one vessel is insured by the policy to which these clauses are attached, all such clauses shall apply as though a separate policy has been issued with respect to each vessel.

In the event any equipment or apparatus not owned by the Assured is installed for use on board the Vessel and the Assured has assumed responsibility therefor, it shall also be considered part of the Subject Matter and the aggregate value thereof shall be included in the Agreed Value.

Notwithstanding the foregoing, cargo containers, barges and lighters shall not be considered a part of the Subject Matter of this insurance.

This insurance also covers loss or damage to parts temporarily removed from the vessel, where such loss or damage is caused by an insured peril occurring during the policy period.

DURATION OF RISK

From the _______ day of ______________________________, 20 _______, ____________________________ time
to the ___________________________________ day of _______, 20 _______, ______________________ time.

Should the Vessel at the expiration of this Policy be in distress, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium until moored safely afloat in a port of refuge.

In the event of payment by the Underwriters for Total Loss of the Vessel this Policy shall thereupon automatically terminate.

AGREED VALUE

The Vessel, for so much as concerns the Assured, by agreement between the Assured and the Underwriters in this Policy, is and shall be valued at ____ Dollars.

AMOUNT INSURED HEREUNDER

____ Dollars.

DEDUCTIBLE

Notwithstanding anything in this Policy to the contrary, there shall be deducted from the aggregate of all claims (including claims under the Sue and Labor clause and claims under the Collision Liability clause) arising out of each separate accident, the sum of $_________, unless the accident results in a Total Loss of the Vessel in which case this clause shall not apply. A recovery from other interests, however, shall not operate to exclude claims under this Policy provided the aggregate of such claims arising out of one separate accident if unreduced by such recovery exceeds that sum. For the purpose of this clause each accident shall be treated separately, but it is agreed that (a) a sequence of damages arising from the same accident shall be treated as due to that accident and (b) all heavy weather damage, or damage caused by contact with floating ice, which occurs during a single sea passage between two successive ports shall be treated as though due to one accident.

PREMIUM

The Underwriters to be paid in consideration of this insurance ____
_________________ Dollars being at the annual rate of ____________ per cent, which premium shall be due on attachment. If the Vessel is insured under this Policy for a period of less than one year at pro rata of the annual rate, full annual premium shall be considered earned and immediately due and payable in the event of Total Loss of the Vessel from a peril insured hereunder.

RETURNS OF PREMIUM

Premium returnable as follows:

Pro rata daily net in the event of termination under the Change of Ownership clause;
Pro rata monthly net for each uncommenced month if it be mutually agreed to cancel this Policy;
For each period of 30 consecutive days the Vessel may be laid up in port for account of the Assured,
_________________ cents per cent. net not under repair, or
_________________ cents per cent. net under repair;

provided always that:

(a) a Total Loss of the Vessel has not occurred during the currency of this Policy;

(b) in no case shall a return for lay-up be allowed when the Vessel is lying in exposed or unprotected waters or in any location not approved by the Underwriters;

(c) in the event of any amendment of the annual rate, the above rates of return shall be adjusted accordingly;
(d) in no case shall a return be allowed when the Vessel is used as a storage ship or for lightering purposes; and
(e) in no case shall a return be allowed if the vessel is under repair due to a loss insured hereunder.

If the Vessel is laid up for a period of 30 consecutive days, a part only of which attaches under this Policy, the Underwriters shall pay such proportion of the return due in respect of a full period of 30 days as the number of days attaching hereto bears to 30. Should the lay-up period exceed 30 consecutive days, the Assured shall have the option to elect the period of 30 consecutive days for which a return is recoverable.

NON-PAYMENT OF PREMIUM

In the event of non-payment of premium 30 days after attachment, or of any additional premium when due, this Policy may be cancelled by the Underwriters upon 10 days written or electronic notice sent to the Assured at his last known address or in care of the broker who negotiated this Policy. Such proportion of the premium, however, as shall have been earned up to the time of cancellation shall be payable. In the event of Total Loss of the Vessel occurring prior to any cancellation or termination of this Policy, full annual premium shall be considered earned.

ADVENTURE

Beginning the adventure upon the Vessel, as above, and so shall continue and endure during the period aforesaid, as employment may offer, in port or at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades; with leave to sail or navigate with or without pilots, to go on trial trips and to assist and tow vessels or craft in distress, but the Vessel may not be towed, except as is customary or when in need of assistance, nor shall the Vessel render assistance or undertake towage or salvage services under contract previously arranged by the Assured, the Owners, the Managers or the Charterers of the Vessel, nor shall the Vessel, in the course of trading operations, engage in loading or discharging cargo at sea, from or into another vessel other than a barge, lighter or similar craft used principally in harbors or inland waters. The phrase "engage in loading or discharging cargo at sea" shall include while approaching, leaving or alongside, or while another vessel is approaching, leaving or alongside the Vessel.

The Vessel is held covered in case of any breach of conditions as to cargo, trade, locality, towage or salvage activities, or date of sailing, or loading or discharging cargo at sea, provided (a) notice is given to the Underwriters immediately following receipt of knowledge thereof by the Assured, and (b) any amended terms of cover and any additional premium required by the Underwriters are agreed to by the Assured.

PERILS

Touching the Adventures and Perils which the Underwriters are contented to bear and take upon themselves, they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the Vessel, or any part thereof, excepting, however, such of the foregoing perils as may be excluded by provisions elsewhere in the Policy or by endorsement thereon.

ADDITIONAL PERILS (INCHMAREE)

Subject to the conditions of this Policy, this insurance also covers loss of or damage to the Vessel directly caused by the following:
Accidents in loading, discharging or handling cargo, or in bunkering;
Accidents in going on or off, or while on drydocks, graving docks, ways, gridirons or pontoons;
Explosions on shipboard or elsewhere;
Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, (excluding the cost and expense of replacing or repairing the defective part);
Breakdown of or accidents to nuclear installations or reactors not on board the insured Vessel;
Contact with aircraft, rockets or similar missiles, or with any land conveyance;
Negligence of Charterers and/or Repairers, provided such Charterers and/or Repairers are not an Assured hereunder;
Negligence of Masters, Officers, Crew or Pilots;

provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them. Masters, Officers, Crew or Pilots are not to be considered Owners within the meaning of this clause should they hold shares in the Vessel.

DELIBERATE DAMAGE (ENVIRONMENTAL HAZARD)

Subject to the conditions of this Policy, this insurance also covers loss of or damage to the Vessel directly caused by governmental authorities acting for the public welfare to prevent or mitigate an environmental hazard, or threat thereof, resulting directly from damage to the Vessel for which the Underwriters are liable under this Policy, provided such act of governmental authorities has not resulted from want of due diligence by the Assured, the Owners, or Managers of the Vessel or any of them to prevent or mitigate such hazard or threat. Masters, Officers, Crew or Pilots are not to be considered Owners within the meaning of this clause should they hold shares in the Vessel.

CLAIMS (GENERAL PROVISIONS)

In the event of any accident or occurrence which could give rise to a claim under this Policy, prompt notice thereof shall be given **to** the Underwriters and as soon as possible after the Assured has, or the Owners or Managers have, become aware or have knowledge of such loss, damage, liability or expense, and

(a) notwithstanding the foregoing requirement of prompt notice of all claims to the Underwriters, and without altering or amending such prompt notice requirement, any claims under this Policy shall be barred if notice of the claim is not given to the Underwriters for any reason within twelve months after the Assured has, or the Owners or Managers of the Vessel have, become aware or have knowledge of the occurrence of the loss, damage, liability or expense giving rise to the claim, unless the Assured reasonably believes that such loss, damage liability or expense will not give rise to a claim, the Underwriters agree to waive this time bar in writing, or notice was properly given to the Underwriters on any subsequent policy year and it is later determined that the loss, damage, liability or expense should be apportioned over multiple policy years, including earlier years;

(b) where practicable, the Underwriters shall be advised prior to survey, so that they may appoint their own surveyor, if they so desire;

(c) the Underwriters shall be entitled to decide where the Vessel shall proceed for docking and/or repair (allowance to be made to the Assured for the actual additional expense of the voyage arising from compliance with the Underwriters' requirement);

(d) the Underwriters shall have the right of veto in connection with any repair firm proposed;

(e) the Underwriters may take tenders, or may require in writing that tenders be taken for the repair of the Vessel, in which event, upon acceptance of a tender with the approval of the Underwriters, an allowance shall be made at the rate of 30 per cent. per annum on the amount insured, for each day or pro rata for part of a day, for time lost between the issuance of invitations to tender and the acceptance of a tender, to the extent that such time is lost solely as the result of tenders having been taken and provided the tender is accepted without delay after receipt of the Underwriters' approval.

Due credit shall be given against the allowances in (c) and (e) above for any amount recovered:

1. in respect of fuel, stores, and wages and maintenance of the Master, Officers or Crew allowed in General or Particular Average; and
2. from third parties in respect of damages for detention and/or loss of profit and/or running expenses; for the period covered by the allowances or any part thereof.

No claim shall be allowed in Particular Average for wages and maintenance of the Master, Officers or Crew, except when incurred solely for the necessary removal of the Vessel from one port to another for average repairs or for trial trips to test average repairs, in which cases wages and maintenance will be allowed only while the Vessel is under way. This exclusion shall not apply to overtime or similar extraordinary payments to the Master, Officers or Crew incurred in shifting the Vessel for tank cleaning or repairs or while specifically engaged in these activities, either in port or at sea.

Upon the request of the Underwriters, the Assured must provide or make available information or documentation from the classification society reasonably requested by Underwriters concerning the condition of the Vessel before and during the policy period. Additionally, the Assured shall authorize the Underwriters to obtain such information directly from the classification society and from the relevant authorities in the country where the Vessel is registered or has been through port state control. Prompt notice shall be given to the assured whenever such requests for information are made.

General and Particular Average shall be payable without deduction, new for old.

The expense of sighting the bottom after stranding shall be paid, if reasonably incurred especially for that purpose, even if no damage be found.

No claim shall in any case be allowed in respect of scraping or painting the Vessel's bottom.

In the event of loss or damage to equipment or apparatus not owned by the Assured but installed for use on board the Vessel and for which the Assured has assumed responsibility, claim shall not exceed (1) the amount the Underwriters would pay if the Assured were owner of such equipment or apparatus, or (2) the contractual responsibility assumed by the Assured to the owners or lessors thereof, whichever shall be less.

No claim for unrepaired damages shall be allowed, except to the extent that the aggregate damage caused by perils insured against during the period of the Policy and left unrepaired at the expiration of the Policy shall be demonstrated by the Assured to have diminished the actual market value of the Vessel on that date if undamaged by such perils.

Claims become time-barred after ten years from the end of the calendar year during which the loss or damage giving rise to any claim under this policy took place, unless the Underwriters agree to an extension in writing, which agreement shall not be unreasonably refused. However, this time bar shall not become effective until ninety days after notice of the time bar has been given to the Assured by the Underwriters, which notice may be given within six months of the expiry of the limitation period, or thereafter. If notice is given within six months of the expiry of the limitation period, the limitation expiry date shall be ten years after the date on which the loss or damage took place, or ninety days after the Assured's receipt of the notice, whichever is later. As respects claims for third-party liability, such claims shall not become time-barred before the time when the liability claim against the assured becomes time-barred. The ten-year limitation shall not apply to claims where notice was properly given to the underwriters on any subsequent policy year and it is later determined that the loss, damage, liability or expense should be apportioned over multiple policy years, including earlier years.

GENERAL AVERAGE AND SALVAGE

General Average and Salvage shall be payable as provided in the contract of affreightment, or failing such provision or there be no contract of affreightment, payable at the Assured's election either in accordance with York-Antwerp Rules 1974 or 1994, or as agreed, or with the Laws and Usages of the Port of New York. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid accordingly.

In the event of salvage, towage or other assistance being rendered to the Vessel by any vessel belonging in part or in whole to the same Owners or Charterers, the value of such services (without regard to the common ownership or control of the vessels) shall be ascertained by arbitration in the manner provided for under the Collision Liability clause in this Policy, and the amount so awarded so far as applicable to the interest hereby insured shall constitute a charge under this Policy.

When the contributory value of the Vessel is greater than the Agreed Value herein, the liability of the Underwriters for General Average contribution (except in respect to amounts made good to the Vessel), or Salvage, shall not exceed that proportion of the total contribution due from the Vessel which the amount insured hereunder bears to the contributory value, and if, because of damage for which the Underwriters are liable as Particular Average, the value of the Vessel has been reduced for the purpose of contribution, the amount of such Particular Average damage recoverable under this Policy shall first be deducted from the amount insured hereunder, and the Underwriters shall then be liable only for the proportion which such net amount bears to the contributory value.

TOTAL LOSS

In ascertaining whether the Vessel is a constructive Total Loss the Agreed Value shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

There shall be no recovery for a constructive Total Loss hereunder unless the expense of recovering and repairing the Vessel would exceed the Agreed Value. In making this determination, only expenses incurred or to be incurred by reason of a single accident or a sequence of damages arising from the same accident shall be taken into account, but expenses incurred prior to tender of abandonment shall not be considered if such are to be claimed separately under the Sue and Labor clause.

In the event of Total Loss (actual or constructive), no claim is to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

In no case shall the Underwriters be liable for unrepaired damage in addition to a subsequent Total Loss sustained during the period covered by this Policy.

SUE AND LABOR

And in case of any Loss or Misfortune, it shall be lawful and necessary for the Assured, their Factors, Servants and Assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the Vessel, or any part thereof, without prejudice to this insurance, to the charges whereof the Underwriters will contribute their proportion as provided below. And it is expressly declared and agreed that no acts of the Underwriters or Assured in recovering, saving or preserving the Vessel shall be considered as a waiver or acceptance of abandonment.

In the event of expenditure under the Sue and Labor clause, the Underwriters shall pay the proportion of such expenses that the amount insured hereunder bears to the Agreed Value, or that the amount insured hereunder (less loss and/or damage payable under this Policy) bears to the actual value of the salved property, whichever proportion shall be less; provided always that their liability for such expenses shall not exceed their proportionate part of the Agreed Value.

If claim for Total Loss is admitted under this Policy and sue and labor expenses have been reasonably incurred in excess of any proceeds realized or value recovered, the amount payable under this Policy will be the proportion of such excess that the amount insured hereunder (without deduction for loss or damage) bears to the Agreed Value or to the sound value of the Vessel at the time of the accident, whichever value was greater; provided always that Underwriters' liability for such expenses shall not exceed their proportionate part of the Agreed Value. The foregoing shall also apply to expenses reasonably incurred in salving or attempting to salve the Vessel and other property to the extent that such expenses shall be regarded as having been incurred in respect of the Vessel.

COLLISION LIABILITY

And it is further agreed that:

(a) if the Vessel shall come into collision with any other ship or vessel, and the Assured or the Surety in consequence of the Vessel being at fault shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, the Underwriters will pay the Assured or the Surety, whichever shall have paid, such proportion of such sum or sums so paid as their respective subscriptions hereto bear to the Agreed Value, provided always that their liability in respect to any one such collision shall not exceed their proportionate part of the Agreed Value;

(b) in cases where, with the consent in writing of a majority (in amount) of Hull Underwriters, the liability of the Vessel has been contested, or proceedings have been taken to limit liability, the Underwriters will also pay a like proportion of the costs which the Assured shall thereby incur or be compelled to pay.

When both vessels are to blame, then, unless the liability of the owners or charterers of one or both such vessels becomes limited by law, claims under the Collision Liability clause shall be settled on the principle of Cross-Liabilities as if the owners or charterers of each vessel had been compelled to pay to the owners or charterers of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision.

The principles involved in this clause shall apply to the case where both vessels are the property, in part or in whole, of the same owners or charterers, all questions of responsibility and amount of liability as between the two vessels being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement, to the decision of Arbitrators, one to be appointed by the Assured and one to be appointed by the majority (in amount) of Hull Underwriters interested; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference, and the decision of such single Arbitrator, or of any two of such three Arbitrators, appointed as above, to be final and binding.

Provided always that this clause shall in no case extend to any sum which the Assured or the Surety may become liable to pay or shall pay in consequence of, or with respect to:

(a) removal or disposal of obstructions, wrecks or their cargoes under statutory powers or otherwise pursuant to law;
(b) injury to real or personal property of every description;
(c) the discharge, spillage, emission or leakage of oil, petroleum products, chemicals or other substances of any kind or description whatsoever;
(d) cargo or other property on or the engagements of the Vessel;
(e) loss of life, personal injury or illness.

Provided further that exclusions (b) and (c) above shall not apply to injury to other vessels or property thereon except to the extent that such injury arises out of any action taken to avoid, minimize or remove any discharge, spillage, emission or leakage described in (c) above.

PILOTAGE AND TOWAGE

This insurance shall not be prejudiced by reason of any contract limiting in whole or in part the liability of pilots, tugs, towboats, or their owners when the Assured or the agent of the Assured accepts such contract in accordance with established local practice.

Where in accordance with such practice, pilotage or towage services are provided under contracts requiring the Assured or the agent of the Assured:

(a) to assume liability for damage resulting from collision of the Vessel insured with any other ship or vessel, including the towing vessel, or

(b) to indemnify those providing the pilotage or towage services against loss or liability for any such damages,

it is agreed that amounts paid by the Assured or Surety pursuant to such assumed obligations shall be deemed payments "by way of damages to any other person or persons" and to have been paid "in consequence of the Vessel being at fault" within the meaning of the Collision Liability clause in this Policy to the extent that such payments would have been covered if the Vessel had been legally responsible in the absence of any agreement. Provided always that in no event shall the aggregate amount of liability of the Underwriters under the Collision Liability clause, including this clause, be greater than the amount of any statutory limitation of liability to which owners are entitled or would be entitled if liability under any contractual obligation referred to in this clause were included among the liabilities subject to such statutory limitations.

CHANGE OF OWNERSHIP

In the event of any change, voluntary or otherwise, in the ownership or flag of the Vessel, or if the Vessel be placed under new management, or be chartered on a bareboat basis or requisitioned on that basis, or if the Classification Society of the Vessel or her class therein be changed, cancelled, or withdrawn, then, unless the Underwriters agree thereto in writing, this Policy shall automatically terminate at the time of such change of ownership, flag, management, charter, requisition or classification; provided, however, that:

(a) if the Vessel has cargo on board and has already sailed from her loading port, or is at sea in ballast, such automatic termination shall, if required, be deferred until arrival at final port of discharge if with cargo, or at port of destination if in ballast;

(b) in the event of an involuntary temporary transfer by requisition or otherwise, without the prior execution of a written agreement by the Assured, such automatic termination shall occur fifteen days after such transfer.

This insurance shall not inure to the benefit of any transferee or charterer of the Vessel and, if a loss payable hereunder should occur between the time of change or transfer and any deferred automatic termination, the Underwriters shall be subrogated to all of the rights of the Assured against the transferee or charterer in respect of all or part of such loss as is recoverable from the transferee or charterer, and in the proportion which the amount insured hereunder bears to the Agreed Value.

The term "new management" as used above refers only to the transfer of the management of the Vessel from one firm or corporation to another, and it shall not apply to any internal changes within the offices of the Assured.

ADDITIONAL INSURANCES

It is a condition of this Policy that no additional insurance against the risk of Total Loss of the Vessel shall be effected to operate during the currency of this Policy by or for account of the Assured, Owners, Managers, Operators or Mortgagees except on the interests and up to the amounts enumerated in the following Sections (a) to (g), inclusive, and no such insurance shall be subject to P.P.I., F.I.A. or other like term on any interests whatever excepting those enumerated in Section (a); provided always and notwithstanding the limitation on recovery in the Assured clause a breach of this condition shall not afford the Underwriters any defense to a claim by a Mortgagee who has accepted this Policy without knowledge of such breach:

(a) DISBURSEMENTS, MANAGERS' COMMISSIONS, PROFITS OR EXCESS OR INCREASED VALUE OF HULL AND MACHINERY, AND/OR SIMILAR INTERESTS HOWEVER DESCRIBED, AND FREIGHT (INCLUDING CHARTERED FREIGHT OR ANTICIPATED FREIGHT) INSURED FOR TIME. An amount not exceeding in the aggregate 25% of the Agreed Value.

(b) FREIGHT OR HIRE, UNDER CONTRACTS FOR VOYAGE. An amount not exceeding the gross freight or hire for the current cargo passage and next succeeding cargo passage (such insurance to include, if required, a preliminary and an intermediate ballast passage) plus the charges of insurance. In the case of a voyage charter where payment is made on a time basis, the amount shall be calculated on the estimated duration of the voyage, subject to the limitation of two cargo passages as laid down herein. Any amount permitted under this Section shall be reduced, as the freight or hire is earned, by the gross amount so earned. Any freight or hire to be earned under the form of Charters described in (d) below shall not be permitted under this Section (b) if any part thereof is insured as permitted under said Section (d).

(c) ANTICIPATED FREIGHT IF THE VESSEL SAILS IN BALLAST AND NOT UNDER CHARTER. An amount not exceeding the anticipated gross freight on next cargo passage, such amount to be reasonably estimated on the basis of the current rate of freight at time of insurance, plus the charges of insurance. Provided, however, that no insurance shall be permitted by this Section if any insurance is effected as permitted under Section (b).

(d) TIME CHARTER HIRE OR CHARTER HIRE FOR SERIES OF VOYAGES. An amount not exceeding 50% of the gross hire which is to be earned under the charter in a period not exceeding 18 months. Any amount permitted under this Section shall be reduced as the hire is earned under the charter by 50% of the gross amount so earned but, where the charter is for a period exceeding 18 months, the amount insured need not be reduced while it does not exceed 50% of the gross hire still to be earned under the charter. An insurance permitted by this Section may begin on the signing of the charter.

(e) PREMIUMS. An amount not exceeding the actual premiums of all interest insured for a period not exceeding 12 months (excluding premiums insured as permitted under the foregoing Sections but including, if required, the premium or estimated calls on any Protection and Indemnity or War Risks and Strikes insurance) reducing pro rata monthly.

(f) RETURNS OF PREMIUM. An amount not exceeding the actual returns which are recoverable subject to "and arrival" or equivalent provision under any policy of insurance.

(g) INSURANCE IRRESPECTIVE OF AMOUNT AGAINST: Risks excluded by War, Strikes and Related Exclusions clause; risks enumerated in the American Institute War Risks and Strikes Clauses; and General Average and Salvage Disbursements.

WAR STRIKES AND RELATED EXCLUSIONS

The following conditions shall be paramount and shall supersede and nullify any contrary provisions of the Policy.

This Policy does not cover any loss, damage or expense caused by, resulting from, or incurred as a consequence of:

(a) Capture, seizure, arrest, restraint, detainment, confiscation or expropriation or any attempt thereat; or

(b) Any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; or

(c) Any mine, bomb or torpedo not carried as cargo on board the Vessel; or

(c) Any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter; or

(e) Civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy; or

(f) Strikes, lockouts, political or labor disturbances, civil commotions, riots, martial law, military or usurped power; or

(g) Any act perpetrated by terrorists or any act carried out by any person or persons acting primarily from a political, religious or ideological motive; or

(h) Any threat of terrorist activity, actual or perceived, including closure of ports or blockage of waterways resulting therefrom; or

(i) Malicious acts or vandalism, unless committed by the Master or Mariners and not excluded elsewhere under this War Strikes and Related Exclusions clause; or

(j) Hostilities or warlike operations (whether there be a declaration of war or not) but this subparagraph (j) not to exclude collision or contact with aircraft, rockets or similar missiles, or with any fixed or floating object, or stranding, heavy weather, fire or explosion unless caused directly by a hostile act by or against a belligerent power, which act is independent of the nature of the voyage or service which the Vessel concerned or, in the case of a collision, any other vessel involved therein, is performing. As used herein, "power" includes any authority maintaining naval, military or air forces in association with a power.

If war risks or other risks excluded by this clause are hereafter insured by endorsement on this Policy, such endorsement shall supersede the above conditions only to the extent that the terms of such endorsement are inconsistent therewith and only while such endorsement remains in force.

Conoco, Inc. v. Republic Insurance Co., 819 F.2d 120 (5th Cir. 1987)

Jerre Williams, Circuit Judge:

Conoco hired a ship owned by Bonanza. The ship was insured by Republic. The ship sank. Bonanza went broke. The parties went to court, and ten years later they are still there. This particular appeal is brought by Republic Insurance Co. from a summary judgment against it in favor of Conoco entered by the district court. We reverse.

I. *The Facts: Bonanza's Foreman Messes Up*.

The underlying script of this show has been set out twice by this Court, at 677 F.2d 455 and at 706 F.2d 1365. We provide only a brief rerun. Appellee Conoco operated an offshore drilling rig in the Gulf of Mexico, and chartered from Bonanza Corp. the vessel Aqua Safari ranged over the area of the Gulf near the rig, performing a variety of chores. Due to the negligence of the Aqua Safari's master, the vessel sank underneath appellee's rig on January 1, 1977. Bonanza refused to remove the wreck, and in March 1977, appellee paid for the raising and removal of the sunken vessel.

Appellee Conoco then sued Bonanza and appellant Republic Insurance Co. for the cost of the salvage effort, $109,000.00. Appellant had issued a policy of marine protection and indemnification covering the Aqua Safari, naming Bonanza and appellee as assureds. The district court held that appellee could recover the removal costs either from Bonanza or from appellant under the terms of the insurance policy, and held that Bonanza was not entitled to limit its liability. *Continental Oil Co. v. Bonanza Corp.*, 511 F. Supp. 62 (S.D.Tex. 1980). This Court, riding *en banc*, reversed the district court's judgment and held that appellee could not recover its costs under the insurance policy because it was not legally required to take any action with regard to the sunken Aqua Safari. *Continental Oil Co. v. Bonanza Corp.,* 706 F.2d 1365 (5th Cir.1983) (en banc).

Meanwhile, back at the ranch, Bonanza has been insolvent since the date of the sinking of the Aqua Safari. Nevertheless, two years after our *en banc* decision was announced, Bonanza executed a demand promissory note in favor of appellee, Conoco, for the cost of raising the Aqua Safari, and also an assignment of any insurance proceeds Bonanza might collect from appellant. At the time these documents were signed, appellee assured Bonanza's president and sole stockholder that it would not attempt to collect the promissory note from him. At trial, Bonanza's president testified that "I can't foresee where Bonanza would ever be able to [pay the note], or any reason why we will ever have any assets in there to pay it. We don't have any intentions of doing anything with it." Subsequent to signing these documents, Bonanza claimed it had thereby paid appellee for the salvage operation. Bonanza then made a demand for reimbursement under the insurance policy from appellant. Appellant refused to make payment under the policy to either Bonanza or appellee.

Appellee instituted the instant legal action against appellant for its failure to honor Bonanza's claim under the terms of the insurance policy. The district court granted appellee's motion for summary judgment, holding that Bonanza had paid the judgment ordered in *Continental Oil Co. v. Bonanza Corp., supra*, by means of the promissory note and assignment agreement, and that therefore the indemnity provision of the insurance policy had been activated. The district court also held that appellee, as a third-party beneficiary of the insurance contract, was entitled to proceed directly against appellant. ***

II. *The Promissory Note: Straight Shootin'*?

Appellant first asserts that the district court erred in holding that Bonanza "paid" appellee by executing the promissory note. Because no payment occurred, appellant argues, it is not liable to Bonanza or appellant for the judgment. We agree. ‘

In the opinion handed down by the initial posse of three judges in this case, *Continental Oil Co. v. Bonanza Corp.,* 677 F.2d 455 (5th Cir. 1982), the distinction between an indemnity contract and a liability contract was addressed:

> The contract between Bonanza and Republic is written as an indemnity contract, not as a liability contract. In a liability contract, the insurer agrees to cover *liability* for damages. If the insured is liable, the insurance company must pay the damages. In an indemnity contract, by contrast, the insurer agrees to reimburse expenses to the insured that the insured is liable to pay and has paid. An indemnity covers only the insured's actual expenses.

677 F.2d at 459. We find nothing in the subsequent proceedings in this case that disturbs this reading of insurance contract law. The above-cited language is a correct statement of the law controlling the agreement contested here.

The issue is thus distilled to the question of whether Bonanza's execution of the promissory note was an actual expense. The question is not to be resolved, as is claimed by appellee, under *Liman v. American Steamship Owners Mutual Protection & Indemnity Association,* 299 F. Supp. 106 (S.D.N.Y.), *aff'd*, 417 F.2d 627 (2nd Cir. 1969), *cert. denied*, 397 U.S. 936, 90 S. Ct. 946, 25 L. Ed. 2d 116 (1970), which holds that an insolvent assured can finance payment by means other than an actual cash transfer. *Liman* does not stand for the proposition that "payment" can be made by the use of a promissory note worthless from the day it is executed. By contrast, the *Liman* court declared that the test "is whether the assured has actually in good faith sustained the loss for which reimbursement is sought." 299 F. Supp. at 109.

Since the bankrupt assured in *Liman* was not completely bereft of assets, the *Liman* court was not faced with the situation we face in this case, where Bonanza is literally incapable of sustaining a loss. At the time the note was executed, Bonanza was not merely insolvent. It had no assets whatsoever. Moreover, Bonanza's president testified that the company was not likely to obtain any assets in the future, or to receive any infusions of capital. Bonanza not only had no intention of paying the promissory note, but offered no hope of eventually providing any value at all in exchange for the note. The company was dormant. Bonanza was gone, and it was not coming back.

In these circumstances, we cannot agree with the district court that Bonanza "paid" appellee. ***In *Smith v. Transit Casualty Co.*, 281 F. Supp. 661 (E.D.Tex. 1968), *aff'd*, 410 F.2d 210 (5th Cir. 1969), prepayment to establish the liability of the insurance company was held to require proof of actual payment by the transfer of something of value. It is true, as Appellee points out, that the prepayment requirement under the Stowers Doctrine has since been abolished by statute. But the current status of prepayment under the doctrine is irrelevant. The germane point, illustrated by *Smith*, is that a worthless promissory note does not constitute payment under Texas law.

The same principle is at work in *Stuyvesant Insurance Co. of New York v. Nardelli,* 286 F.2d 600 (5th Cir. 1961), where we held that an insurer would not become liable under an indemnity contract until the assured "has made some payment[,] and that the insurer is only liable to the extent those payments are made." 286 F.2d at 602. Under appellee's standard for determining "payment," the limitation we set out in *Stuyvesant* would be without substance. We therefore hold that Bonanza did not pay appellee, and that appellant has incurred no obligation under the indemnity insurance contract.

III. *Standing: A Deal's a Deal.*

Appellant argues second that the district court erred in holding that appellee could proceed against it directly to enforce the indemnity provisions of the insurance policy. We agree with appellant here also.

In our *en banc* opinion, we ruled that appellee could not proceed against appellant based on its status as a co-assured, but we expressly withheld ruling on the issue of appellee's standing as a third-party beneficiary. 706 F.2d at 1368, n. 2. The district court then, on remand, ruled that appellant did have standing to enforce the indemnity clause as a third-party beneficiary, relying on *Cumis Ins. Society v. Republic National Bank*, 480 S.W.2d 762 (Tex. Civ. App. -- Dallas 1972, writ ref'd n.r.e.). In *Cumis*, however, the policy at issue did not include a clause forbidding a third party to claim under it. The *Cumis* court expressly noted that had such a clause been in the contract, the third-party beneficiary would have had no right of recovery. 480 S.W.2d at 767 ("On the other hand, no such right [as a third-party beneficiary] exists if the contract expressly excludes the right of any third party to bring an action on it.").

The contract at issue here does include a clause barring a third-party suit:

> . . . no person shall acquire any right against this Company by virtue of this insurance without the express consent of this Company.

This clause does not allow the accrual of third-party rights without appellant's consent. None of the actors in this case allege that appellant consented to appellee's accrual of a right of action against it. Even under the reasoning of *Cumis*, therefore, appellee has no standing as a third-party beneficiary.

Appellee also claims standing to enforce the insurance provisions by virtue of Bonanza's purported assignment to appellee of "any insurance proceeds." This assignment agreement, however, had no legal effect. The insurance contract contained an unambiguous no-assignment clause:

> No claim or demand against this Company under this policy shall be assigned or transferred, . . .

Texas law permits the enforcement of no-assignment clauses in insurance policies. *Dallas County Hospital District v. Pioneer Casualty Co.*, 402 S.W.2d 287, 288 (Tex.Civ.App. -- Fort Worth 1966, writ ref'd n.r.e.) (holding that, under Texas' assignment statute, parties may agree to and enforce no-assignment provisions). Therefore, the assignment was invalid, and appellee cannot rely on the assignment document to proceed directly against appellant.

Appellee argues in response that its rights as an assignee arise not because Bonanza assigned a "claim or demand," in contravention of the no-assignment clause, but here Bonanza assigned "proceeds" -- a horse of a different color. The distinction is specious. An assignee stands in the boots of his assignor, and we have already held that Bonanza's boots do not entitle it to recover from appellant. Appellee cannot enlarge Bonanza's boots by putting the label "proceeds" on its claim. Words cannot change a plugged nickel into a silver dollar.

Conclusion: The Final Episode?

We hold that Bonanza did not pay appellee within the contemplation of the indemnity provision, so appellant is not liable to appellee under the insurance contract. Further, we hold that appellee has no standing as a third-party beneficiary of the contract to maintain an action directly against appellant. Finally, we hold that the purported assignment of the insurance proceeds does not give appellee a direct right of action against appellant. The Aqua Safari was put out to pasture long ago. Hopefully, this series of cases will now follow. ***

Chapter 9: General Principles of Marine Insurance

Wilburn Boat Co. v. Fireman's Fund Insurance Co., 348 U.S. 310 (1955)

Justice Black (joined by Chief Justice Warren and Justices Douglas, Clark, Minton, and Harlan) delivered the opinion of the Court.

This case raises questions concerning the power of States to regulate the terms and conditions of marine insurance contracts.

Glenn, Frank and Henry Wilburn, merchants in Denison, Texas, bought a small houseboat to use for commercial carriage of passengers on nearby Lake Texoma, an artificial inland lake between Texas and Oklahoma. The respondent Fireman's Fund Insurance Company insured the boat against loss from fire and other perils. While moored on the lake the boat was destroyed by fire. Following respondent's refusal to pay for the loss, this suit was brought in a Texas state court by the Wilburns and by their wholly owned corporation, the Wilburn Boat Company, to which the boat's legal title had been transferred.*** Liability was denied however because of alleged breaches of printed policy terms or "warranties" providing that, without written consent of the company, the boat could not be sold, transferred, assigned, pledged, hired or chartered, and must be used solely for private pleasure purposes.*** Contending that the evidence showed the policy contract to have been made and delivered in Texas, petitioners urged that all questions concerning alleged policy breaches were controlled by Texas law. If Texas law does govern, the policy provision against pledging may be wholly invalid. Furthermore no breach by the insured of the provisions of a fire insurance policy is a defense to any suit under Texas law unless the breach contributes to the loss. Without finding whether the policy had been made and delivered in Texas, the court refused to give that State's law any effect at all, holding that since a marine policy is a maritime contract, federal admiralty law -- not state law -- governed.[4] The court went on to hold that there is an established admiralty rule which requires literal fulfillment of every policy warranty so that any breach bars recovery, even though a loss would have happened had the warranty been carried out to the letter. Finding that the Wilburns had breached policy provisions against transfer, pledge and use of the boat, the District Court entered judgment for the insurance company. Approving the District Court's actions in all respects, the Court of Appeals affirmed, saying that "It is the settled doctrine that a marine contract of insurance is 'derived from' is 'governed by', and is a 'part of' the general maritime law of the world."***

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[4] The District Court said: "After much consideration of the above matter, I am of the opinion that the policy involved here is a maritime contract and therefore governed by the general admiralty law and not by the law of Texas, since the policy covered the vessel on navigable waters of the United States, without as well as within the State of Texas, and I find that the waters of Lake Texoma are navigable waters of the United States."

Since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction. *Insurance Co.* v. *Dunham*, 11 Wall. 1. But it does not follow, as the courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined admiralty rule. In the field of maritime contracts [7] as in that of maritime torts, [8] the National Government has left much regulatory power in the States. As later discussed in more detail, this state regulatory power, exercised with federal consent or acquiescence, has always been particularly broad in relation to insurance companies and the contracts they make.

Congress has not taken over the regulation of marine insurance contracts and has not dealt with the effect of marine insurance warranties at all; hence there is no possible question here of conflict between state law and any federal statute. But this does not answer the questions presented, since in the absence of controlling Acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress. *See, e. g., Garrett v. Moore-McCormack Co.,* 317 U.S. 239. Consequently the crucial questions in this case narrow down to these: (1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?

The only decision of this Court relied on by the Court of Appeals to support its holding that there is an established admiralty rule requiring strict fulfillment of marine insurance warranties was *Imperial Fire Insurance Co.* v. *Coos County*, 151 U.S. 452. There, because of a breach of warranty, an insurance company was relieved of liability for loss of a courthouse by fire, and this Court said it was immaterial whether the breach contributed to the loss. But no question of marine insurance was remotely involved nor was there any reliance on a marine insurance rule. Writing its own "general commercial law," as was the custom in diversity cases prior to *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, this Court in the *Coos County* case simply followed a general doctrine commonly applied to warranties in all types of insurance. A mere cursory examination of the cases, state and federal, will disclose that through the years this common-law doctrine, when accepted, has been treated not as an admiralty rule but as a general warranty rule applicable to many types of contracts including marine and other insurance. There are very few federal cases on marine insurance in which the strict breach of warranty rule has even been considered. And only two circuits appear to have thought of the rule as

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[7] *See, e. g., The Lottawanna,* 21 Wall. 558; *Madruga v. Superior Court,* 346 U.S. 556. *But cf. Union Fish Co.* v. *Erickson*, 248 U.S. 308.

[8] *See, e.g., Just v. Chambers,* 312 U.S. 383; *The Hamilton*, 207 U.S. 398. *But cf. Pope & Talbot v. Hawn,* 346 U.S. 406; *Butler v. Boston & Savannah S. S. Co.*, 130 U.S. 527, 557-558.

a part of the general admiralty law. [11] On the contrary, other circuit court decisions, including the ones relied on in those few cases holding the rule to be one of federal admiralty, seem to indicate that state law was followed in applying the rule or that the question was decided as one of "general commercial law," a uniform practice during the era of *Swift* v. *Tyson*, 16 Pet. 1. This Court did say in one marine insurance case that warranties "must be strictly and literally performed." *Hazard's Administrator* v. *New England Marine Ins. Co*., 8 Pet. 557, 580. But there is not the slightest indication that this statement referred to a federal admiralty rule and the Court in fact expressly followed and applied Massachusetts law to decide another question in that very case. Whatever the origin of the "literal performance" rule may be, we think it plain that it has not been judicially established as part of the body of federal admiralty law in this country. Therefore, the scope and validity of the policy provisions here involved and the consequences of breaching them can only be determined by state law unless we are now prepared to fashion controlling federal rules.

The whole judicial and legislative history of insurance regulation in the United States warns us against the judicial creation of admiralty rules to govern marine policy terms and warranties. The control of all types of insurance companies and contracts has been primarily a state function since the States came into being. In 1869, this Court held in *Paul v. Virginia*, 8 Wall. 168, that States possessed regulatory power over the insurance business and strongly indicated that the National Government did not have that power. Three years later, it was first authoritatively decided in *Insurance Co*. v. *Dunham, supra*, that federal courts could exercise "jurisdiction" over marine insurance contracts. In 1894, years after the *Dunham* holding, this Court applied the doctrine of *Paul* v. *Virginia* and held that States could regulate marine insurance the same as any other insurance. *Hooper v. California,* 155 U.S. 648. Later, the power of States to regulate marine insurance was reaffirmed in *Nutting v. Massachusetts*, 183 U.S. 553. This constitutional doctrine carrying implications of exclusive state power to regulate all types of insurance contracts remained until 1944 when this Court decided *United States v. South-Eastern Underwriters Assn*., 322 U.S. 533. Thus it is clear that at least until 1944 this Court has always treated marine insurance contracts, like all others, as subject to state control. The vast amount of insurance litigation in state courts throughout our history also bears witness that until recently state legislatures and state courts have treated marine insurance as controlled by state law to the same extent as all other insurance. This is aptly illustrated by a Massachusetts case decided in 1893 which expressly held a generally worded statute of that State relating to warranties to be applicable to marine insurance companies equally with other insurance companies. *Durkee v. India Mutual Ins. Co.,* 159 Mass. 514, 34 N. E. 1133.

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[11] *Aetna Ins. Co*. v. *Houston Oil & Transport Co.,* 49 F.2d 121 (1931); *Home Ins. Co*. v. *Ciconett*, 179 F.2d 892 (1950).

Not only courts, but Congress, insurance companies, and those insured have all acted on the assumption that States can regulate marine insurance. In the Merchant Marine Act of 1920, Congress recognized that marine insurance companies were operating under state laws. Then, following a three-year study of marine insurance, Congress in 1922 passed a law regulating *all* types of insurance in the District of Columbia. This enactment generally referred to as the District of Columbia Model Marine Insurance Act, had the backing of insurance companies generally and was hailed as a model which it was hoped States would copy. Because of a provision in the bill as offered relating to "policy forms and conditions," the bill was first criticized by a national association of shipowners but was later approved after the criticized provision was removed. Hearings on the bill make it plain that shipowners and marine insurance companies recognized that marine insurance was then, and would continue to be, regulated by the States. This model bill which it was hoped would serve as a pattern for States to follow was prompted in part by widespread doubt created by *Paul* v. *Virginia* and *Hooper* v. *California* that the Federal Government could enter the field at all. Again in 1935 marine insurance was discussed in congressional hearings in connection with the Limitation of Liability Act. There representatives of shipowners strongly opposed regulation of marine insurance by federal authority, arguing that it was better for the States to retain their regulatory function. Finally, in 1944 and 1945, Congress had before it for consideration bills specifically designed to authorize States to continue to regulate the business of insurance. At the very beginning of extensive hearings on these bills the Committee's attention was directed to that part of this Court's opinion in *Hooper* v. *California* deciding that States could regulate the marine insurance business the same as they could regulate other kinds of insurance businesses. Again and again the Committee was reminded of the *Paul* and *Hooper* cases which together showed that States had previously been regulating marine insurance as well as all other types. Passage of the bill followed *United States v. South-Eastern Underwriters Assn., supra*, holding that, despite the constitutional doctrine embodied in the *Paul* v. *Virginia* line of cases, Congress had power under the Constitution to regulate interstate insurance transactions. In the *South-Eastern* case, however, all the opinions had emphasized the historical fact that States had always been free to regulate insurance. The measure Congress passed shortly thereafter, known as the McCarran Act, was designed to assure that existing state power to regulate insurance would continue. Accordingly, the Act contains a broad declaration of congressional policy that the continued regulation of insurance by the States is in the public interest, and that silence on the part of Congress should not be construed to impose any barrier to continued regulation of insurance by the States.

The hearings on the McCarran Act reveal the complexities and difficulties of an attempt to unify insurance law on a nationwide basis, even by Congress. Courts would find such a task far more difficult. Congress in passing laws is not limited to the narrow factual situation of a particular controversy as courts are in deciding lawsuits. And Congress could replace the presently functioning state regulations of marine insurance by one comprehensive Act. Courts, however, could only do it piecemeal, on a case-by-case basis. Such a creeping approach would result in leaving marine insurance largely unregulated for years to come.

In this very case, should we attempt to fashion an admiralty rule governing policy provisions, we would at once be faced with the difficulty of determining what should be the consequences of breaches. We could adopt the old common-law doctrine of forfeiting all right of recovery in the absence of strict and literal performance of warranties, but that is a harsh rule. Most States, deeming the old rule a breeder of wrong and injustice, have abandoned it in whole or in part. But that has left open the question of what kind of new rule could be substituted that would be fair both to insurance companies and policyholders. Out of their abundant broad experience in regulating the insurance business, some state legislatures have adopted one kind of new rule and some another. Some States for example have denied companies the right to forfeit policies in the absence of an insured's bad faith or fraud. Other States have thought this kind of rule inadequate to stamp out forfeiture practices deemed evil. The result, as this Court has pointed out, has been state statutes like that of Texas which "go to the root of the evil" and forbid forfeiture for an insured's breach of policy terms unless the breach actually contributes to bring about the loss insured against. *Northwestern National Life Ins. Co.* v. *Riggs,* 203 U.S. 243, 253-254. Thus there are a number of other possible rules from which this Court could fashion one for admiralty. But such a choice involves varied policy considerations and is obviously one which Congress is peculiarly suited to make. And we decline to undertake the task.***

Under our present system of diverse state regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where congressional power is undoubted. We, like Congress, leave the regulation of marine insurance where it has been -- with the States. ***

Justice Frankfurter, concurring in the result.

This case concerns a marine insurance policy covering a small houseboat yacht, inappropriately named *The Wanderer*, plying the waters of Lake Texoma, an artificial inland lake between Texas and Oklahoma. The coverage of the policy was specifically restricted to *The Wanderer's* trip to and use on that lake "solely for private pleasure purposes." After *The Wanderer* was destroyed by fire while lying idle on Lake Texoma, it was discovered that certain warranties of the insurance policy had been ignored by petitioner. Under a uniform rule of admiralty law governing breach of such warranties, petitioner probably would be unable to recover on the policy. Texas statute law, however, might excuse the breaches of warranty, although this is by no means clear. Our problem is whether this situation -- involving a marine policy such as is the basis of litigation -- calls for a uniform rule throughout the country applicable to breaches of warranty of all similar marine insurance contracts.

There is no doubt that as to some matters affecting maritime affairs the States are excluded from indulging in variant state policies. *E.g., Chelentis v. Luckenbach S. S. Co.*, 247 U.S. 372; *The Lottawanna,* 21 Wall. 558. Equally, there is no doubt that some matters are so predominantly restricted in the range of their significance that a uniform admiralty rule need not be recognized or fashioned. *E. g., Madruga v. Superior Court*, 346 U.S. 556; *C.J. Hendry Co.* v. *Moore*, 318 U.S. 133; *The Hamilton*, 207 U.S. 398. Therefore the question, and the only question now to be decided, is whether the demands of uniformity relevant to maritime law require that marine insurance on a houseboat yacht brought to Lake Texoma for private recreation should be subject to the same rules of law as marine insurance on a houseboat yacht "confined," after arrival, to the waters of Lake Tahoe or Lake Champlain. The provision of the policy whereby the insured warranted "that the vessel be confined to Lake Texoma" conveys the emphasis of the situation -- the essentially localized incidence of the transaction despite the interstate route followed in reaching the circumscribed radius within which the yacht was to move. It is reasonable to conclude that the interests concerned with shipping in its national and international aspects are substantially unconcerned with the rules of law to be applied to such limited situations. I join in a result restricted within this compass.

Unfortunately, for reasons that I do not appreciate, the Court's opinion goes beyond the needs of the problem before it. Unless I wholly misconceive that opinion, its language would be invoked when cases so decisively different in degree as to be different in kind come before this Court. It seems directed with equal force to ocean-going vessels in international maritime trade, as well as coastal, intercoastal and river commerce. Is it to be assumed that were the *Queen Mary*, on a world pleasure cruise, to touch at New York City, New Orleans and Galveston, a Lloyd's policy covering the voyage would be subjected to the varying insurance laws of New York, Louisiana and Texas? Such an assumption, I am confident, would not prevail were decision necessary. The business of marine insurance often may be so related to the success of many manifestations of commercial maritime endeavor as to demand application of a uniform rule of law designed to eliminate the vagaries of state law and to keep harmony with the marine insurance laws of other great maritime powers.*** It cannot be that by this decision the Court means suddenly to jettison the whole past of the admiralty provision of Article III and to renounce requirements for nationwide maritime uniformity, except insofar as Congress has specifically enacted them, in the field of marine insurance.

It is appropriate to recall that the preponderant body of maritime law comes from this Court and not from Congress. Judicial enforcement of nationwide rules regarding marine insurance is, as my brother Reed cogently shows, deeply rooted in history. What reason is there for abruptly turning over, pending action by Congress, to the crazy-quilt regulation of the different States what so long has been the business of the courts?

As is true of other maritime interests, however, the demand for uniformity is not inflexible and does not preclude the balancing of the competing claims of state, national and international interests. The process and some of the relevant considerations here are not unlike those involved when the question is whether a State, in the absence of congressional action, may regulate some matters even though aspects of interstate commerce are affected. In rejecting abdication of all responsibility by this Court for uniformities in marine insurance and its complete surrender to the States, one is not required to embrace another absolute, complete absorption by this Court of the field of marine insurance and entire exclusion of the States. It is not necessary to assert that uniformity, if it be required in any case, is required in all cases cognizable in admiralty -- whether the craft was for business or pleasure, touched in five states, five nations or never left the confines of an inland lake. The deceptive lure of certainty and comprehensive symmetry should not be permitted to conceal the fact that admiralty's expansion beyond "the ebb and flow of the tides" has been a response to demands more inclusive than those for mechanical uniformity.

Under the distribution of power between national authority and local law, admiralty has developed for more than a hundred years by rulings of the Court, but not by absolutes either of abstention or extension. While not able to join the dissenters, I can only hope that what are essentially *dicta* will not be found controlling when situations which have not called them forth, and to which they are not applicable, come before the Court for adjudication.

Justice Reed, with whom Justice Burton joins, dissenting.

The opinion of the Court states that "the crucial questions in this case narrow down to these: (1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?" By question (1) the Court means, as its opinion shows, a federal admiralty rule that a warranty of an insured is to be strictly enforced with the result that a breach of the warranty relieves the insurer of liability for loss although the breach was not shown to have contributed to the loss.

The Court concludes that the literal performance rule has not been established by statute or by judicial decision. It acknowledges that a maritime insurance policy is a maritime contract brought under federal jurisdiction by the Admiralty Clause of the Constitution. *Insurance Co.* v. *Dunham*, 11 Wall. 1. And so it recognizes that the power "to fashion controlling federal rules" rests in the Federal Government -- in Congress and the federal courts. However, the Court determines that in the absence of congressional action it will leave the formulation of rules governing marine insurance policies to the States. It applies this conclusion to the effect of a breach of warranty in a maritime insurance policy.

I disagree with both conclusions. Our admiralty laws, like our common law, came from England. As a matter of American judicial policy, we tend to keep our marine insurance laws in harmony with those of England. *Queen Ins. Co.* v. *Globe Ins. Co.,* 263 U.S. 487, 493; *Calmar Steamship Corp.* v. *Scott,* 345 U.S. 427, 442-443. Before our Revolution, the rule of strict compliance with maritime insurance warranties had been established as the law of England. That rule persists. While no case of this Court has been cited or found that says specifically that the rule of strict compliance is to be applied in admiralty and maritime cases, that presupposition has been consistently adopted as the basis of reasoning from our earliest days.[2] Other courts have been more specific.[3] No case holds to the contrary.

I am inclined to think that Congress or this Court might well consider modifying the strict rule insofar as the breached warranty does not contribute to the loss. But since the Court concludes that it will not undertake the task, it is unnecessary for me to go farther than to say that in the absence of federal amelioration I would follow the established rule of holding the insured to his warranty.

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[2] *Hodgson v. The Marine Ins. Co. of Alexandria*, 5 Cranch 100, 109:

> "The insurance in this case being general, as well for the parties named as 'for all and every other person or persons to whom the vessel did or might appertain,' and containing no warranty of neutrality, belligerent as well as American property was covered by it."

Livingston v. The Maryland Ins. Co., 6 Cranch 274, 278:

> "The warranty, in this case, is in these words; 'warranted, by the assured, to be American property, proof of which to be required in the United States only.'
>
> "The interest insured is admitted to be American property, in the strictest sense of the term; but it is contended, that Baruro, a Spanish subject, had an interest in the cargo, which falsifies the warranty.
>
> "Whether Baruro could be considered as having an interest in the cargo, or not, is a question of some intricacy, which the court has not decided; and which, if determined in the one way or the other, would not affect the warranty; because, the assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral."

Hazard's Administrator v. *New Eng. Mar. Ins. Co.*, 8 Pet. 557, 570; *Calmar Steamship Corp.* v. *Scott,* 345 U.S. 427, 432-436.

[3] *Ogden v. Ash,* 1 Dall. 174 (Common Pleas of Philadelphia County); *Martin* v. *Delaware Ins. Co.*, 16 Fed. Cas. No. 9,161, p. 894 (C. C. D. Pa.); *Snyder v. Home Ins. Co.,* 133 F. 848 (D. C. S. D. N. Y.); *Whealton Packing Co.* v. *Aetna Ins. Co.,* 185 F. 108 (C. A. 4th Cir.); *Canton Ins. Office, Ltd.* v. *Independent Transp. Co.,* 217 F. 213 (C. A. 9th Cir.); *Shamrock Towing Co.* v. *American Ins. Co.*, 9 F.2d 57, 60 (C. A. 2d Cir.); *Aetna Ins. Co.* v. *Houston Oil & Transp. Co.,* 49 F.2d 121 (C. A. 5th Cir.); *Robinson v. Home Ins. Co.,* 73 F.2d 3 (C. A. 5th Cir.); *Levine v. Aetna Ins. Co.,* 139 F.2d 217 (C. A. 2d Cir.); *Home Ins. Co.* v. *Ciconett,* 179 F.2d 892 (C. A. 6th Cir.); *Red Top Brewing Co.* v. *Mazzotti*, 202 F.2d 481 (C. A. 2d Cir.); *United States Gypsum Co.* v. *Insurance Co.,* 19 F. Supp. 767 (D. C. S. D. N. Y.).

This brings me to the crucial phase of the Court's decision which, so the Court says, "leave[s] the regulation of marine insurance where it has been -- with the States." This is the dominant issue here, and the Court's decision strikes deep into the principle of a uniform admiralty law and will have the result of unduly burdening maritime commerce. This is the issue presented by the petition for certiorari and argued in petitioners' brief on the merits.

One rule of law stands unquestioned. That is that all courts, state and federal, which have jurisdiction to enforce maritime or admiralty substantive rights must do so according to federal admiralty law. See particularly the excellent discussion by Judge Magruder in *Doucette v. Vincent,* 194 F.2d 834, 841 *et seq*. The issue of an insurer's liability upon an insured's broken warranty is clearly a matter of substantive law.

The Court relies upon *Paul v. Virginia,* 8 Wall. 168; *Hooper v. California*, 155 U.S. 648; and *Nutting v. Massachusetts*, 183 U.S. 553, as holding that "States could regulate marine insurance the same as any other insurance." Those cases only approve provisions of state law that require agents and companies to take out licenses and conform to various conditions preliminary to doing business. The Court also relies on congressional action and inaction, but the fact that Congress has regulated the organization, taxing and licensing of fire, casualty and marine insurance companies in the District of Columbia, and has recognized the existence of marine companies under the Merchant Marine Act of 1920, has no relevancy to whether the provisions of state law should control the effect to be given to warranties in marine insurance policies. Nor does the McCarran Act indicate that States may legislate to change fundamentally maritime insurance law. It was so decided in *Maryland Casualty Co*. v. *Cushing*, 347 U.S. 409, 413. The answer as to whether state or federal law governs marine insurance contracts lies in the nature of the federal admiralty jurisdiction.

The Constitution, Art. III, § 2, provides that "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ." The First Congress enacted that the district courts "shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . ." In this manner national control was asserted over maritime litigation. It was needed because the Republic bordered a great length of the Atlantic littoral and the navigable waters furnished the best avenue of transportation.

Although congressional authority over maritime trade was not expressly granted by the Constitution, the grant of admiralty jurisdiction together with the Necessary and Proper Clause has been found adequate to enable Congress to declare the prevailing maritime law for navigable waters throughout the Nation. The Commerce Clause aids where interstate commerce is affected, but has not the scope of "navigable waters." Congressional power to rest exclusive jurisdiction in the federal courts where, as here, the constitutionally delegated judicial authority exists, is established. *The Moses Taylor*, 4 Wall. 411, 429. The remedy preserved by the savings clause of the Judiciary Act of 1789, "is not a remedy in the common-laws courts . . . but a common-law remedy." *Id.* at 431. The meaning of the quoted clause becomes plainer when read with the state statute which *The Moses Taylor* held unconstitutional. That statute authorized a "proceeding against the vessel," a strictly *in rem* proceeding in admiralty, *id.* at 412, 413, different from the common-law action *in personam*. Consequently, when a California resident brought an *in rem* proceeding in a California court, he was pursuing an admiralty remedy, not a common-law remedy. This Court, therefore, held the case outside the savings clause of the ninth section of the Judiciary Act of 1789.

On the other hand, a state court was held to have jurisdiction to sell a vessel to enforce a lien in *Knapp, Stout & Co.* v. *McCaffrey,* 177 U.S. 638, where the suit was against the owner, *in personam*, although in equity for foreclosure of a possessory lien. "The remedy chosen by the plaintiff was the detention of the raft for his towage charges." *Id.* at 644. As this was a state-approved remedy in the common law, the use of state equity procedure to enforce the lien was held to be in accord with the reservation of a common-law remedy from the exclusive jurisdiction of admiralty. Thus, by saving a suitor's common-law remedy, Congress has created by § 9 of the Judiciary Act of 1789, now 28 U.S.C. (Supp. V, 1952) § 1333, only a limited exclusive jurisdiction. The state courts may furnish not only a common-law remedy existing at the time of the adoption of the Constitution, for substantive admiralty rights, but also new judicial remedies created by statute; that is, whatever remedy is not strictly *in rem*.

State authority, however, although it may provide remedies, does not extend to changing the general substantive admiralty law. That is the maritime law existing as a body of law enforceable in admiralty. The extent of the States' power to grant rights arising from maritime incidents is not subject to definition. It may vary as the course or manner of navigation or commerce changes. It exists in some circumstances, see *Just v. Chambers,* 312 U.S. 383, 388, and, as indicated both in the majority and minority opinions in the *Jensen* case, 244 U.S. 205, must be determined in each situation. The principles which control the validity of an assertion of state power in the admiralty sphere are, however, clear. State power may be exercised where it is complementary to the general admiralty law. It may not be exercised where it would have the effect of harming any necessary or desirable uniformity. The cases decided by this Court make it plain that state legislation will not be permitted to burden maritime commerce with variable rules of law that destroy that uniformity.

Since Congress has power to make federal jurisdiction and legislation exclusive, the situation in admiralty is somewhat analogous to that governing state action interfering with interstate commerce. In the absence of congressional direction, it is this Court that must bear the heavy responsibility of saying when a state statute has burdened the required federal uniformity. It is one thing to allow the States to add a remedy or create a new cause of action for certain incidents arising out of maritime activity. It is quite another thing to relinquish an entire body of substantive law making for a whole phase of maritime activity to the States. Such action does violence to the premise upon which the admiralty jurisdiction was constructed.

It is not only in markings, lights, signals, and navigation that States are barred from legislation interfering with maritime operation. The need for a uniform rule is just as great when dealing with the effect to be given to marine insurance on boats which plough our navigable waters. A vessel moves from State to State along our coasts or rivers. State lines may run with the channel or across it. Under maritime custom an insurance policy usually covers the vessel wherever it may go. If uniformity is needed anywhere, it is needed in marine insurance. It is like the question of seaworthiness which must be controlled by one law. It presents the same problem as a state law controlling the operation of interstate boats. *Kelly v. Washington,* 302 U.S. 1, 15. For a State to require policies to be issued under its authority or to require extra-state policies to be interpreted by its laws burdens maritime operations unduly. Shipmasters must know how to handle their vessels to preserve their insurance. Insurers must know the risks they are assuming when they fix their premiums. What law is to govern -- that of the State where the insurance contract was issued, the State of the accident, or the State of the forum? It seems an unreasonable interference with maritime activity to allow the many States to declare the substantive law of marine insurance.

The Court refuses to declare the governing maritime law on warranties in this case because it could only be done "piecemeal, on a case-by-case basis." It would prefer to await congressional enactment of a comprehensive code. But questions of contract interpretation and the effect to be given to contract provisions are questions which the Court is particularly equipped to handle. A broad legislative approach might be desirable; but in its absence we could establish a rule governing the effect to be given to breaches of warranties which would be binding on every court in the land. It is certainly not desirable to defer to the legislature of Texas or any other State which, though it can enact a comprehensive code, can make it binding only in its own State. To do so destroys the essential uniformity of the maritime law.

My understanding of the facts and legal issues and the rule to be deduced from the Court's decision forbids my joining the limited concurrence of Mr. Justice Frankfurter. The policy here is not restricted to the boat's use on Lake Texoma nor to its use in any one State. In addition to its use on the lake, the policy covered a "cruise from Greenville, Mississippi via Mississippi and Red Rivers to Denison, Texas" and then to the lake. The waters of five States were navigated before reaching the lake, which is itself an interstate body of water lying between Texas and Oklahoma. The considerations which lead me to favor a uniform rule are not changed simply because a relatively small boat was here involved, or the number of States through which it passed were few, or because its ultimate destination was a small lake.

This state rule of law covering the incidents of marine insurance affects not only Texas or Lake Texoma but the longest voyage within the cruising capacity of *The Wanderer*. As is shown by *The Hamilton*, 207 U.S. 398, such an exercise of state power permits the States to declare the applicable laws of marine insurance even on the high seas. The event of loss must always be local, but the coverage of the policy is general. When state power intrudes upon the uniformity imposed by federal law, its exercise is invalid when applied to maritime litigation whether the application occurs in litigation arising from an incident that happens on a small lake or a mighty river.***

Albany Insurance Co. v. Anh Thi Kieu, 927 F.2d 882 (5th Cir. 1991).

Sam Johnson, Circuit Judge:

Oblivious to the tangled mess it has left the practitioner to decipher, this Court has extended numerous -- and often seemingly inconsistent -- explanations of the appropriate choice of law in marine insurance disputes. Our task in the instant appeal is to untie the Gordian knot. Albany Insurance Company ("Albany") challenges the district court's declaration that appellee Anh Thi Kieu recover some $ 90,405 in damages and "sue and labor" charges under a marine insurance contract. The district court determined that Texas insurance law, and not federal maritime or Louisiana insurance law, governed the parties' rights and obligations. Unable to conclude that the district court committed reversible error, this Court affirms the judgment of the district court.

I. FACTS AND PROCEDURAL HISTORY

In February 1988, Anh Thi Kieu, a Vietnamese immigrant who resides in Texas, attempted to secure marine hull insurance coverage on the F/V STACY MARIE, a sixty-five foot shrimping vessel. An independent agent, the Edgar Coco Agency, Inc., of Marksville, Louisiana, submitted to Anh Thi Kieu an application for insurance coverage from Albany Insurance Company. Although it was printed in English, Anh Thi Kieu completed the application. The Edgar Coco Agency forwarded the application to Albany's general agent, G & M Insurance Company. On March 1, 1988, Albany approved coverage of the STACY MARIE and forwarded a policy to Anh Thi Kieu.

It is undisputed that Anh Thi Kieu's application for insurance coverage contained several inaccurate statements. Among other things, Anh Thi Kieu recited (1) that she regularly operated the STACY MARIE as captain, (2) that the vessel had sustained no damages in the last five years, and (3) that she had purchased the vessel for $ 110,000. In truth, Anh Thi Kieu purchased the STACY MARIE in 1984 for $ 30,000 and assembled an independent crew to guide the vessel in fishing and shrimping operations off the coast of Port Arthur, Texas. Late in 1984, the STACY MARIE collided with an offshore repair boat and suffered minor damage that was repaired by a marine shipyard in Freeport, Texas. Albany Insurance Company had ample opportunity to discover these facts and cancel coverage. Instead, Albany continued to receive premiums from Anh Thi Kieu and to extend coverage on the STACY MARIE.

On November 3, 1988, the STACY MARIE allided with an unmarked offshore Department of Energy platform. The allision damaged the hull planking on the vessel and opened a gaping hole on its port bow. Assisted by the Coast Guard and another shrimp boat, the crew of the STACY MARIE successfully floated the vessel to Sabine Pass, Texas. There, Sabine Offshore Services, Inc. ("Sabine Offshore"), agreed to place the STACY MARIE in dry storage in its dock yard. Anh Thi Kieu apparently secured these dry storage arrangements with Sabine Offshore in an effort to "save and preserve" the STACY MARIE.

After learning from Anh Thi Kieu that the vessel had suffered an allision, Albany investigators surveyed the damage. The investigators recommended that Albany deny any liability under the marine hull insurance policy. Subsequently, Albany filed a declaratory judgment action in federal district court requesting a declaration of Anh Thi Kieu's rights in the policy. The district court entered findings of fact and conclusions of law on February 21, 1990. The court declared that Anh Thi Kieu should recover the insured value of the STACY MARIE ($ 90,000) minus the salvage value of the vessel's hull ($ 15,000) -- a total of $ 75,000 in damages. In addition, the court ordered that Anh Thi Kieu recover $ 15,405 in "sue and labor" charges -- an amount intended to cover the storage fees at Sabine Offshore.

II. DISCUSSION

Albany raises a number of arguments on appeal. The most significant of these arguments attack the district court's application of Texas insurance law. Albany argues that the district court erroneously applied Texas insurance law and instead should have applied the federal law of *uberrimae fidei*. In the alternative, Albany argues that the district court should have applied Louisiana insurance law instead of Texas insurance law. Maritime commerce traverses the waters of many states. A set of facts in a maritime case could conceivably implicate the laws of several states, as well as the federal laws of the United States. Thus, in determining the applicable law, a court first must consider whether federal maritime law is preeminent, and then often must also consider whether one state's law is applicable over another state's law. We begin with the federal preemption analysis.

A. ***Maritime Preemption***

Albany contends that the federal law of *uberrimae fidei*, which invalidates marine insurance contracts on evidence of the assured's material misrepresentations to the underwriter, supports its denial of liability on the policy covering the STACY MARIE. Anh Thi Kieu responds that relevant provisions of the Texas Insurance Code preclude Albany's denial of coverage. The issue is simply stated, but the law is complex: does federal maritime law or state insurance regulation determine the effect of an assured's misrepresentations? Although the courts typically rely upon federal common law to resolve maritime disputes, state law occasionally can be used to supplement or even supersede maritime law.***

In *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955), the United States Supreme Court concluded that the regulation of marine insurance is, in most instances, properly left with the states. *Id.* at 321, 75 S. Ct. at 374-75. Following the direction of the Court in *Wilburn Boat*, the Fifth Circuit has ruled that "the interpretation of a contract of marine insurance is -- in the absence of a specific and controlling federal rule -- to be determined by reference to appropriate state law." *Ingersoll-Rand Financial Corp. v. Employers Ins. of Wausau,* 771 F.2d 910, 912 (5th Cir. 1985). This presumption of state law is, by now, "axiomatic." *INA of Texas v. Richard*, 800 F.2d 1379, 1380 (5th Cir. 1986). State law, therefore, governs the interpretation of marine insurance policies unless an available federal maritime rule controls the disputed issue. This Circuit has identified three factors that a court should consider in determining if a federal maritime rule controls the disputed issue: (1) whether the federal maritime rule constitutes "entrenched federal precedent,"*** (2) whether the state has a substantial and legitimate interest in the application of its law,*** (3) whether the state's rule is materially different from the federal maritime rule.*** *See Kossick v. United Fruit Co.,* 365 U.S. 731, 738-39, 81 S. Ct. 886, 891-92, 6 L. Ed. 2d 56 (1961).[3] These factors are merely instructive and not dispositive. We address them in reverse order.

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[3] Our Circuit has taken varying, and arguably inconsistent, approaches to the precedential authority of *Kossick v. United Fruit Co.,* 365 U.S. 731, 81 S. Ct. 886, 6 L. Ed. 2d 56 (1961). In at least one opinion, this Court assumed that *Kossick* essentially limited *Wilburn Boat* to its factual scenario. *McDuffie v. Old Reliable Fire Ins. Co.,* 608 F.2d 145, 147 n. 1 (5th Cir. 1979). In another case, however, the Court severely criticized and declined to follow the *Kossick* opinion, concluding that it only contributed confusion to the question whether maritime law controlled the interpretation of marine contracts. *Irwin v. Eagle Star Ins. Co.,* 455 F.2d 827, 829-30 (5th Cir.), *cert. denied*, 409 U.S. 852, 93 S. Ct. 118, 34 L. Ed. 2d 95 (1972). Still other cases ignore *Kossick* altogether. *See, e.g., Transco Exploration Co. v. Pacific Employers Ins. Co.*, 869 F.2d 862, 863 (5th Cir. 1989) (applying *Wilburn Boat* standard without reference to *Kossick*); *INA of Texas*, 800 F.2d at 1380 (same).

State insurance law generally should not govern marine insurance disputes if it is materially different from federal maritime law. The application of state law inconsistent with the core principles of maritime law "would defeat the reasonably settled expectations of maritime actors." *Exxon Corp. v. Chick Kam Choo,* 817 F.2d 307, 318 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140, 108 S. Ct. 1684, 100 L. Ed. 2d 127 (1988). While there is no requirement that state insurance regulations precisely mirror parallel federal regulations, state law should not be applied unless it bears a reasonable similarity to the federal maritime practice. We find a reasonable similarity between the applicable federal and state laws in the instant case. Under the *uberrimae fidei* doctrine, an assured's material misrepresentations invalidate the policy of insurance ab initio. *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974, 980-81 & n. 20 (5th Cir. 1969). Under Texas law, an assured's misrepresentations may invalidate the policy of insurance, but only if the insured intended to deceive the insurer. *Mayes v. Massachusetts Mutual Life Ins. Co.*, 608 S.W.2d 612, 616 (Tex. 1980). Texas law, unlike federal law, imposes an appropriate limitation that relatively minor misstatements which the insured did not intend to make do not afford the insurer an excuse to refuse payment. The fundamental nature of both laws, however, is the same. Texas insurance law shares the concern of federal maritime law that an assured should not profit from her material misrepresentations to the underwriter.

State insurance law generally should not govern marine insurance disputes if the state does not have a substantial and legitimate interest in the application of its law. Federal maritime law properly controls any maritime dispute in the absence of a substantial and legitimate state interest. Stated conversely, state law should not be applied unless the local state interest materially exceeds the comparative maritime concerns in the controversy. *See Grant Smith-Porter Ship Co. v. Rohde,* 257 U.S. 469, 477, 42 S. Ct. 157, 158, 66 L. Ed. 321 (1922); *Walter v. Marine Office of America,* 537 F.2d 89, 94-95 (5th Cir. 1976). It is evident in the instant case that the local state interest is substantial and legitimate. Regulation of insurance relationships, including marine insurance relationships, has historically been a matter of state concern. *See Wilburn Boat Co.*, 348 U.S. at 316, 75 S. Ct. at 371. From their experience, states are far better equipped to balance the risks that each party to an insurance contract endures. The State of Texas has concluded that the burden of unintentional misrepresentations should fall on the insurance underwriter. Texas has a material interest in ensuring that marine insurance underwriters do not invalidate the insurance protection of Texas citizens on the basis of misrepresentations that were neither willfully or intentionally asserted.

State insurance law generally should not govern marine insurance disputes if an existing federal maritime rule constitutes "entrenched federal precedent." Maritime law, as federal common law, supersedes state law if the maritime law specifically governs the conduct in question and consistently has been invoked to control such conduct. In the absence of preexisting entrenched federal maritime law, this Court will refuse to impose unfamiliar federal common law maritime requirements on the parties to a marine insurance contract. *See INA of Texas*, 800 F.2d at 1382 ("In case after case, we have applied state law in interpreting marine insurance policies, because there is no contrary federal admiralty rule."). The application of unfamiliar federal maritime rules engenders undesirable uncertainty among maritime actors; this Court can easily avoid such uncertainty by the application of "already well-developed state laws." *Chick Kam Choo*, 817 F.2d at 317.

The question whether the *uberrimae fidei* doctrine is entrenched federal precedent is troublesome. Repeated references to the doctrine appear in early United States Supreme Court opinions. *See, e.g., Stipcich v. Metropolitan Life Ins. Co.*, 277 U.S. 311, 316, 48 S. Ct. 512, 513, 72 L. Ed. 895 (1928); *Phoenix Life Ins. Co. v. Raddin,* 120 U.S. 183, 189, 7 S. Ct. 500, 502, 30 L. Ed. 644 (1887). The Supreme Court applied the *uberrimae fidei* doctrine as a "traditional" aspect of insurance law in general. *See Stipcich,* 277 U.S. at 316, 48 S. Ct. at 513 ("Insurance policies are traditionally contracts uberrimae fidei and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option."). As mentioned, though, insurance law is typically a matter of state concern. Over the years most states abandoned the strict *uberrimae fidei* articulation. Today, the sole remaining substantial vestige of the doctrine is in maritime insurance law. *See* 2 Arnould, Marine Insurance & Average § 575, at 531 (13th ed. 1950); F. Tempelman & C. Greenacre, Marine Insurance 16-17 (4th ed. 1934); W. Winter, Marine Insurance 223 (3d ed. 1952).

Even under maritime law, the federal courts have rarely invoked the *uberrimae fidei* doctrine. Despite the long history of the doctrine in the Supreme Court, only three cases -- two of which date from the 1960s -- have examined the availability of the doctrine in this Circuit. Each of these cases has confidently asserted that the doctrine is "well recognized" in federal law. Indeed, in *Fireman's Fund Insurance Co. v. Wilburn Boat Co.,* 300 F.2d 631 (5th Cir. 1962), the Court expressly declared that the *uberrimae fidei* doctrine "is solidly *entrenched* in our body of federal maritime law." *Id.* at 647 n. 12 (emphasis added). In *Gulfstream Cargo, Ltd. v. Reliance Insurance Co.,* 409 F.2d 974 (5th Cir. 1969), the Court, relying extensively upon its language in *Fireman's Fund Insurance Co.*, stated without equivocation that "nothing is better established in the law of marine insurance than that 'a mistake or commission material to a marine risk, whether it be wilful or accidental, or result from mistake, negligence or voluntary ignorance, avoids the policy.'" *Id.* at 980 (quoting *Fireman's Fund Insurance Co.,* 300 F.2d at 646). Each of these cases has declined, however, to enforce the strict *uberrimae fidei* rule as the basis for the invalidation of a marine insurance policy.

The circumstances in *Fireman's Fund Insurance Co.* and *Gulfstream Cargo, Ltd.* were unusual. In both cases, the Court assumed, without formally deciding, that the *uberrimae fidei* doctrine was controlling federal precedent. The Court nonetheless resolved each case on state law grounds, concluding that state insurance law would not permit the respective plaintiffs to recover under their marine insurance policies. In *Fireman's Fund Insurance Co.*, the Court remarked that, because Texas law would not afford relief anyway, the applicability of the *uberrimae fidei* doctrine was "of minimal significance." 300 F.2d at 647 n. 12. In *Gulfstream Cargo, Ltd.*, the Court echoed its prior opinion and conceded that it was "unnecessary" to further resolve the struggle between federal and state law in marine insurance disputes. 409 F.2d at 981.

The circumstances were equally unusual in the only other case in this Circuit to discuss the availability of the *uberrimae fidei* doctrine. In *Austin v. Servac Shipping Line,* 794 F.2d 941 (5th Cir. 1986), the Court affirmed a district court's conclusion that the *uberrimae fidei* doctrine did not preclude the plaintiff's recovery under a marine hull insurance policy. The Court emphasized that, even if the doctrine existed, the *uberrimae fidei* doctrine did not require invalidation of the policy because the plaintiff's alleged misrepresentations were not "material." *Id.* at 944. Consequently, like *Fireman's Fund Insurance Co.* and *Gulfstream Cargo Ltd.*, Austin's expression of the significance of the doctrine was mere dicta.

It is the accepted practice of this Court that one panel cannot overturn the decisions of another. *See Hodge v. Seiler*, 558 F.2d 284, 287 (5th Cir. 1977); *Puckett v. Commissioner,* 522 F.2d 1385, 1385 (5th Cir. 1975). None of the opinions of this Court which have cited the *uberrimae fidei* doctrine *authoritatively* conclude, however, that the doctrine applies to the exclusion of state law. For that matter, no opinion of this Court has ever explicitly authorized the application of the *uberrimae fidei* doctrine to invalidate a marine insurance policy. The *uberrimae fidei* doctrine, in sum, is a rule which this Court has recognized, *but never applied*. We therefore conclude, albeit with some hesitation, that the *uberrimae fidei* doctrine is not "entrenched federal precedent."

The facts in the instant case are analogous to the facts in the salient opinion of *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955). The marine insurance underwriter in *Wilburn Boat Co.* refused to pay for the loss of a houseboat because the plaintiffs allegedly had breached certain warranties in the insurance policy. The underwriter sought application of a so-called "strict" breach of warranty rule under general maritime law. The Supreme Court, however, viewed this maneuver with skepticism. Noting that there were "very few federal cases on marine insurance in which the strict breach of warranty rule has even been considered," the Court determined that the strict breach of warranty rule had not been firmly established as part of the body of federal law. *Id. at* 315-16, 75 S. Ct. at 371-72. Accordingly, the Court required the application of state law. *Id.* at 321, 75 S. Ct. at 374.

The same result should ensue here. There are very few cases on marine insurance in this Circuit which have considered the *uberrimae fidei* doctrine. Even when this Court has considered the doctrine, it has not applied the doctrine. Perhaps the doctrine was "entrenched federal precedent" at the time of the *Fireman's Fund Insurance Co.* and *Gulfstream Cargo, Ltd.* decisions, but its spotty application in recent years -- even in other circuits [6] -- suggests that the *uberrimae fidei* doctrine is entrenched no more.

Concluding, as we do, that all three factors a court should consider in the marine insurance preemption analysis favor the application of state law, we therefore must examine the relevant state law to determine the viability of Anh Thi Kieu's request for compensation. But before we leave our discussion of the tug of war between federal and state law, we find it necessary to stress those decisions which we do *not* reach. This Court does not hold that federal maritime law no longer embraces the *uberrimae fidei* doctrine: while we have found no cases in this Circuit which apply the doctrine, we also have found no cases which expressly reject the doctrine. Neither does this Court hold that state insurance law always will supersede the *uberrimae fidei* doctrine. In an appropriate case, it is entirely possible that application of the doctrine would be more appropriate than application of the relevant state insurance regulations.

B. *Choice of State Law*

After concluding that federal maritime law does not govern the assured's right to payment on the marine insurance policy, we next must determine whether Texas or Louisiana insurance law applies. Albany argues that, even if federal maritime law does not apply, the district court should have applied a similarly strict Louisiana law. Although a federal court customarily applies the choice of law rules of the forum in which it is located, *Klaxon v. Stentor Electric Manufacturing Co.,* 313 U.S. 487, 496, 61 S. Ct. 1020, 1021, 85 L. Ed. 1477 (1941), the court in maritime cases must apply general federal maritime choice of law rules. *Gonzalez v. Naviera Neptuno A.A.,* 832 F.2d 876, 880 n. 3 (5th Cir. 1987). *Cf. Hellenic Lines v. Rhoditis,* 398 U.S. 306, 90 S. Ct. 1731, 26 L. Ed. 2d 252 (1970); *Lauritzen v. Larsen,* 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953). In this case, we must consider the choice of law rules which specifically govern marine insurance disputes.

The decisions of this Court that attempt to explain the proper choice of state insurance law governing the interpretation of marine insurance policies are seemingly in conflict. This Court has held that "the law of the state in which the [insurance] contract was formed" determines the parties' rights. *Graham v. Milky*

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[6] We recognize that our sister circuit, the Eleventh Circuit, has concluded that the *uberrimae fidei* doctrine is well settled and "as a clear rule of maritime law it is the controlling federal rule even in the face of contrary state authority." *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984). However, the Eleventh Circuit itself has retreated from this broad view and held that state law may in at least some circumstances control to the exclusion of the *uberrimae fidei* doctrine. *See King v. Allstate Ins. Co.*, 906 F.2d 1537, 1540 (11th Cir. 1990) (parties to a marine insurance policy may agree to the application of state law).

Way Barge, Inc., 811 F.2d 881, 885 (5th Cir. 1987). It has held that "the law of the state where the marine insurance contract was issued and delivered is the governing law." *Elevating Boats, Inc. v. Gulf Coast Marine, Inc.*, 766 F.2d 195, 198 (5th Cir. 1985). *See also Eagle Leasing Corp. v. Hartford Fire Ins. Co.,* 540 F.2d 1257, 1261 (5th Cir. 1976), *cert. denied*, 431 U.S. 967, 97 S. Ct. 2926, 53 L. Ed. 2d 1063 (1977). It has held that "in identifying the appropriate state law to apply, we look to the state having the greatest interest in the resolution of the issues." *Truehart v. Blandon,* 884 F.2d 223, 226 (5th Cir. 1989). *See also Transco Exploration Co. v. Pacific Employers Ins. Co.,* 869 F.2d 862, 863 (5th Cir. 1989). Considered separately under the circumstances of this particular appeal, these choice of law rules point the Court in entirely different directions: the contract was countersigned and therefore likely formed in Louisiana; it was issued in Louisiana but delivered in Texas; and Texas appears to have the greatest interest in the application of its law.

Nonetheless, we believe that we can reconcile these seemingly inconsistent choice of law rules. Modern choice of law analysis, whether maritime or not, generally requires the application of the law of the state with the "most significant relationship" to the substantive issue in question. *See* Restatement (Second) of Conflict of Laws § 6 (1980). In contract cases, courts must consider such factors as the place of formation of the contract and the place of negotiation of the contract to determine which states have sufficient contact with the transaction and the parties to support the application of their law. *Id.* § 188 (1971). However, the application of the most significant relationship approach does not simply turn on the number of contacts each state has with the controversy. The most significant relationship approach instead examines the relative interests of *all* of the states which share a sufficient relationship with the transaction and the parties. *Id.* § 6.

We conclude that the first two choice of law rules this Court has applied in marine insurance disputes -- requiring the application of the law of the state in which the policy was formed or the law of the state in which the policy was issued and delivered -- identify only the states which have sufficient contact with the policy and the parties that their laws *can* be applied. The third choice of law rule -- requiring the application of the law of the state with the greatest interest -- identifies the state law that *should* be applied. A federal court in a marine insurance dispute must apply the first two rules to isolate the "eligible" states; of these states, the court then must determine which state has "the greatest interest in the resolution of the issues." *Truehart*, 884 F.2d at 226.

A review of the first two choice of law rules reveals that both Texas and Louisiana have sufficient contact with the marine insurance policy and the parties to support the application of their insurance laws. Of these two states, Texas has a considerably greater interest in the application of its insurance code. Texas has a strong interest in the protection of its citizens, including Anh Thi Kieu, against the overbearing tactics of insurance underwriters. Louisiana's interest in the protection of citizens of foreign states is less significant. The insurance laws of Texas should have been applied, and appropriately, the district court so applied them. Albany's argument that Louisiana insurance law governs its dispute with Anh Thi Kieu lacks merit.

C. *Application of Texas Insurance Law*

1. Misrepresentations

Under Texas insurance law, an insurer may invalidate a policy of insurance on the basis of the insured's misrepresentations in the insurance application only if the insurer can successfully plead and prove the following five elements: (1) the making of the representation; (2) the falsity of the representation; (3) reliance thereon by the insurer; (4) the intent to deceive on the part of the insured in making same; and (5) the materiality of the representation. *Mayes v. Massachusetts Mutual Life Ins. Co.*, 608 S.W.2d 612, 616 (Tex.1980); *Southern Life & Health Ins. Co. v. Medrano*, 698 S.W.2d 457, 461 (Tex.App. -- Corpus Christi 1985, writ ref'd n.r.e.). The unique aspect of this Texas law is the requirement that the insurer plead and prove the insured's intent to deceive. "It is incumbent upon the insurer to prove that the insured made some material misrepresentation 'willfully and with design to deceive or defraud,' as an element of this [misrepresentation] defense." *Soto v. Southern Life & Health Ins. Co.*, 776 S.W.2d 752, 756 (Tex.App. -- Corpus Christi 1989, no writ). *See also Haney v. Minnesota Mutual Life Ins. Co.,* 505 S.W.2d 325, 328 (Tex.1974); *Allen v. American National Ins. Co.,* 380 S.W.2d 604, 607-08 (Tex.1964).[9]

This Court, after a review of the record, is unpersuaded that the district court's rejection of Albany's misrepresentation defense requires reversal. Albany completely failed to fulfill its burden of proof. It offered absolutely no evidence that Anh Thi Kieu intended to deceive or defraud Albany. At most, Albany adduced evidence that Anh Thi Kieu, an immigrant who could not easily understand English, was careless in her completion of the insurance application. The negligence or carelessness of the insured in completing an application for

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[9] In *Fireman's Fund Insurance Co. v. Wilburn Boat Co.,* 300 F.2d 631 (5th Cir. 1962), this Court, attempting to interpret Texas insurance law, reckoned that the insured's "intent to deceive" was not an element of a misrepresentation defense. *Id.* at 646. Subsequent Texas Supreme Court decisions have revealed that the Court's interpretation in *Fireman's Fund Insurance Co.* was wrong. *See, e.g., Mayes v. Massachusetts Mutual Life Ins. Co.*, 608 S.W.2d 612, 616 (Tex.1980); *Allen v. American Nat'l Ins. Co.*, 380 S.W.2d 604, 607-08 (Tex.1964). Since this Court, when required to interpret state law, is bound by the formulation of the law articulated by the highest court in the state, *see Ayo v. Johns-Manville Sales Corp.*, 771 F.2d 902, 909 n. 4 (5th Cir. 1985), we conclude that our prior interpretation of the misrepresentation defense in *Fireman's Fund Insurance Co.* is no longer authoritative.

insurance, however, does not support the invalidation of an insurance policy. "In short, false statements which are made negligently, carelessly or by mistake are not sufficient to avoid an . . . insurance policy where the defense is based upon the insured's misrepresentation of a material fact." *Soto*, 776 S.W.2d at 756.

2. Breaches of Warranty

Albany argues that, even if Anh Thi Kieu's misrepresentations in the insurance application do not invalidate the insurance policy, Anh Thi Kieu's breaches of certain express warranties in the insurance policy permit Albany to deny liability. The marine hull insurance policy contained two significant warranties: an owner aboard warranty, which warranted that Anh Thi Kieu would remain aboard the STACY MARIE at all times when the vessel was not safely in port, and a seaworthiness warranty, which warranted that Anh Thi Kieu would exercise due diligence to maintain the STACY MARIE in a seaworthy condition at all times during the life of the policy. Albany contends, and Anh Thi Kieu concedes, that the insured frequently was not aboard the STACY MARIE during its travels and especially was not aboard the STACY MARIE at the time of its allision with the Department of Energy platform. Albany further contends that at the time of the allision the STACY MARIE was not seaworthy because it was infested with marine toredo worms.

The Texas Insurance Code contains an "anti-technicality" provision which states that an insured's breach of warranty will not constitute a defense to an action on an insurance policy unless the breach caused or contributed to the destruction of the insured property. Tex.Ins.Code Ann. art. 6.14 (Vernon 1981 & Supp.1990). It is clear in the instant case that Anh Thi Kieu's breaches of the owner aboard warranty and the seaworthiness warranty had no causal relationship with the STACY MARIE's accident. The fact that Anh Thi Kieu was not on board the STACY MARIE at the time of the allision with the Department of Energy platform, for instance, did not make the allision any more likely or possible. Her presence on the vessel could not have prevented the STACY MARIE's allision with an unmarked and unlighted platform. Similarly, the fact that the STACY MARIE suffered an infestation of marine toredo worms did not contribute to the destruction of the vessel. The district court specifically rejected Albany's theory that the worms contributed to the hole formed in the hull of the STACY MARIE after the allision, and the evidence at trial supported this factual finding. [10]

Albany contends that the Texas anti-technicality provision does not apply if the breach from its very nature could not contribute to the destruction of the insured property. We do not doubt that this is a correct statement of the law; however, this exception to the anti-technicality provision is not relevant here. It is certainly

[10] Plaintiff's expert witness testified that there was evidence of toredo worms in the wooden hull of the STACY MARIE, but the infestation was light and did not contribute to the hole in the hull. Record Vol. III, at 160-61.

possible that, under a different set of circumstances, the breach of an owner aboard warranty or a seaworthiness warranty might contribute to the destruction of insured property. The district court's determination that Anh Thi Kieu's breaches did not contribute to the destruction of the STACY MARIE renders the Texas anti-technicality statute applicable.***

III. CONCLUSION

Upon consideration of the relevant choice of law principles, this Court concludes that Texas insurance law, rather than federal maritime law or Louisiana insurance law, properly governs the instant marine hull insurance dispute. The provisions of the Texas Insurance Code require that Albany compensate Anh Thi Kieu for the losses incurred by the insured vessel. Finding no reversible error in the district court's actions, this Court affirms.

***Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Services*, 778 F.3d 69 (1st Cir. 2015)**

Torruella, Circuit Judge:

This is an appeal from a decision of the United States District Court for the District of Puerto Rico sitting in admiralty. The trial involved a maritime insurance policy issued by Appellee Catlin (Syndicate 2003) at Lloyd's ("Catlin"), to cover the floating drydock PERSEVERANCE owned by Appellant San Juan Towing and Marine Services ("SJT"), a ship repair company based in San Juan, Puerto Rico. At trial, the district court concluded that the insurance policy was void ab initio by reason of SJT's violation of the doctrine of uberrimae fidei in its application for the policy.[2] *See Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Servs., Inc.,* 979 F. Supp. 2d 181, 186 (D.P.R. 2013) ("Catlin IV"). The district court erred in deeming the contract void ab initio; rather, we find that it was voidable. We therefore affirm, albeit with a minor modification of the lower court's holding to reflect this correction.

I. Background

A. Factual History

In 2006, SJT retained the services of Marine Consultants, Inc. ("Marine

[2] Uberrimae fidei means roughly "utmost good faith." See Black's Law Dictionary 1754 (10th ed. 2014); see also *Grande v. St. Paul Fire & Marine Ins. Co.*, 436 F.3d 277, 282 (1st Cir. 2006). Under this doctrine, the insured in a maritime insurance contract is required "to disclose to the insurer all known circumstances that materially affect the insurer's risk, the default of which . . . renders the insurance contract voidable by the insurer." *Windsor Mount Joy Mut. Ins. Co. v. Giragosian,* 57 F.3d 50, 54-55 (1st Cir. 1995); accord Black's Law Dictionary (10th ed. 2014) 808 (defining utmost good faith as "[t]he state of mind of a party to a contract who will freely and candidly disclose any information that might influence the other party's decision to enter into the contract").

Consultants") to perform a condition and valuation survey of the floating drydock PERSEVERANCE. In that survey, which was dated April 17, 2006, the PERSEVERANCE was valued at $1,500,000. Thereafter, on August 27, 2006, SJT purchased the PERSEVERANCE for $1,050,000. Subsequently, SJT made improvements to the floating drydock, modifying it so that it could be towed from Louisiana to Puerto Rico. Marine Consultants then issued another condition and valuation report on November 21, 2006, in which it valued the floating drydock at $1,750,000. This $250,000 increase in value from the first report to the second was the result of the value added to the floating drydock due to the improvements and modifications that allowed the PERSEVERANCE to be towed to Puerto Rico.

By 2009, and as late as 2011, due to declining business and increasing financial distress, SJT was actively trying to sell the PERSEVERANCE. SJT had initially advertised the sale price in 2009 as $1,350,000. In February 2010, SJT advertised the floating drydock for sale in Boats & Harbors -- a marine industry publication --for $1,350,000. During January 2011, SJT continued to advertise the PERSEVERANCE for sale at $1,350,000. On January 3, 2011, a potential buyer offered to purchase the floating drydock for $700,000. As negotiations progressed throughout the month, SJT lowered the PERSEVERANCE's purchase price to $850,000, and eventually, on January 29, 2011, to $800,000. That potential buyer ultimately did not consummate the purchase.

In April 2011, SJT again advertised the PERSEVERANCE for sale in Boats & Harbors. This time the asking price was $800,000. Five months later, on September 4, 2011, SJT agreed to sell the PERSEVERANCE to Leevac Shipyards ("Leevac"), a Louisiana-based company, and on September 19, 2011, SJT signed a purchase-and-sale agreement in which it accepted Leevac's offer to purchase the floating drydock for $700,000. The deal later fell through.

Between August 2006 and February 2011, SJT insured the PERSEVERANCE with the RLI Insurance Company ("RLI"), with a declared hull value of the PERSEVERANCE under this policy of $1,750,000, presumably based on the second Marine Consultants condition and valuation report dated on November 21, 2006. In February 2011, RLI cancelled the drydock's insurance policy, cryptically stating "Loss History" as the reason for said action.

Thereafter, at SJT's request, SJT's insurance broker, John Toscani ("Toscani"), who was located in New York, approached Catlin seeking, through Lloyd's, a marine insurance policy "consisting of hull, [protection and indemnity], ship repairs, general liability and contractor's equipment" (emphasis added). SJT's broker represented that the PERSEVERANCE's prior insurance coverage was for $1,750,000, but did not provide Catlin with a copy of RLI's notice of cancellation. The parties agree that SJT did not provide additional representations suggesting that this was the actual value of the PERSEVERANCE, and Catlin's representative, Mr. Kirchhofer, testified that he did not ask for more information on the floating drydock's value or condition, but rather assumed that the value was in line with that number. Most importantly, SJT also did not disclose information regarding substantial, preexisting damage to the PERSEVERANCE's hull, which had been evident since at least April 2010.

Thereafter, the Catlin policy -- the Ocean Marine Insurance Policy (the "Policy") -- became effective in April 2011, with a total insurable value of $1,840,000. The Policy, however, contained an endorsement that modified its terms to list the insured value at $1,750,000, the same stated amount in the previous RLI policy. Additionally, the total limit of liability for each loss occurrence was set at $1,000,000.

On September 28, 2011, the PERSEVERANCE was berthed at Pier 15, in San Juan, Puerto Rico. At the direction of Mark Payne ("Payne"), one of SJT's principals, the floating drydock was ballasted for the purpose of performing maintenance on parts of the hull. Payne instructed the repairmen to add ballast water to the floating drydock's stern compartments to allow access to the forward sections to be repaired. Thereafter, Payne left the PERSEVERANCE'S berthing area on personal business. At approximately 3:30 p.m., before he left for the day, SJT foreman José Monge gave instructions to the repairmen to pick up and shut off the water hose that was still filling at least one of the floating drydock's ballast tanks.

Late that evening, SJT tug Captain Padilla ("Padilla") returned to Pier 15 after a towing assignment and found the PERSEVERANCE with its aft section completely underwater and its forward part awash. Padilla proceeded to call Payne on his cell phone to inform him of the dire situation the PERSEVERANCE was in, but ten minutes later, at about midnight, called him again to inform him of the total sinking of the PERSEVERANCE. Payne arrived shortly thereafter and, together with Padilla, observed that a fire hose connected to a water main on the dock was still pumping water into the sunken drydock, with the valve on shore still in an open position. Payne proceeded to shut the valve, which was easily seen and accessible to anyone who wished to turn off the flow of water.

Refloating the PERSEVERANCE turned out to be a challenging process, taking nearly one month to complete. After being refloated, the PERSEVERANCE was inspected and the damage assessed by expert marine surveyors. The surveyors found the underside of the floating drydock to be substantially rusted and decayed, the existence of which SJT had known about but failed to disclose to Catlin when it sought coverage under the Policy. This damage explained why refloating the PERSEVERANCE -- a drydock that was designed specifically to be able to submerge and refloat using its ballast tanks -- had been so difficult. During the month of December 2012, the drydock was sold for scrap for $40,000.00.

SJT proceeded to file a claim with Catlin, alleging the total loss of the PERSEVERANCE, in the amount of $1,750,000. Catlin denied this claim, relying on the discrepancy between the amount the PERSEVERANCE was insured for according to the Endorsement ($1,750,000) and its actual market value (approximately $700,000 to $800,000), as evidenced by the sale price advertised to potential buyers around the time when SJT sought the quote for the Policy.

B. Procedural History

To afford a better understanding of the final resolution of this appeal, we deem it appropriate to include a résumé of the procedural history of this case before the district court. On November 8, 2011, Catlin filed a declaratory judgement complaint against SJT, invoking both admiralty (28 U.S.C. § 1333) and diversity (28 U.S.C. § 1332) jurisdiction. Catlin alleged eight admiralty or maritime claims and sought to void the Policy pursuant to the doctrine of uberrimae fidei. In turn, SJT filed a separate diversity suit against Catlin, demanding recovery for the full insured value of $1,750,000 under the Policy for the loss of the PERSEVERANCE. Catlin counterclaimed and the cases were consolidated.

1. Catlin I

On April 8, 2013, the district court granted SJT's motion for partial summary judgment and dismissed without prejudice the claim brought by Catlin, concluding that under the recently decided case of *Lozman v. City of Riviera Beach,* 133 S. Ct. 735, 184 L. Ed. 2d 604 (2013), the court lacked admiralty jurisdiction over this controversy because the PERSEVERANCE was not a "vessel." *See Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Servs, Inc*., Civil Nos. 11-2093 (FAB); 11-2116 (FAB), 2013 U.S. DIST. LEXIS 52307, at *37-38 (D.P.R. Apr. 8, 2013) ("Catlin I"). This ruling was based on the court's determination that the PERSEVERANCE did not meet the *Lozman* test for determining whether a floating structure was a "vessel" for admiralty jurisdiction purposes because "a reasonable observer, looking to the PERSEVERANCE's physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on water." 2013 U.S. DIST. LEXIS 52307 at *38.

2. Catlin II

On May 13, 2013, the district court entertained a motion for reconsideration of its ruling in Catlin I. Although the court continued to adhere to its finding that the PERSEVERANCE failed to meet the *Lozman* standard as to what constitutes a vessel for the purposes of admiralty jurisdiction, it nevertheless concluded that admiralty jurisdiction was present because the central issue of the controversy concerned a maritime contract -- i.e., the Policy -- the "primary objective" of which was "essentially maritime [in] nature" and "relates to navigation, business or commerce of the sea." *Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Servs., Inc.,* 946 F. Supp. 2d 256, 260 (D.P.R. 2013) ("Catlin II"); *see also Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd*., 543 U.S. 14, 24-25, 125 S. Ct. 385, 160 L. Ed. 2d 283 (2004). It also ruled that Catlin's complaint properly pleaded diversity jurisdiction and found diversity to be an alternate ground for the exercise of federal jurisdiction, even if not in admiralty. *See Catlin II,* 946 F. Supp. 2d at 267.

3. Catlin III

On July 30, 2013, the district court once again opined on the dispute, this time regarding the outstanding motions for summary judgment filed by Catlin and SJT, respectively. *Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Servs., Inc.*, 974 F. Supp. 2d 64 (D.P.R. 2013) ("Catlin III"). In substance, the court concluded that notwithstanding its finding that the PERSEVERANCE was not a "vessel," federal admiralty jurisdiction and law did attach to this controversy because the interpretation of a maritime contract was at issue (as per Catlin II). *Id.* at 74-76. Furthermore, the district court held that the doctrine of uberrimae fidei's representation and disclosure requirements together constituted an "entrenched federal precedent" that would apply to this case if the facts alleged by Catlin were proven to be correct. *Id.* at 75-76. The court, however, was unable to decide the merits of these contentions because there were factual matters in dispute that needed to be resolved in a trial and not via summary judgment. *Id.* at 79-80. In ruling on the question as to the risks covered by the Policy, an alternate issue raised by Catlin's denial of coverage, the district court found that the Policy was an "all risk insurance policy," as contended by SJT. *Id.* at 83. Summary judgment, however, could not be entered on behalf of SJT on this issue because there were factual issues in dispute as to whether the PERSEVERANCE sank due to "fortuitous circumstance[s] or casualty . . . covered under the all risk policy." *Id.* at 84. These outstanding factual issues needed to be resolved through a trial.

4. Catlin IV

On October 8, 2013, after a bench trial, the district court resolved the merits of this controversy. *See Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Servs., Inc.,* 979 F. Supp. 2d 181, 191 (D.P.R. 2013) ("Catlin IV"). Having already ruled in Catlin III that uberrimae fidei was an entrenched doctrine governing maritime insurance contracts, the court made findings of fact in support of its eventual conclusion that SJT had failed to comply with the doctrine of uberrimae fidei in its application for the Policy, and was therefore barred from recovery thereunder. *Id.* at 186-191.

II. Discussion

The application of the doctrine of uberrimae fidei to this controversy (as decided in Catlin III), which in modern American jurisprudence is extant only in the context of maritime insurance,[6] depends on the outcome of the central issue raised

[6] See *Giragosian,* 57 F.3d at 54 n.3 ("The sole remaining vestige of the doctrine is in maritime insurance."); Thomas J. Schoenbaum, *The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law*, 29 J. Mar. L. & Com. 1, 39 (1998). At one time, good faith was a requirement of general contract

by SJT both here and below: whether Puerto Rico's Insurance Code, P.R. Laws Ann. tit. 26, §§ 1101 et seq. ("the Code"), is the controlling substantive law in this controversy rather than general federal maritime law.*** We conclude, based on our de novo review, that it does not.

A. Does Federal Admiralty Law Apply to this Controversy?

As a general rule, in the absence of established and governing federal admiralty law, the states have largely unfettered power to regulate matters related to marine insurance. *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310, 321, 75 S. Ct. 368, 99 L. Ed. 337 (1955) ("We, like Congress, leave the regulation of marine insurance where it has been -- with the States."); *Commercial Union Ins. Co. v. Pesante,* 459 F.3d 34, 37 (1st Cir. 2006) ("Generally, in cases involving a marine insurance contract, we will apply state law . . . ."). ***

B. Is Uberrimae Fidei an Entrenched Precept of Federal Admiralty Law Applicable to this Controversy?

Presented twice with this issue previously, we have not yet taken an authoritative stance on whether uberrimae fidei is an established rule of maritime law. See *Pesante*, 459 F.3d at 38 ("While we have never actually decided the issue, it is true that we have questioned whether uberrimae fidei is an established rule of maritime law."); *Giragosian,* 57 F.3d at 54 n.3 ("[I]t is debatable whether the doctrine can still be deemed an 'entrenched' rule of law."). The question of whether a doctrine is an established rule of maritime law, though seemingly abstruse, is of vital importance in admiralty cases as it can prove to be dispositive in controversies such as the dispute at hand. This is because for marine insurance contract cases, we only apply federal maritime rules that are established and settled; otherwise we would look to state law. *See Pesante*, 459 F.3d at 37; *Giragosian,* 57 F.3d at 54.

Marine insurance is vital to the adequate flow of commerce. The nature of the risks that are covered by maritime insurance is such that, given the urgent necessity for the placement of this type of insurance coverage that is often present in the business of maritime commerce, as well as the extreme distances that often separate the insurance seeker and the insurer, it is imperative that the insurer be provided with truthful and valid information about the risk the insurer is asked to undertake by the party most able to provide such data: the insured.

Although this court had not yet held definitively that uberrimae fidei is an established rule of maritime law, we do so now, thus joining the near-unanimous consensus of our sister circuits,[13] ruling without further equivocation that the

law. See generally Eric M. Holmes, *A Contextual Study of Commercial Code Faith: Good-Faith Disclosure in Contract Formation*, 39 U. Pitt. L. Rev. 381 (1978) (providing an analysis of the historical development of the concept of good faith).

[13] *See, e.g., N.Y. Marine & Gen. Ins. Co. v. Cont'l Cement Co., LLC*, 761 F.3d 830, 839 (8th

doctrine of uberrimae fidei is an established rule of maritime law in this Circuit.[14] This ruling should hardly be surprising. As early as 1828, the Supreme Court characterized an insurance contract as "a contract uberrimae fidei." *M'Lanahan v. Universal Ins. Co..,* 26 U.S. 170, 185, 7 L. Ed. 98 (1828). In fact, 100 years later, "the doctrine was referred to as a 'traditional' aspect of insurance law."[15] *N.Y. Marine & Gen. Ins. Co.,* 761 F.3d at 839 (quoting *Stipcich v. Metro. Life Ins. Co.,* 277 U.S. 311, 316, 48 S. Ct. 512, 72 L. Ed. 895 (1928)). Even following the Supreme Court's Wilburn Boat Co. decision in 1955, which held that states should have the primary say in matters of marine insurance, 348 U.S. at 321, the circuit courts -- including the Fifth Circuit prior to its Anh Thi Kieu decision in 1991 -- routinely applied uberrimae fidei as a federal admiralty rule to marine insurance contracts because it was so well-established. *See Inlet Fisheries Inc.*, 518 F.3d at 651-52 (citing, e.g., *Ingersoll Milling Mach. Co. v. M/V Bodena,* 829 F.2d 293, 308 (2d Cir. 1987); *Fireman's Fund Ins. Co. v. Wilburn Boat Co.,* 300 F.2d 631, 646 (5th Cir. 1962) (on remand from the Supreme Court)).

Then, in 1991, the Fifth Circuit held in Anh Thi Kieu that uberrimae fidei was not established maritime law, a decision that the Ninth Circuit has characterized as an "abrupt[] change[] [in] course". *Id. at 652* (referencing *Anh Thi Kieu,* 927 F.2d at 889-90). "Ironically, were it not for the Anh Thi Kieu decision itself, there would

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Cir. 2014) (recognizing that uberrimae fidei is "established federal precedent"); *AGF Marine Aviation & Transp. v. Cassin*, 544 F.3d 255, 263, 50 V.I. 1134 (3d Cir. 2008) (same); *Certain Underwriters at Lloyds v. Inlet Fisheries Inc.*, 518 F.3d 645, 650-54 (9th Cir. 2008) (same); *HIH Marine Servs., Inc. v. Fraser,* 211 F.3d 1359, 1362 (11th Cir. 2000) (same); *Puritan Ins. Co. v. Eagle S.S. Co. S.A.,* 779 F.2d 866, 870 (2d Cir. 1985) (same). The Fifth Circuit is alone in holding that uberrimae fidei is "not entrenched federal precedent." *Albany Ins. Co. v. Anh Thi Kieu,* 927 F.2d 882, 889 (5th Cir. 1991) (internal quotation marks omitted). This view, however, has been heavily criticized. *See, e.g.*, *Inlet Fisheries Inc.,* 518 F.3d at 652-54 (disparaging the Anh Thi Kieu decision as logically flawed and concluding that it "does violence" to established law).

[14] Our adoption of uberrimae fidei does not violate the Supreme Court's warning in *Wilburn Boat Co.*, 348 U.S. at 316, not to create new admiralty rules that govern marine insurance policies. *See Inlet Fisheries Inc.*, 518 F.3d at 650-51 ("[T]he Supreme Court in Wilburn Boat expressed a reluctance for federal courts to fashion new admiralty rules, not a desire to do away with existing ones."). Uberrimae fidei is a judicially created admiralty rule that substantially predates *Wilburn Boat Co.* and has been reapplied time and time again even after the *Wilburn Boat Co.* decision. *See, e.g., Inlet Fisheries Inc.,* 518 F.3d at 653 (observing that uberrimae fidei is a 200-year-old rule); *see also M'Lanahan v. Universal Ins. Co..,* 26 U.S. 170, 185, 7 L. Ed. 98 (1828) (discussing uberrimae fidei in the context of insurance).

[15] As one commentator has put it, "'no rule of marine insurance is better established tha[n] the utmost good faith rule.'" *Inlet Fisheries Inc.,* 518 F.3d at 653-54 (alteration in original) (quoting Thomas J. Schoenbaum, *The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law*, 29 J. Mar. L. & Com. 1, 11 (1998)).

be little cause at all to doubt that uberrimae fidei is indeed firmly entrenched maritime law." *Id.*

We find it instructive that following our 2006 decision in Pesante, in which we questioned whether uberrimae fidei was an established rule of maritime law, 459 F.3d at 38, three of our sister circuits -- the Third Circuit in 2008, the Ninth Circuit in 2008, and the Eighth Circuit in 2014 -- formally recognized the doctrine as established admiralty law. See *N.Y. Marine & Gen. Ins. Co.*, 761 F.3d at 839; *AGF Marine Aviation & Transp.,* 544 F.3d at 263; *Inlet Fisheries Inc.*, 518 F.3d at 654. Moreover, the Second and Eleventh Circuits -- courts that have recognized uberrimae fidei as an established maritime rule since at least the 1980s -- have recently reaffirmed the vitality of uberrimae fidei within their respective jurisdictions. *See, e.g.*, *St. Paul Fire & Marine Ins. Co. v. Matrix Posh, LLC*, 507 F. App'x 94, 95 (2d Cir. 2013); *I.T.N. Consolidators, Inc. v. N. Marine Underwriters Ltd.*, 464 F. App'x 788, 790 n.3 (11th Cir. 2012) (per curiam). Therefore, based on both the policy rationales supporting uberrimae fidei and the longstanding history and consistent application of the doctrine by most of the circuits, we formally recognize uberrimae fidei as an established admiralty rule within this Circuit.

C. Did SJT Violate Uberrimae Fidei?

We finally proceed to an analysis of the application of uberrimae fidei to this case. At the bench trial, Richard Thompson ("Thompson"), a hull inspector who surveyed the PERSEVERANCE, testified that he found "heavy wastage" in the drydock's hull during an April 2010 inspection. After Thompson notified SJT of the rust and deterioration problems, SJT admitted that "those damages were pre-existing." Because the PERSEVERANCE was not in prime condition and business was slow, SJT offered to sell the floating drydock to potential buyers at a price between $700,000 to $800,000, which presumably approximated its actual value at the time. Indeed, in April 2011 -- the same month that the Catlin Policy took effect -- SJT advertised the PERSEVERANCE for sale at a price of $800,000. Yet, SJT, in its request for marine insurance coverage from Catlin, represented to Catlin that the PERSEVERANCE had been previously insured by RLI for $1,750,000 -- $700,000 more than what SJT paid for the drydock originally. We agree with the district court that Catlin could have reasonably assumed the value presented to it in the previous insurance policy from RLI as the actual value and evaluated its risks based on the conditions it would have reasonably expected from a drydock of that value. SJT's failure to disclose the true value of the PERSEVERANCE, what SJT paid for the PERSEVERENCE, and the PERSEVERANCE's level of deterioration, therefore, are all material facts, the nondisclosure of which violates uberrimae fidei. See *N.H. Ins. Co. v. C'Est Moi, Inc.,* 519 F.3d 937, 939 (9th Cir. 2008) ("The purchase price of a vessel is unquestionably a fact material to the risk, as it provides an objective measure of the vessel's worth and the corresponding risk of insuring the vessel." (internal quotation marks and citation omitted)); *Pesante*, 459 F.3d at 38 (explaining that a material fact is "that which can possibly influence the mind of a prudent and intelligent insurer in determining whether it will accept [a] risk" (internal quotation marks omitted)); *Grande,* 436 F.3d at 283 ("[T]he strict maritime rule of uberrimae fidei [provides that] an insured must make full disclosure of all material facts of which the insured has, or ought to have, knowledge . . . even though no inquiry be made." (last alteration in original) (internal quotation marks omitted)).

Under uberrimae fidei, when the marine insured fails to disclose to the marine insurer all circumstances known to it and unknown to the insurer which "materially affect the insurer's risk," the insurer may void the marine insurance policy at its option. *Giragosian,* 57 F.3d at 55. In other words, the policy becomes voidable. See *id.* at 54-55. As discussed above, the evidence conclusively shows that SJT failed to disclose material information about the PERSEVERENCE's actual value and preexisting deteriorated condition prior to Catlin determining whether it would accept the risk. Catlin was free, therefore, to void the policy.

III. Conclusion

SJT violated the doctrine of uberrimae fidei in its procurement of the Policy. Thus, Catlin was entitled to void the Policy. The decision of the district court is affirmed, however, its holding is modified to reflect that the contract was voidable, not void ab initio.***

Fireman's Fund Insurance Co. v. Great American Insurance Co., 822 F.3d 620 (2d Cir. 2003)

Droney, Circuit Judge:

Plaintiffs-Appellants are Fireman's Fund Insurance Company, One Beacon Insurance Company, National Liability and Fire Insurance Company, and QBE Marine & Energy Syndicate 1036 (collectively "Fireman's Fund"), insurance companies that provided marine general liability and marine excess liability policies to Defendant—Appellant Signal International, LLC ("Signal"). Fireman's Fund and Signal appealed from a judgment of the United States District Court for the Southern District of New York (Oetken, *J.*), granting summary judgment to Defendants-Appellees Great American Insurance Company of New York ("Great American") and Max Specialty Insurance Company ("MSI").

Fireman's Fund, Great American, and MSI issued insurance policies that provided various coverages for a dry dock in Port Arthur, Texas owned by Signal. After the dry dock sank in 2009, Signal and Fireman's Fund sought contributions from Great American and MSI for the loss of the dry dock and resulting environmental cleanup costs. The district court ruled in adjudicating a number of summary judgment motions that the Great American and MSI policies were void in light of Signal's failure to disclose when it applied for those policies that the dry dock had significantly deteriorated and that repairs recommended by a number of consultants and engineers over several years had not been made.***

We agree with the district court's orders. We hold that the Great American policy was a marine insurance contract subject to the doctrine of *uberrimae fidei* and that Signal's nondisclosure violated its duty under that doctrine, permitting Great American to void the policy. We further hold that MSI's policy was governed by Mississippi law; that, under that law, Signal materially misrepresented the dry dock's condition; and that MSI was entitled to void the policy on that basis. Accordingly, we **AFFIRM**.

BACKGROUND

I. Factual Background

A. The Operation and Loss of the Dry Dock

Signal is a marine construction firm involved principally in building and repairing ocean-going structures such as offshore drilling rigs, platforms, and barges. In 2003, Signal purchased six facilities—two in Mississippi and four in Texas—for use in its business of repairing, upgrading, and converting offshore drilling rigs. One of the Texas facilities was a dockyard in Port Arthur, Texas. In acquiring that facility, Signal assumed an existing lease of a dry dock ("the dry dock") located along the Sabine-Neches Waterway near the Gulf of Mexico. The dry dock was built in 1944 at the direction of the United States Navy to repair Navy ships. In early 2005, Signal accepted an offer from the lessor to purchase the dry dock, which Signal had been using in its operations since it assumed the lease.

Throughout its lease and ownership of the dry dock, Signal received a number of reports on the dry dock's deteriorated condition. These included the following:

- The Heger Reports: The dry dock engineering firm Heger Dry Dock, Inc. ("Heger") of Holliston, Massachusetts, periodically inspected the dry dock between 2002 and 2009. In 2002, Freide Goldman Offshore—the operator of the dry dock before Signal—asked Heger to inspect the dry dock in order to provide an estimate of its fair market value. In a December 2002 appraisal, Heger described "the dry dock [as being] . . . in fair to good condition, with the exception of the pontoon deck . . . , which [was] in poor condition and should be replaced, and section H, which showed markedly more corrosion internally . . . ." J.A. 4215. Heger estimated that the dry dock would have "10 years of remaining useful life if the pontoon deck [was] completely repaired," but the costs of making these "extensive repairs" in the United States rendered the dry dock's value "below zero." J.A. 4215, 4216. In a series of subsequent reports from 2007 through 2009 commissioned by Signal to assist it in prolonging the existing life of the dry dock, Heger found that the dry dock had continued to deteriorate and that long-term repairs had not been made. Instead, Signal had simply patched damaged areas with "doublers." J.A. 688. Heger provided recommendations for extensive repairs that would be required for the dry dock to continue to operate safely. However, Heger repeatedly advised that "the expected life extension for the dock . . . [would] only be a few years" and therefore "the cost, time and effort to perform this work [was] not economically justifiable." J.A. 689. Heger also provided Signal with plans for converting the dry dock to a seven-pontoon configuration (by removing Pontoon H) but warned that "the dry dock structure . . . should be satisfactorily restored before using the dock or proceeding with any modifications." J.A. 4513-14.

• The ABS Audits: Auditor ABS Consulting ("ABS") of Houston, Texas, a maritime risk management firm, was designated by the Port of Port Arthur to review and report on Signal's maintenance and repair programs at the dry dock. In 2003, ABS observed "the rapidly increasing rate of overall deterioration" of the dry dock, which was "largely due to the drydock's age . . . , and . . . lack of adequate maintenance and/or repair." J.A. 4166. ABS noted that, although it had notified the dry dock's owners and operators in January 2000 of the "advanced state of . . . deterioration," they had "made no apparent efforts" to implement ABS's recommended repairs. J.A. 4168. Instead, "more than a hundred doubler plates ha[d] been welded over severely wasted/holed . . . platings." J.A. 4167. Six months later, ABS reported that Pontoon H was "leaking severely," and Pontoons E and G were "leaking significantly" as well. J.A. 4161. ABS concluded that "it appeared that unsafe drydock operations were being conducted" and recommended that "additional drydockings [not be conducted] until substantial hull repairs [were] made to 'H' pontoon and the repairs [were] verified." J.A. 4162 (emphases omitted).

• Internal Staff Study: In April 2003, Signal conducted an internal "staff study" to determine whether to purchase the leased dry dock from the Port Commission of Port Arthur. The study found that, "without major renewal costs," the dry dock's remaining useful life was "only 3 to 5 years." J.A. 4188. The study concluded that it would cost $21.88 million to extend the life of the dry dock's pontoons "for maybe 10 to 15 years." J.A. 4186-87. The study ultimately advised against purchasing the dry dock in light of its "relatively short remaining useful life and extreme costs of renewal/life extension." J.A. 4188.

• The DLS Surveys: The marine appraiser, surveyor, and consulting firm Dufour, Laskay & Strouse, Inc. ("DLS") of Houston, Louisiana, and Florida was hired to inspect and appraise Signal's Texas and Mississippi facilities "for the purpose of asset allocation and financial review" by GE Commercial Finance, Signal's financing company. J.A. 526. Between 2005 and 2007, DLS observed that the dry dock "had significant water in most compartments . . . [that] require[d] pumping and trimming every four hours," which was "indicative of some wastage holes in the bottom." J.A. 551, 4437; *see also* J.A. 5314. Each year, DLS noted that "[t]he deck plating . . . ha[d] significant doubler plates where plating ha[d] either wasted or separated from internal framing" and that "there was . . . a 12-long tear in the plating extending along a transverse frame" that "reportedly . . . w[ould] be fitted with a proper doubler in the near future." J.A. 551, 4437, 5314. In 2007, DLS concluded that the dry dock was in "fair to good condition" but recommended that its pontoons be dry-docked and repaired "[a]s soon as practical within the succeeding eighteen months . . . to render [it] in good stable operating condition and provide a life extension." J.A. 4437.

• The 2009 Heller Property Risk Assessment Report: Stephen Heller & Associates Inc. ("Heller") of Houston—a loss prevention consulting firm—was hired by Signal in 2008 to conduct a risk review of Signal's Mississippi and Texas facilities in order to "assist [insurance] underwriters in evaluating the exposures, operations, and loss prevention" for those facilities. J.A. 2267. In a January 2009 report, Heller rated the Mississippi and Texas facilities "[o]verall" as "Above Average," meaning that they met "[a]cceptable standards including some industry best practices." J.A. 2270. Heller found that "[t]he maximum foreseeable loss (MFL) or worst case scenario for these facilities [included] a sinking or structural collapse of [the] dry dock at . . . Port Arthur." J.A. 2269. The maximum foreseeable loss was described as "one of extremely low probability and frequency based on previous industry experience." J.A. 2298-99.

Signal never replaced the dry dock's pontoons or pontoon decks. Instead, Signal continued to use inserts and doublers to patch holes in the decks.

In 2009, Signal decided to implement the seven-pontoon configuration by removing Pontoon H. On August 20, 2009, it attempted to remove that pontoon, but during that procedure the entire dry dock sank.

Shortly after the sinking, Signal notified the Texas General Land Office ("GLO"), which regulates pollution affecting Texas shoreline waters, about what had occurred. In September 2009, the GLO advised Signal to "initiate immediate action to recover the . . . dry dock from Texas coastal waters." J.A. 3516. In June 2010, Signal hired Weeks Marine, Inc., to manage removal of the sunken dry dock and cleanup of the site. Removal and cleanup efforts were not completed until March 2012 and resulted in $12,395,026 in costs.

B. The Insurance Policies Covering the Dry Dock

Signal had obtained five insurance policies that insured against risks related to the dry dock at the time of its sinking: (1) a marine general liability policy issued by Fireman's Fund; (2) a marine excess liability policy issued by Fireman's Fund; (3) a pollution policy issued by Great American (the "Pollution Policy"); (4) a primary property insurance policy (the "PPI Policy") issued by Westchester Surplus Lines Insurance Company ("Westchester"); and (5) an excess property insurance policy issued by MSI, which provided coverage in excess of the PPI Policy (the "EPI

Policy"). Only the Great American Pollution Policy and the MSI EPI Policy are at issue here.***

II. Procedural Background

On March 2, 2010, Fireman's Fund commenced this action against Signal, Great American, and MSI, seeking a declaration as to the obligations of Signal and its insurers for losses associated with the sinking of the dry dock. MSI asserted cross-claims against Signal for the $3.6 million it had paid, and also sought to void the EPI Policy on the ground of misrepresentation after discovery revealed the various reports on the dry dock's poor condition that Signal had not provided to MSI when applying for the policy. Signal cross-claimed against MSI for cleanup and removal costs and additional damages. Great American filed claims against Signal and Fireman's Fund, seeking a declaration that the Pollution Policy was void under the maritime doctrine of *uberrimae fidei*, which imposes a duty of utmost good faith on the insured, or alternatively under the policy's "Misrepresentation" clause.

On October 15, 2010, Signal assigned to Fireman's Fund its rights under the Great American Pollution Policy, and Fireman's Fund continued to pursue coverage against Great American. Both Signal and Fireman's Fund maintained their claims against MSI; Signal opposed MSI's efforts to obtain from Signal the $3.6 million it had already paid, and both Signal and Fireman's Fund sought additional payments from MSI under its EPI Policy.

On March 25, 2013, the district court granted partial summary judgment, holding that under the EPI Policy, MSI was required to contribute to the payments that Fireman's Fund had made to Signal.*** However, on March 31, 2014, the district court ruled—also on summary judgment—that the Great American Pollution Policy and the MSI EPI Policy were void *ab initio* because of Signal's failure to disclose the dry dock's deteriorated state.*** The court concluded that the Great American Pollution Policy was a marine insurance contract subject to the doctrine of *uberrimae fidei* and that Signal had breached its duty of utmost good faith to Great American by withholding material information about the dry dock's condition when it applied for coverage. *See id.* 476-93. The district court also held that the EPI Policy was void under Mississippi law because Signal had materially misrepresented the dry dock's condition in its 2009-2010 Property Insurance Submission. *Id.* at 494-503. The court therefore denied Fireman's Fund's and Signal's motions for summary judgment and partial summary judgment, granted MSI's and Great American's motions for summary judgment declaring the policies void, and denied the remaining motions, including MSI's motion for reconsideration of the March 25, 2013 decision on contribution. *Id.* at 493 & n.19, 503-04 & n.25. Fireman's Fund and Signal appealed.

After submission of this appeal, MSI and Signal reached a settlement and obtained dismissal of the case between them. We still must address the validity of the EPI policy, however, because, notwithstanding the recent settlement between Fireman's Fund and Signal, the EPI policy is still the basis for Fireman's Fund's claim for contribution against MSI.

DISCUSSION***

I. Great American's Pollution Policy

Fireman's Fund argues that Great American's Pollution Policy is not subject to the doctrine of *uberrimae fidei*. It further argues that, even if the doctrine applies, Signal did not breach its duty to Great American because it provided all information that Great American requested about the dry dock on its insurance application.

A. Admiralty Jurisdiction and the Doctrine of *Uberrimae Fidei*

Great American argues—and the district court concluded—that the Pollution Policy is void under the maritime doctrine of *uberrimae fidei*. For the doctrine to apply, Fireman's Fund's suit against Great American "must . . . be sustainable under the [court's] admiralty jurisdiction." *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 23, 125 S. Ct. 385, 160 L. Ed. 2d 283 (2004) (emphasis omitted). This is because federal courts' "authority to make decisional law for the interpretation of maritime contracts stems from the Constitution's grant of admiralty jurisdiction to federal courts." *Id.*; see U.S. Const. art. III, § 2, cl. 1 (providing that the federal judicial power "shall extend . . . to all Cases of admiralty and maritime Jurisdiction"). Thus, "the grant of admiralty jurisdiction and the power to make admiralty law are mutually dependent." *Kirby*, 543 U.S. at 23.

"Title 28 U.S.C. § 1333(1) grants federal district courts the power to entertain '[a]ny civil case of admiralty or maritime jurisdiction.'" *Atl. Mut. Ins. Co. v. Balfour Maclaine Int-l Ltd.,* 968 F.2d 196, 199 (2d Cir. 1992). "[T]his grant includes jurisdiction 'over all contracts which relate to the navigation, business, or commerce of the sea.'" *Id.* (ellipsis omitted) (quoting *De Lovio v. Boit*, 7 F. Cas. 418, 444, F. Cas. No. 3776 (C.C.D. Mass. 1815)).

"[T]here are few 'clean lines between maritime and non-maritime contracts.'" *Folksamerica Reinsurance Co. v. Clean Water of N.Y., Inc.*, 413 F.3d 307, 311 (2d Cir. 2005) (quoting *Kirby,* 543 U.S. at 23). "The boundaries of admiralty jurisdiction over contracts are conceptual rather than spatial, and defined by the purpose of the jurisdictional grant—to protect maritime commerce." *Id.* (citations omitted). "[W]hether a contract is a maritime one . . . 'depends upon the nature and character of the contract,' and the true criterion is whether it has 'reference to maritime service or maritime transactions.'" *Kirby,* 543 U.S. at 23-24 (ellipsis omitted) (quoting *N. Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 125, 39 S. Ct. 221, 63 L. Ed. 510 (1919)). Our inquiry focuses on "whether the principal objective of a contract is maritime commerce." *Id.* at 25.

"Therefore, the contract's subject matter must be our focal point." *Folksamerica*, 413 F.3d at 312.

"[A]dmiralty jurisdiction will exist over an insurance contract where the primary or principal objective of the contract is the establishment of 'policies of marine insurance.'" *Id.* at 315 (quoting *Ins. Co. v. Dunham,* 78 U.S. (11 Wall.) 1, 35, 20 L. Ed. 90 (1870)). "[W]hether an insurance policy is marine insurance depends on 'whether the insurer assumes risks which are marine risks.'" *Id.* at 316 (quoting *Jeffcott v. Aetna Ins. Co.,* 129 F.2d 582, 584 (2d Cir. 1942)). "[A]n insurance policy's predominant purpose, as measured by the dimensions of the contingency insured against and the risk assumed, determines the nature of the insurance." *Id. at 317* (quoting *Acadia Ins. Co. v. McNeil,* 116 F.3d 599, 603 (1st Cir. 1997)). Thus, "[u]ltimately, coverage determines whether a policy is 'marine insurance,' and coverage is a function of the terms of the insurance contract and the nature of the business insured." *Id.*

The question of whether an insurance contract is subject to the court's admiralty jurisdiction "ha[s] implications beyond conferring federal jurisdiction." *Id.* at 310. In particular, "[w]hen a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation." *Kirby*, 543 U.S. at 22-23.

Under federal law, a marine insurance contract is subject to "the federal maritime doctrine of *uberrimae fide*, or utmost good faith." *Folksamerica*, 413 F.3d at 310; *see also Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 13 (2d Cir. 1986) ("[T]he substantive law governing marine insurance . . . . [includes the] well-established [principle that] under the doctrine of *uberrimae fidei* . . . the parties to a marine insurance policy must accord each other the highest degree of good faith.").***
Accordingly, under the doctrine, "the party seeking insurance is required to disclose all circumstances known to it which materially affect the risk." *Folksamerica*, 413 F.3d at 311 (quoting *Atl. Mut. Ins. Co. v. Balfour MacLaine Int'l Ltd. (In re Balfour MacLaine Int'l Ltd.),* 85 F.3d 68, 80 (2d Cir. 1996)); *see also Knight*, 804 F.2d at 13 ("Since the [insured] is in the best position to know of any circumstances material to the risk, he must reveal those facts to the underwriter, rather than wait for the underwriter to inquire."). "If [the insured] acquires material information after having applied for insurance, he is required to communicate that information to the proposed insurer" as well. *Puritan Ins. Co. v. Eagle S.S. Co. S.A.,* 779 F.2d 866, 870 (2d Cir. 1985). Thus, "[t]he [insured] is bound, although no inquiry be made, to disclose every fact within his knowledge that is material to the risk." 2 Schoenbaum, *supra*, § 19-14, at 405-06. "The standard for disclosure is an objective one, that is, whether a reasonable person in the [insured's] position would know that the particular fact is material." *Knight*, 804 F.2d at 13.

"Failure by the [insured] to disclose all available information will allow the insurer to avoid the policy," regardless of "whether such omission is intentional or results from mistake, accident, forgetfulness, or inadvertence."[13] 2 Schoenbaum, *supra*, § 19-14, at 406; *see Sun Mut. Ins. Co. v. Ocean Ins. Co.,* 107 U.S. 485, 510, 1 S. Ct. 582, 27 L. Ed. 337 (1883) ("The concealment, whether intentional or inadvertent, . . . avoids the policy . . . . In respect to the duty of disclosing all material facts, . . . [t]he obligation . . . is one *uberrimae fidei*. The duty of communication, indeed, is independent of the intention, and is violated by the fact of concealment even where there is no design to deceive."); *Puritan Ins. Co.,* 779 F.2d at 870-71; *see also Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Servs., Inc.*, 778 F.3d 69, 83 (1st Cir. 2015) ("Under *uberrimae fidei*, when the marine insured fails to disclose to the marine insurer *all* circumstances known to it and unknown to the insurer which 'materially affect the insurer's risk,' the insurer may void the marine insurance policy at its option." (emphasis in original) (quoting *Windsor Mount Joy Mut. Ins. Co. v. Giragosian,* 57 F.3d 50, 55 (1st Cir. 1995))). However, "[t]he principle of *uberrimae fidei* does not require the voiding of the contract unless the undisclosed facts were material and relied upon." *Puritan*, 779 F.2d at 871.

B. The Pollution Policy is a Marine Insurance Contract

1. The "Threshold Inquiry": The Maritime Nature of the Dispute

In determining whether a contractual dispute falls within our admiralty jurisdiction, "[s]everal of our cases . . . [have] require[d] that, prior to inquiring into the subject matter of the contract, we first make a 'threshold inquiry' into the subject matter of the *dispute*." *Folksamerica,* 413 F.3d at 312. Those cases hold that "a federal court must initially determine whether the *subject matter of the dispute* is so attenuated from the business of maritime commerce that it does not implicate the concerns underlying admiralty and maritime jurisdiction." *Id.* (quoting *Balfour, 968 F.2d at 200*).

"[S]ome uncertainty [exists] as to the extent to which this Court's 'threshold inquiry' test survives the Supreme Court's . . . decision [in *Kirby*] . . . . [where,] [f]ocusing on the contract subject matter, the [*Kirby*] Court found admiralty jurisdiction." *Id.* at 313. "[T]he absence of any discussion by the Supreme Court [in

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[13] The district court concluded that, under *uberrimae fidei*, the Pollution Policy was void *ab initio*, "meaning that there was never an enforceable contract to begin with." *Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Servs., Inc.*, 778 F.3d 69, 83 n.19 (1st Cir. 2015). However, we agree with the First Circuit that, "as the Supreme Court has described it, . . . *uberrimae fidei* renders a marine insurance contract *voidable*—the contract is deemed valid until being voided at the election of the insurer." *Id.* (emphasis in original); *see Stipcich v. Metro. Life Ins. Co.*, 277 U.S. 311, 316, 48 S. Ct. 512, 72 L. Ed. 895 (1928) (noting that, for insurance policies subject to the doctrine of *uberrimae fidei*, "a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option"). As Great American seeks a declaration that the Pollution Policy is void, the distinction makes no practical difference here.

Kirby] of a 'threshold inquiry' akin to that found in our precedents is notable." *Id.* at 314.

However, we need not resolve that uncertainty here. Assuming the continued vitality of the "threshold inquiry" into the subject matter of the dispute, this case survives it. The dispute over the Pollution Policy concerns insurance coverage for the costs of removing the dry dock and the pollutants it produced upon sinking in navigable waters. The sinking of the dry dock created potential dangers to public health and safety and the environment—matters that would directly impact those who conducted maritime commerce in those waters.

Moreover, the parties' dispute here concerns information provided to an insurer for pollution coverage for a structure used in vessel repair and maintenance. These questions directly implicate the business of maritime commerce. *See Folksamerica*, 413 F.3d at 313 ("The business of ship maintenance has long been recognized as maritime . . . ."); *id.* at 321 ("Pollution coverage is widely recognized as marine in nature."); *cf. Sirius Ins. Co. (UK) Ltd. v. Collins,* 16 F.3d 34, 36 (2d Cir. 1994) ("There are few objects—perhaps none—more essentially related to maritime commerce than vessels.").

Thus, **"the insurance claim [here] . . . has more than a 'speculative and attenuated' connection with maritime commerce."** ***Folksamerica***, 413 F.3d at 313 (quoting *Balfour*, 968 F.2d at 200). Assuming that the threshold inquiry survives *Kirby*, the dispute here is sufficiently maritime in nature to withstand that inquiry.

2. The Maritime Nature of the Pollution Policy

Our next inquiry is whether the Pollution Policy itself is sufficiently "marine" to warrant application of federal maritime law, including the doctrine of *uberrimae fidei*.

Fireman's Fund urges us to consider only the policy's coverage of the dry dock in determining whether the contract is marine insurance. It maintains that such a "fixed structure drydock" is not a vessel, and thus pollution coverage for the dry dock is not subject to maritime jurisdiction. Fireman's Fund Br. at 17. Fireman's Fund argues that this coverage is severable from the policy's coverage of other structures and vessels, as evidenced by the fact that each object listed in the policy's Schedule of Vessels is subject to a separate premium.

Prior to *Kirby*, this Court had held that admiralty jurisdiction was limited to "contracts, claims, and services [that were] *purely* maritime." *Folksamerica*, 413 F.3d at 314 (quoting *Rea v. The Eclipse*, 135 U.S. 599, 608, 10 S. Ct. 873, 34 L. Ed. 269 (1890)). "A 'mixed' contract, i.e., a contract that contain[ed] both admiralty and non-admiralty obligations [was], therefore, usually not within admiralty jurisdiction." *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.,* 109 F.3d 105, 109 (2d Cir. 1997). "[T]he general rule that 'mixed' contracts f[e]ll outside admiralty jurisdiction" was subject to two exceptions: (1) cases where the "claim [arose] from a breach of maritime obligations that [were] severable from the non-maritime obligations of the contract" ("the severability exception"), and (2) cases "where the non16 maritime elements of a contract [were] merely incidental to the maritime ones" ("the incidental exception"). *Folksamerica*, 413 F.3d at 314 (citations and internal quotation marks omitted).

After *Kirby*, however, we "amended our jurisprudence on maritime contracts." *Williamson v. Recovery Ltd. P'ship,* 542 F.3d 43, 49 (2d Cir. 2008). We held that "[i]n applying what we have previously called the 'incidental' exception, we should focus 'on whether the principal objective of a contract is maritime commerce,' rather than on whether the non-maritime components are properly characterized as more than 'incidental' or 'merely incidental' to the contract." *Folksamerica*, 413 F.3d at 315 (citation omitted) (quoting *Kirby,* 543 U.S. at 25).

We have not yet addressed the impact of *Kirby* on the severability exception. The Ninth Circuit has held that the exception "collapses in the wake of the [*Kirby*] Court's conceptually-based 'primary objective' test." *Sentry Select Ins. Co. v. Royal Ins. Co. of Am.,* 481 F.3d 1208, 1218 (9th Cir. 2007). We need not to resolve the issue here, however. Assuming *arguendo* that the Pollution Policy is severable and that its coverage of the dry dock should be viewed in isolation, we nonetheless find that the policy is a maritime contract.

To reach this conclusion, we consider whether "the primary or principal objective of the [Pollution Policy's dry dock coverage] is the establishment of policies of marine insurance," which "depends on whether the insurer assumes risks which are marine risks." *Folksamerica*, 413 F.3d at 315, 316 (citations and internal quotation marks omitted). This requires consideration of "the terms of the insurance contract and the nature of the business insured." *Id.* at 317.

As it pertains to the dry dock, the Pollution Policy insures against liability for "accidental discharge or substantial threat of a discharge" from the dry dock "into the navigable waters of the United States." J.A. 724. Coverage includes liability arising under the OPA and the FWPCA, statutes that hold parties responsible for the release of pollutants into navigable waters. *See* 33 U.S.C. §§ 1321(b)(3), 2702(a). It also extends to "the on-water removal of materials . . . [as] mandated by an authorized public authority." J.A. 737.

In addition to emissions from the dry dock itself, the policy insures against liability for emissions from "all Vessels while under repair" within "a 100 nautical mile radius" of the Port Arthur dockyard. J.A. 738. Thus, the policy provides coverage for vessels located at the dry dock in connection with Signal's repair business—the type of business which has "long been recognized as maritime."***

We conclude that the primary object of the Pollution Policy's coverage of the dry dock was to insure against the risk of liability for pollutants emitted during Signal's ship repair and maintenance operations there. Insurance policies protecting against such risks have long been considered marine in nature.*** We hold that the Pollution Policy is a marine insurance policy, subject to our admiralty jurisdiction and federal maritime law, including the doctrine of *uberrimae fidei*.

C. Signal Violated Its Duty of Utmost Good Faith by Failing To Disclose the Dry Dock's Condition

We turn next to the questions of whether Signal violated its duty of utmost good faith under the doctrine of *uberrimae fidei* and whether this breach permits Great American to void the Pollution Policy. Under the doctrine, Signal was "bound, although no inquiry be made, to disclose every fact within [its] knowledge that [was] material to the risk [insured against]." 2 Schoenbaum, *supra*, § 19-14, at 405-06; *see Puritan,* 779 F.2d at 870.

We have held that the doctrine "does not require the voiding of the contract unless the undisclosed facts were material and relied upon." *Puritan,* 779 F.2d at 871. While both parties acknowledge the materiality requirement, they disagree as to whether reliance is an independent requirement and whether that requirement should apply here. Great American notes that reliance has not been widely discussed in this Circuit since *Puritan*. It also contends that, to the extent reliance may be required in some circumstances, it should not be required here, because this case involves a "complete non-disclosure," as opposed to a partial, misleading disclosure. 14-1346-cv Dkt. No. 264.

Citing our decision in *Puritan*, the Eighth Circuit recently held that materiality and reliance are "distinct elements," both of which must be proven for the doctrine to apply. *See St. Paul Fire & Marine Ins. Co. v. Abhe & Svoboda, Inc.*, 798 F.3d 715, 720-22 (8th Cir. 2015). "[M]ateriality examines whether a fact would have influenced the judgment of a *reasonable and prudent* underwriter," *id.*, in deciding whether "to insure at all or at a particular premium," *Tradeline,* 266 F.3d at 123; *see also Sun Mut. Ins. Co.,* 107 U.S. at 509-10 (holding that nondisclosure permitted avoidance of the contract where, "[h]ad [the undisclosed information] been known, it [was] reasonable to believe that a prudent underwriter would not have accepted the proposal as made"). Reliance, however—according to the Eighth Circuit—requires "a causal connection between the misrepresentation or concealment of that material fact and the *actual* underwriter's decision to issue the policy." *St. Paul Fire,* 798 F.3d at 722; *see Puritan,* 779 F.2d at 871 ("[A] marine insurance policy 'cannot be voided for misrepresentation where the alleged misrepresentation was not relied upon and did not in any way mislead the insurer.'" (quoting *Rose & Lucy, Inc. v. Resolute Ins. Co.*, 249 F. Supp. 991, 992 (D. Mass. 1965))).

We need not decide here whether subjective reliance is required in all cases in order for the doctrine to apply. Even assuming that it is, we find that Signal breached its duty to Great American and that no genuine disputes of fact exist as to either the materiality of Signal's non-disclosures or Great American's reliance. In applying for the 2009-2010 Pollution Policy, Signal's insurance broker submitted only Great American's standard "Vessel Pollution Liability Application" along with a "Schedule of Vessels," which listed the dry dock. It appears that the only information in those materials related to the dry dock's condition was that it was built in 1945, that it was constructed from steel, and that its gross tonnage was less than 27,000 tons; neither Signal nor Fireman's Fund has argued otherwise. Signal did not provide any surveys to Great American when it applied for coverage for the dry dock.

Notwithstanding the paucity of relevant information furnished by Signal to Great American, it is undisputed that by 2009 Signal had in its possession numerous surveys and reports concluding that the dry dock had substantially deteriorated and that necessary long-term repairs were not being made. At least one survey estimated that the dry dock's value was "below zero." J.A. 4216. Signal's own internal documents and communications with the Heger engineering firm demonstrate its awareness of these concerns. Nevertheless, Signal did not disclose this information to Great American.

This undisclosed information was clearly material—that is, it "would have influenced the judgment of a reasonable and prudent underwriter." *St. Paul Fire,* 798 F.3d at 722 (emphasis omitted). That multiple engineers and Signal's own internal staff study described considerable deterioration of the dry dock and Signal's failure to make recommended repairs over several years was precisely the type of information that would have affected a reasonable insurer's decision "to insure [the dry dock] at all or [at least] at a particular premium." *Tradeline*, 266 F.3d at 123. If disclosed, this information would have raised significant concerns about the likelihood of pollutant emissions from the dry dock. Given the nature and abundance of this information and the high likelihood that it would have impacted coverage, there can be no genuine dispute that "a reasonable person in [Signal's] position would [have] know[n] that [these] particular fact[s] [were] material" and that Signal therefore had a duty to disclose them. *Knight*, 804 F.2d at 13; *see Catlin*, 778 F.3d at 82 ("[A] hull inspector who surveyed the [drydock] testified that he found 'heavy wastage' in the drydock's hull during an . . . inspection. . . . [The insured's] failure to disclose . . . the [drydock's] level of deterioration [when it applied for insurance] . . . [is a] material fact[], the nondisclosure of which violates *uberrimae fidei*.").

There is also no genuine dispute that in "decid[ing] to issue the policy," *St. Paul Fire,* 798 F.3d at 720, the underwriters at Great American in fact relied upon the absence of this undisclosed information from Signal's application materials. Cindy Stringer, the Great American underwriter who evaluated the Pollution Policy applications from 2005 to 2010, testified at her deposition that, "had I been able to read [the] [undisclosed] surveys, I definitely would have been concerned . . . . If

I had known [the dry dock] was in bad shape, and Signal told me they were going to fix it up, . . . more than likely, I would have told them I didn't want to cover that vessel until they completed all the recommendations." J.A. 6440. She further stated that, "[i]f I knew that the wing walls were in poor condition, I definitely [would have] want[ed] to know what was being done about it." J.A. 6445.***

Reese Lever, an underwriter who worked with Stringer on the 2009 renewal of the Pollution Policy, similarly testified that, if Signal was "doing repairs on a vessel, . . . if they're major repairs, it's something we'd want to know about," and that "it's common sense you'd want to let your insurers know that you're repairing these vessels." J.A. 6431. Lever explained that, in his view, "it goes back to the duty of utmost good faith. If there are vessels that have problems, the underwriter should be aware of it." J.A. 6431.

Fireman's Fund argues that Signal did not have an obligation to provide the undisclosed information because Great American did not request surveys or additional information about the dry dock's condition as part of its underwriting criteria or application. However, under the doctrine of *uberrimae fidei*, Great American was not obligated to request such information. *See Knight*, 804 F.2d at 13 ("Since the [insured] is in the best position to know of any circumstances material to the risk, he must reveal those facts to the underwriter, *rather than wait for the underwriter to inquire*." (emphasis added)). Instead, Great American was entitled make its decision to underwrite the policy based on the information that Signal provided, secure in the knowledge that Signal was under a duty of utmost good faith that required it to disclose all information material to the risk insured against.***

We conclude that Signal breached its duty of utmost good faith by failing to disclose information about the dry dock's condition to Great American. Because this information was both material and relied upon, Great American is entitled to void the Pollution Policy. *See Puritan,* 779 F.2d at 871; *see also Catlin*, 778 F.3d at 83 ("[T]he evidence conclusively shows that [the insured] failed to disclose material information about the [dry dock's] actual value and preexisting deteriorated condition prior to [the insurer] determining whether it would accept the risk. [The insurer] was free, therefore, to void the policy."). We affirm the district court's grant of Great American's motion for summary judgment and its denial of Fireman's Fund and Signal's cross-motions.

II. MSI's Excess Property Insurance Policy

We next consider the EPI Policy issued by MSI. The district court held that the EPI Policy was not a maritime contract, *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York*, No. 10 Civ. 1653 (JPO), 2013 U.S. DIST. LEXIS 11114, 2013 WL 311084, at *5 (S.D.N.Y. Jan. 25, 2013), a conclusion that is not challenged on appeal.[24] Nevertheless, the court found that the policy was void under Mississippi law for material misrepresentation. *Fireman's Fund*, 10 F. Supp. 3d at 503.

Fireman's Fund argues that the district court erred in holding that the EPI Policy was governed by Mississippi law rather than Texas law. Alternatively, it contends that, even if Mississippi law applies, the court erred in its application of that state law. For the reasons below, we reject both arguments.***

CONCLUSION

We hold that Great American's Pollution Policy is a marine insurance contract and that Great American was entitled to void the policy under the doctrine of *uberrimae fidei* due to Signal's failure to disclose material information indicating that the dry dock was in a deteriorated condition and that recommended long-term repairs were not being made. We also hold that MSI was entitled to void the EPI Policy under Mississippi law because Signal materially misrepresented the dry dock's condition when it disclosed to MSI only reports reflecting positively on the dry dock, while failing to disclose numerous other reports indicating that the dry dock was in a dilapidated state and nearing the end of its useful life.***

***Gamez v. Ace American Insurance Co.*, 638 F. App'x 850 (11th Cir. 2016)**

Hodges, Circuit Judge:

This is an appeal arising out of an action for breach of contract. Eurys Gamez brought suit in the district court against Ace American Insurance Company ("Ace American") seeking to recover the proceeds of an insurance policy covering a boat. The case proceeded to a jury trial, ending in a verdict and resulting judgment favoring Ace American. The district court denied Gamez's motion for judgment as a matter of law and an alternative motion for a new trial. Gamez appeals. We affirm.

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[24] The district court concluded that the dry dock was not a "vessel" under *Lozman v. City of Riviera Beach,* [568] U.S. [115], 133 S. Ct. 735, 184 L. Ed. 2d 604 (2013), *see Fireman's Fund*, 2013 U.S. Dist. LEXIS 11114, 2013 WL 311084, at *3-5, and that "the vessel status of the Drydock was relevant [to the question of whether the EPI Policy was a marine insurance contract] because it informed the primary purpose of the PPI and EPI Policies[] and . . . was *dispositive* because the Drydock was 'by far' the largest piece of property insured" under those policies, *Fireman's Fund*, 10 F. Supp. 3d at 479. The court did not find the dry dock's status to be similarly dispositive of the question of whether the Great American Pollution Policy was a marine insurance contract. *See id*.***

Background

In late October, 2007, Gamez applied for and obtained from Ace American a "Yachtsman" wet marine insurance policy covering a 2008, 32 foot Glasstream boat and trailer, powered by twin, 275 hp Mercury outboard engines. Gamez took delivery of the vessel on or about November 1, 2007, and promptly gave possession of it to his cousin, Alfredo Hassun. Gamez also gave Hassun full permission to use the boat which was thereafter stored and maintained at Hassun's home in Miami.[2] In late November, 2007, about a month after the purchase of the vessel and the issuance of the Ace American insurance policy, Hassun loaned the boat to Alexis Suarez for a fishing trip. Hassun had only known Suarez for a few weeks, and did not know where he lived, whether he had any boating experience, or whether he was otherwise qualified to operate a 32 foot vessel. Further, Hassun was not acquainted with Suarez's fishing companion, known only by his nickname "Patchey." Suarez took the boat and trailer and then disappeared. Neither he nor the vessel were ever seen or heard from again.

Gamez later filed with Ace American a claim and sworn proof of loss.[3] After an investigation and evaluation of the claim, Ace American notified Gamez that it was rescinding the policy, refunding the premium and denying the claim based upon intentional misrepresentations and concealments of material facts by Gamez in the application for the policy. Gamez responded by suing Ace American in the district court for breach of contract due to Ace American's non-payment of the claim.

Ace American defended the action by pleading a number of affirmative defenses including its assertion of fraud in the application for the policy. Specifically, Gamez stated in the application that he was the owner of the vessel whereas the evidence disclosed that he was, for whatever reason, a mere surrogate for Hassun, the true owner. Gamez stated in the application that the boat would be kept at an address given as his residence in Miami (though he did not live there) and the vessel was, in fact, kept at Hassun's residence. Gamez stated in the application that he would be the "primary operator," and no additional operator was identified in the application whereas Hassun was, in fact, the primary operator of the vessel. Gamez stated in the application that he had four years of prior boat ownership experience, whereas he did not own any of the vessels listed in the application.

At trial, an underwriter for Ace American testified, without contradiction by any opposing witness, that the misrepresentations in the application were material to acceptance of the risk and the amount of the premium to be charged.

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[2] Gamez later reported in his sworn proof of loss of the vessel that "Alfredo Hassun had use of the boat and made the majority of the monthly payments . . . [and] the payments to Ace." In truth, the evidence revealed, and the jury implicitly found, that Hassun was the *de facto* owner of the vessel.

[3] The sworn proof of loss recited that the Coast Guard had reported that the vessel was believed to have been stolen and was lost at sea while transporting "refugees."

With regard to fraud in the application, the district court instructed the jury as follows:

> Thus, to establish its affirmative defense based on fraud, ACE American must prove each of the following elements by a greater weight of the evidence: (1) that Gamez or Hassun falsely misrepresented or concealed a specific, material fact; (2) that Gamez or Hassun knew or should have known that the representation was false; (3) that Gamez or Hassun willfully made the representation or concealment with the intention of defrauding ACE American; (4) that Gamez or Hassun intended to induce ACE American to act on the representation or concealment; and (5) that the representation made was one that would affect the liability of ACE American to pay a certain amount of money. Because not every misstatement qualifies as fraud, where, as here, the express language of an insurance contract prohibits intentional acts of concealment, misrepresentation or fraud, the insurer bears the heavy burden of establishing that the conduct complained of was a willful, intentional misrepresentation of fact.

The case was then submitted to the jury on the basis of a special verdict form . . . .Those factual findings were:

> We, the jury, make the following findings:
>
> 1. That the Plaintiff, EURYS GAMEZ, has proven his breach of contract claim by the greater weight of the evidence.
> YES X NO
>
> * * * *
>
> 2. That the Defendant, ACE American Insurance Company, established by a greater weight of the evidence that the Plaintiff, EURYS GAMEZ, failed to provide ACE American Insurance Company with proper Notice of the Loss as required in the insurance contract.
>
> YES NO X
>
> * * * *
>
> 3. That the Defendant, ACE American Insurance Company, established by a greater weight of the evidence that the Plaintiff, EURYS GAMEZ, intentionally misrepresented any material fact or circumstance related to the application of insurance or contract of insurance before or after the alleged loss.
>
> YES X NO
>
> If your answer to question 3 is YES, then your verdict is for the Defendant, ACE American Insurance Company, and you should go no

> further except to have the foreperson sign and date the verdict form and return it to the courtroom. If your answer to question 3 was NO, then you should proceed to answer question 4.

In accordance with the instruction following finding number three, the jury did not respond to the fourth and last factual finding relating to the defense of illegal usage of the vessel at the time of loss.

Judgment was entered in favor of Ace American on the basis of factual finding number three,[7] and after Gamez's post-trial motions were denied, this appeal ensued.

The Issue on Appeal

The singular issue of law presented by Gamez involves a construction and application of Florida Statute § 627.409(1)(a)-(b) and *(2)*:

> 1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and not a warranty. . . . [A] misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply:
>
> > (a) The misrepresentation, omission, concealment, or statement is fraudulent or is material to the acceptance of the risk or to the hazard assumed by the insurer.
> >
> > (b) If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith would not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss.
>
> (2) A breach or violation by the insured of a warranty, condition, or provision of a wet marine or transportation insurance policy, contract of insurance, endorsement, or application does not void the policy or contract, or constitute a defense to a loss thereon, unless such breach or violation increased the hazard by any means within the control of the insured.

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[7] Gamez challenges, in this appeal, the sufficiency of the evidence sustaining the jury's verdict on the issue of fraud in the application. Suffice it to say that the evidence, including reasonable inferences to be drawn from it, amply supports the jury verdict and we reject Gamez's contention to the contrary without necessity of further discussion.

Gamez argues that Subsection (2) of the statute applies to the wet marine insurance policy involved in this case, and that, according to the last clause of Subsection (2), a breach by the insured does not constitute a defense "unless such breach or violation increased the hazard by any means within the control of the insured." Here, of course, the hazard constituting the immediate cause of the loss of the vessel is unknown. It cannot be determined, and Ace American cannot prove, whether that cause — whatever it might have been — was within the control of the insured.

Ace American responds to Gamez's argument, and the district court held in denying post-trial motions, that the statute must be construed as a whole. Subsections (1)(a) and (1)(b) deal with misrepresentations in applications for insurance in general, including marine policies, and provide that such misrepresentations are not warranties and do not invalidate the policy unless the misrepresentation was fraudulently made (fraud in the inducement) or, if innocently made, that it was material to the risk in one of the ways spelled out in Subsection (1)(b). Innocent misstatements of fact in an application that are not material to the risk do not afford a defense to the insurance company.[8]

On the other hand, Subsection (2) of the statute applies to breaches of the contract of insurance after the application has been submitted and the policy has been issued; and, in the case of marine coverages, any breach of a provision of the policy, even the breach of a warranty, does not forfeit the coverage unless the breach "increased the hazard by any means within the control of the insured."

The flaw in Gamez's argument is that he conflates Subsections (1) and (2) of the statute so that, in his view, the concluding clause of Subsection (2) — "unless such breach or violation increased the hazard by any means within the control of the insured" — would apply to Subsection (1)(a) and (b) as well as Subsection (2). This interpretation, however, is simply contrary to the structure and clear wording of the statute. Subsection (1)(a) and (b) plainly applies to statements made by an insured in negotiations or in applications for insurance prior to the insurer's assumption of the risk by binding the coverage or by issuance of the policy. Subsection (2) applies only to "wet marine or transportation insurance polic[ies]," and then only to "breaches or violations" of the contract by the insured after the

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[8] There is a doctrine in the field of marine insurance law known as *uberrimae fidei* requiring that insureds conduct themselves in the utmost good faith in supplying information to an insurer. Under this doctrine even unintentional material misrepresentations will render a policy void. *HIH Marine Servs., Inc. v. Fraser,* 211 F.3d 1359, 1362-63 (11th Cir. 2000). That rule is incorporated by Subsection (1)(a) of Florida Statute § 627.409 which provides that a misrepresentation in an application for insurance may prevent recovery if the "statement is fraudulent or is material to acceptance of the risk . . . ." (emphasis supplied). In this case, however, the Ace American policy expressly limited the defense of material misrepresentation to intentional misconduct by the insured and the jury was so instructed.

contract has been formed by issuance of the policy. In those circumstances, "a defense to a loss thereon" will be available only if "such breach or violation increased the hazard by any means within the control of the insured." The purpose of Subsection (2) was "to prevent the insurer from avoiding coverage on a technical omission playing no part in the loss." *Windward Traders, Ltd. v. Fred S. James & Co. of New York, Inc.,* 855 F.2d 814, 818 (11th Cir. 1988) (quoting *Pickett v. Woods,* 404 So. 2d 1152, 1153 (Fla. 5th Dist. Ct. App. 1981)).

Thus, in this case for example, but for Gamez's fraud in the application — fraud that was material to the risk — he would win his case because the hazard that ultimately caused the loss is unknown and Ace American cannot prove that such hazard, whatever it might have been, was increased by a means within the control of the insured.

In sum, Subsection (1)(a) and (b) of the statute focuses on misrepresentations material to the risk, that is, material to the insurer's decision whether to issue the policy, and, if so, at what premium. Subsection (2) focuses instead on the actual or immediate cause of the loss — the hazard that occurred — and the question whether that hazard was brought about or increased by the insured's "breach" of a "warranty, condition, or provision" of the contract documents.

None of the cases cited by Gamez support his conflation of the two subsections of the statute such that the last clause of Subsection (2) becomes a condition applicable to pre-contract misrepresentations germane to acceptance of the risk and made at a time when it is impossible to determine whether a "loss" has occurred due to a "hazard" that was "increased" by a "breach" of the policy on the part of the insured. On the contrary, all of the cases applying *Subsection (2)* involve a loss, but none present an issue of fraud in the application that was material to acceptance of the risk. See *AXA Global Risks (UK) Ltd. v. Webb*, 2000 AMC 2679, 2000 WL 33179617 (M.D. Fla. July 28, 2000) (Policy contained warranty made in the application that the insured vessel would be "laid up" on shore, but sank while docked in the water. The breach by the insured increased the hazard and *Subsection (2)* of the statute barred recovery); *Proprietors Ins. Co. v. Siegel,* 410 So. 2d 993 (Fla. 3rd Dist. Ct. App. 1982) (Loss occurring during a charter of the insured vessel did not breach the contract or increase the hazard where the application revealed that chartering of the vessel was an intended use; Subsection (2) did not bar recovery); *Windward Traders*, 855 F.2d at 818, n. 5 (Breach of warranty regarding vessel's trading locale did not increase the hazard so as to bar recovery under Subsection (2) where the insurer denied coverage solely because of lack of notice); *Great Lakes Reinsurance (UK) PLC v. Rosin,* 757 F. Supp. 2d 1244 (S.D. Fla. 2010) (decision by Jordan, J.) (Breach of warranty concerning identity of operators voided coverage under Subsection (2) where hazard of negligence by the operator, not named in the policy, was cause of loss and was within control of insured); *Eastern Ins. Co. v. Austin*, 396 So. 2d 823 (Fla. 4th Dist. Ct. App. 1981) (Warranty that vessel would be used for private pleasure not breached by occasional sale of fish, *i.e.*, vessel did not become commercial thereby increasing the hazard under Subsection (2)); *Fireman's Fund Ins. Co. v. Cox,* 742 F. Supp. 609 (M.D. Fla. 1989) (Breach of warranty regarding size of crew increased the hazard within the control of the insured and Subsection (2) precluded recovery by insured).

The district court correctly denied Gamez's motion for judgment as a matter of law and the alternative motion for a new trial. The judgment is therefore

AFFIRMED.

Chapter 10: Principles for Protection and Indemnity Policies

Lanasse v. Travelers Insurance Co., 450 F.2d 580 (5th Cir. 1971)

John R. Brown, Chief Judge:

This is another one of those seagoing donnybrooks in which all generously claim that someone else must bear the burden of amounts paid to a seaman for injuries sustained during a typical offshore drilling operation in Louisiana shelf waters. Aside from the usual complexities arising from impleaders, cross-claims, direct actions against underwriters and demands for indemnity, it is also a case in which the party that wrote the contract claims it does not mean what it says and means what it does not say.

The now-to-be-forgotten victim (Porphire Lanasse) was a crew member on the utility tender Bo-Truc No. 5, [1] then under time charter to Chevron. [2] By stipulation Cheramie settled the claim brought by Lanasse as a full-fledged bluewater seaman against Cheramie and on diversity against Chevron. The case as submitted to the District Court, lacking only an ailing plaintiff, was for the determination of who should bear any, all or part of the loss.

The District Court was unpersuaded by Chevron's arguments on both the indemnity contract and the P & I policy and entered judgment against Chevron for the full amount paid by Cheramie in settlement of the claim for maintenance and cure and damages asserted by Lanasse.

What Happened to Lanasse

As usual, all but forgotten is the event which brings all this about, certainly as to Lanasse's problems. Cf. *United Services Automobile Association v. Russom,* 5 Cir., 1957, 241 F.2d 296.

On April 25, 1964 M/V Bo-Truc No. 5 was operating in the Gulf of Mexico under a written time charter between Cheramie and Chevron.[4]

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[1] Owned by Cheramie Bo-Truc No. 5, Inc.

[2] Chevron Oil Company (The California Company Division) was the charterer of Bo-Truc No. 5 and the operator of the offshore platform "Zulu."

[4] The relevant terms of the time charter are as follows:

> "Owner hereby warrants that the said vessel is now, and at all times during the life of this charter will be, maintained by owner at owner's expense properly staunch, strong, and in all respects seaworthy, and in good repair and running condition. * * * Owner shall man, operate, and navigate the vessel. * * * Responsibility for the management and navigation and operation of the vessel shall remain at all times in the owner. * * * Owner hereby agrees to indemnify and hold harmless The California Company against all claims * * * as well as

Chevron ordered the vessel to proceed to its fixed off-shore production platform "Zulu" for the purpose of moving a welding machine from the west to the east side of the structure. The weather was clear, Bo-Truc No. 5 was heavily ballasted and riding well on the water, there was only a little wind and a few small swells, and the only cargo on deck consisted of three mud pallets which had been stacked 10 to 12 feet behind the wheelhouse in order to make room for the welder.

After transferring a supply of potable water to the platform, the vessel proceeded to the west side of the rig where without incident Chevron's crane operator, Plaisance, lowered the welding machine onto the afterdeck of Bo-Truc No. 5. While the machine was being secured and Bo-Truc No. 5 moved to the other side of the platform, Plaisance crossed to the east side, positioned himself at the controls of the crane located there, and proceeded to lower the line and hook. His view of the waiting vessel was clear and unobstructed.

When the hook had been lowered it was caught by a deckhand and handed to Lanasse, who proceeded to attach it to an eye on top of the welding machine. Although there is conflicting testimony as to what followed, the District Court found -- and Chevron does not seriously challenge these findings -- that after the hook was secured but before either man had moved clear, the crane operator began lifting but stopped when the machine was 5 or 6 inches above the deck, causing the load to swing against the starboard railing of the vessel and then back into Lanasse. Plaisance then lowered the machine back onto the deck, and in attempting to get out of the way Lanasse was knocked back and pinned against the pallets. Only his great size and physical strength prevented him from being crushed to death.

The District Court also found that (i) the sole proximate cause of the injury was the negligence of Chevron's crane operator, (ii) the vessel was not unseaworthy and (iii) no member of the vessel's crew was guilty of negligence. While Chevron half-heartedly challenges these findings, we think they are amply supported by evidence in the record that rises way above the Plimsoll line of F.R.Civ.P. 52(b). They are not clearly erroneous, and we accept them.

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against any and all claims for damages, whether to person or property, and howsoever arising in any way *directly or indirectly connected with the possession, navigation, management, and operation of the vessel*. During the life of this charter, owner will, at its own expense, provide and maintain insurance covering all liabilities which might arise from the possession, management, manning, navigation, and operation of the vessel, which said policies shall be in form and amount, and with companies as required and approved by The California Company; and on which policies The California Company shall, if it so elects, be included as party assured." (Emphasis added [by the court])***

How to Escape from Crane Operator's Negligence

Essentially Chevron's main argument is that even though the mishap was solely the result of its own negligence, any resulting liability fell on Cheramie under the indemnity provision in the time charter (note 4, *supra*.). In addition, Chevron claims its liability was also covered under the terms of a standard P & I policy obtained by Cheramie in accordance with the terms of the charter. The policy incorporated the typical provision insuring liabilities of the assured as shipowner.[7] Coverage was expressly extended to Chevron as an additional assured and, even more significantly, the underwriters' right of subrogation against Chevron was expressly waived. [8]

The Indemnity Covenant Too Loose

The indemnity provision in the time charter insulated Chevron only against liability for claims "directly or indirectly connected with the possession, management, navigation, and operation" of the vessel. Cheramie does not have a legal responsibility for the consequences of the negligent operation of the crane -- the proximate cause of the injury -- because, on the facts found, the operation of the crane was not even remotely related to the operation, navigation or management of the vessel. As broad as those terms are to comprehend injuries caused by the operation of the vessel in a practical sense, they do not comprehend an occurrence in which the vessel's sole contribution is to be there as the carrier fromwhich the cargo is being removed.

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[7] The policy was written by appellees Royal Insurance Company, Excess-Surplus Lines, Inc., and Lloyd's of London.

It provided:

> "In consideration of the premium and subject to the warranties, terms and conditions herein mentioned, this Company hereby undertakes to pay up to the amount hereby insured and in conformity with lines 5 and 6 hereof, such sums as the assured, *as owner of the Vessels* as per Schedule shall have become legally liable to pay and shall have paid * * *." (Emphasis added)

It also contained the traditional provision:

> "It is expressly understood and agreed if and when the assured has any interest other than as a shipowner in the vessel named herein, in no event shall this Company be liable hereunder to any greater extent than if the assured were the sole owner and entitled to petition for limitation of liability in accordance with present and future law."

Only an owner or owner pro hac vice can limit liability. *See* 46 U.S.C.A. § 181 *et seq*.

[8] "While the (vessels) named herein is/are working for any of the following [Chevron] the one for whom the (vessels) is/are working at any given time is named as an additional assured during that particular time and all rights of subrogation hereunder are waived with respect to the one for whom the (vessels) is/are working at that particular time."

Even, however, if we were to stretch the limits of the English language to find that somehow the crane operator was "indirectly" engaged in the "operation" of Bo-Truc No. 5, or vice versa, we still could not read the charter clause to blanket Chevron with the claimed immunity against liability for the negligence of its own employees. As we stated in Batson-Cook Co. v. Industrial Steel Erectors, 5 Cir. 1958, 257 F.2d 410, 413, "the purpose to impose this extraordinary liability * * * must be spelled out in unmistakable terms. It cannot come from reading into the general words used the fullest meaning which lexicography would permit." Liability of this sort can arise only from the plainly expressed intention of the parties, manifested by language couched in unmistakable terms, not from a mere after-the-fact judicial inference based solely upon what Chevron claims it intended to say but did not. The lack of concreteness and specificity cannot be cured at this late date by the unilateral contention of one party that it meant to impose unlimited liability on the other side.

P & I Policy Does Not Cover

The Trial Judge was also right in holding that the P & I policy did not cover this claim because Chevron as an additional assured (see note 6, *supra*) did not become liable "as owner of" the vessel. The fact findings -- which no one can, or does, challenge -- are specific. The vessel and her crew were, on the one hand, absolved from all wrong or unseaworthiness. Chevron, on the other hand, was found at fault for the manner in which the crane was operated. The vessel offered nothing further than a condition or locale for the accident.

There must be at least some causal operational relation between the vessel and the resulting injury. The line may be a wavy one between coverage and noncoverage, especially with industrial complications in these ambiguous amphibious operations plus those arising from the personification of the vessel as an actor in a suit in rem. But where injury is done through nonvessel operations, the vessel must be more than the inert locale of the injury. Nothing more occurred here, for it was Chevron's actions as a platform operator or as a crane operator that caused the harm, and that does not make it a liability of a shipowner.

Thus far we speak with a single voice and conclude that the Trial Court was correct, with the result that the judgment is affirmed.***

***Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994), *overruled on other grounds*, *Bienvenu v. Texaco*, *Inc.*, 164 F.3d 901 (5th Cir. 1999) (en banc)**

King, Circuit Judge:

Theodore F. Randall, an employee of Chevron, U.S.A., Inc. ("Chevron"), drowned after unsuccessfully attempting a swing rope transfer from a fixed platform in the Gulf of Mexico to the M/V SEA SAVAGE. Randall's widow, Barbara Randall, brought suit individually, on behalf of Randall's estate, and on behalf of their children against Chevron and Sea Savage, Inc. ("Sea Savage"). The matter was tried to the court, and the court entered judgment against the defendants. This appeal followed.

I.
Factual Background

This case arises from the tragic death of Theodore F. Randall, a mechanic employed by Chevron on its fixed platforms in the Gulf of Mexico. On July 31, 1989, Randall was on Chevron's West Delta Field Block 27 P-1 platform, a fixed structure located off the coast of Louisiana but within Louisiana territorial waters. At the time, a tropical storm was known to be approaching the West Delta area.

The M/V SEA SAVAGE was a 100-foot vessel owned and operated by Sea Savage and certified by the United States Coast Guard as a passenger vessel. Chevron entered into a time charter with Sea Savage on January 1, 1989, to obtain the services of the vessel in the operation of Chevron's platforms in the West Delta Block 27 oil field. The time charter provided that Sea Savage would man, operate, and navigate the vessel, while Chevron would assign the vessel its tasks. Sea Savage was required to provide liability insurance naming Chevron as an additional insured, and Sea Savage did in fact procure some $ 5,000,000 of protection and indemnity coverage naming Chevron as an additional insured.

At 2:30 a.m. on July 31, 1989, the SEA SAVAGE set out on its regularly scheduled cargo run in the West Delta field. Captain Dalton Parker was in command of the vessel. By 10:06 a.m., the tropical storm had been upgraded to a hurricane, and Chevron's operations manager ordered an evacuation of the West Delta field. Before proceeding to the P-1 platform, the SEA SAVAGE carried personnel to other platforms to secure them in preparation for evacuation. Several swing rope transfers to and from these platforms were safely accomplished. As weather conditions deteriorated, it became unsafe to make further swing rope transfers to and from the smaller satellite platforms. Captain Parker testified that he requested to be released from further tasks in the field because he thought his mission had been completed. Jim Howell, the area foreman in the West Delta field, asked Captain Parker to proceed to West Delta Field Block 27 to provide any necessary assistance in the evacuation.

The SEA SAVAGE arrived at the P-1 platform at approximately 10:45 a.m. Witnesses estimated that the seas were between six and eight feet at the time and that the winds were some 35 miles per hour. Three workers, including Randall, were waiting to be evacuated. Captain Parker backed the SEA SAVAGE next to the platform and, following standard procedures, held the stern at an angle to the platform. Randall was the first to attempt the swing transfer. He grasped the swing rope and swung to the deck of the vessel. What happened next is not clear, but it appears that Randall landed on his feet as the vessel rose with a swell, causing the swing rope to go slack. Randall continued to hold onto the rope, and as the vessel fell with the waves the rope went taut. Randall was then pulled back off the vessel. Randall lost his grip on the rope and fell into the water.

Deckhand Paul Nash witnessed the episode and immediately ran some fifty feet to the rear of the SEA SAVAGE's pilothouse to retrieve the life ring. Captain Parker was aware of Randall's fall and immediately put the vessel into gear, moving the vessel forward and away from Randall. He testified that moving towards Randall would have risked sucking Randall into the propellers or crushing him against the platform. Randall, a strong swimmer, managed to swim to one of the platform's legs. He clung to the leg as best he could in the rough water for some twenty-five minutes. Efforts to save Randall with a life ring thrown from the SEA SAVAGE were unsuccessful. At last Randall let go of the platform, slumped over, and drowned. He floated out from under the platform and was recovered by deckhand Nash. His body was lacerated, apparently from being thrown against the barnacle-encrusted leg of the platform by the waves. The remaining Chevron employees were evacuated by helicopter.

Procedural History

On October 2, 1989, Barbara Randall, both individually and as personal representative of the estate of her deceased husband and their two children, commenced this action in the United States District Court for the Eastern District of Louisiana seeking wrongful death and survival damages under the Jones Act, 46 U.S.C. App. § 688, and the general maritime law against Chevron and the SEA SAVAGE. Sea Savage filed a complaint for exoneration from or limitation of liability, claiming it was entitled to limit its liability to the value of the SEA SAVAGE and her pending freight. On January 25, 1990, this matter was consolidated with the Randall lawsuit for trial. Chevron answered and filed a cross-claim against Sea Savage seeking indemnification, costs, and attorneys' fees in connection with the Randall lawsuit. Chevron also filed a third-party complaint against the underwriters supplying the insurance coverage to Chevron as an additional insured pursuant to Chevron's time charter with Sea Savage.

On March 30, 1990, Chevron moved for summary judgment on plaintiff's Jones Act and punitive damages claims. By minute entry dated July 26, 1990, the district court dismissed the Jones Act claims, finding that Randall could not be considered a Jones Act seaman because he was never assigned to any vessel and worked exclusively on fixed platforms. The court did not dismiss plaintiff's general maritime or punitive damages claims.

On March 26, 1991, Chevron moved for partial summary judgment, arguing that the court should dismiss all of the plaintiff's claims except for those claims stated under § 905(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.,* and/or the exclusive remedy provisions of the

Louisiana Workers' Compensation Statute. Barbara Randall and Sea Savage opposed Chevron's motion. Following oral argument on October 30, 1991, the district court found "that Mr. Randall was a longshoreman or harbor worker within the meaning of the Longshore and Harbor Workers' Compensation Act." The district court also granted the underwriters' motions to dismiss Chevron's claims against them prior to trial on the ground that the insurance policies naming Chevron as an additional insured did not cover the claims being asserted against Chevron.

The bench trial commenced on November 12, 1991. At the conclusion of the trial on November 14, 1991, the district court rendered oral reasons for judgment from the bench. The court found Sea Savage and the crew of the SEA SAVAGE 757 liable in causing the accident. Among other things, the district court found that Sea Savage was negligent in failing to train the captain and crew of the SEA SAVAGE properly in lifesaving procedures, in failing to place a life ring near the jump station of the vessel, and for the failure of the SEA SAVAGE's captain and crew to follow accepted rescue procedures after Randall fell into the water. The court further held that Sea Savage was not entitled to its requested limitation of liability because of its failure to properly train the captain and crew of the vessel, to require drills in rescue procedures, and to ensure that the captain was competent. The court held Chevron 257 liable for directing the vessel to remain in and encounter the treacherous weather conditions that then existed.***

The district court took under advisement Chevron's claim against Sea Savage for contractual indemnity. By minute entry filed February 19, 1992, the district court ruled that Chevron was entitled to contractual indemnity from Sea Savage under the terms of the time charter. This decision is reported as *Randall v. Chevron U.S.A., Inc.,* 788 F. Supp. 1391 (E.D.La.1992). The district court based its decision on the holding that Chevron's liability arose in its capacity as time charterer of the vessel, thus coming within the indemnity provision in the time charter. *Id.* at 1395. Chevron had also moved post-trial for reconsideration of the dismissal of its claims against the underwriters for insurance coverage, and on March 16, 1992, the district court ruled that the plaintiff's claims against Chevron did come within the insurance coverage provided to Chevron by the underwriters. This decision is reported as *Randall v. Chevron U.S.A., Inc.,* 788 F. Supp. 1398 (E.D.La.1992).

On March 19, 1992, judgment was entered in favor of Chevron for indemnity and insurance coverage.***

After the notices of appeal and briefs were filed, Sea Savage and its various insurance underwriters entered into a settlement agreement with the plaintiff on April 22, 1993, which included a complete assignment of all plaintiff's claims in this matter to Sea Savage and its underwriters. Thus, Sea Savage and its underwriters now stand in the place of Mrs. Randall vis-a-vis Chevron.

II.
Standard of Review and Choice of Law***

Construction of maritime contracts is governed by federal maritime law. *Theriot v. Bay Drilling Corp.,* 783 F.2d 527, 538 (5th Cir.1986). Although federal law governs the interpretation of marine insurance contracts, we apply the law of the state where the marine insurance contract was issued and delivered if there is no federal law, legislative or judicial, relating to the question. *Elevating Boats, Inc. v. Gulf Coast Marine, Inc.,* 766 F.2d 195, 198 (5th Cir.1985).***

1. *Time Charterer Liability*

We next consider the district court's apportionment of liability between Chevron and Sea Savage. The court apportioned fault because, under § 905(b) of the LHWCA, a longshoreman injured by the negligence of a "vessel" is entitled to bring an action against that vessel. The court determined that Chevron constituted a "vessel" because the term "vessel" is defined by the LHWCA to include not only the vessel's owner but also a "charter or bare boat charterer." 33 U.S.C. § 902(21). Thus a time charterer may be liable under § 905(b) if the cause of the harm is "within the charterer's traditional sphere of control and responsibility or has been transferred thereto by the clear language of the charter agreement." *Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc.,* 830 F.2d 1332, 1343 (5th Cir. 1987); *see also Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1041-42 (5th Cir.1983) (holding that a time charterer could be liable under § 905(b) of the LHWCA for ordering a worker to unload equipment from a vessel to a platform during rough weather); *cf.* 2 Alex L. Parks, *The Law and Practice of Marine Insurance and Average* 884-85 (1987) ("[The body of law governing time charterer liability in § 905(b) cases] is just now developing; it is confusing and it is inconclusive.").

We begin by noting that the LHWCA casts a wide net in defining parties potentially liable in the event of injury caused by vessel negligence. The statute provides that

> unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

33 U.S.C. § 902(21*)*. Nothing in the statute suggests that a finding that negligence was committed by one entity definedas a "vessel" in § 902(21), such as the vessel's owner, precludes a finding that another such entity, such as a charterer, was also contributorily negligent. Indeed, holding each such entity liable in proportion to its degree of fault advances the purpose underlying the LHWCA, which is to provide longshoremen with the benefits of workers' compensation without depriving them of the right to be compensated for their injuries caused by the

negligence of third parties or eliminating the incentive for third parties to provide longshoremen with a safe place to work. *Perez v. Arya Nat'l Shipping Line, Ltd.,* 468 F. Supp. 799, 802 (S.D.N.Y.1979), *aff'd mem.,* 622 F.2d 575 (2d Cir.1980), *aff'd sub nom. Rodriguez v. Compass Shipping Co.,* 451 U.S. 596, 101 S. Ct. 1945, 68 L. Ed. 2d 472 (1981). It is also beyond dispute that time charterers are among those third parties included in the definition, although they are not specifically mentioned. *Kerr-McGee Corp.,* 830 F.2d at 1338.

Chevron argues that there was no evidence that it was negligent in its capacity as time charterer of the SEA SAVAGE. In his oral findings, the district judge found Chevron negligent for "directing the vessel to remain in, and to encounter the treacherous weather conditions that existed in the Gulf." Chevron argues that there is no duty on the part of a time charterer to determine whether the missions it assigns can be accomplished safely. In Chevron's view, this duty rests solely with the vessel captain unless specific contractual provisions shift duties onto the time charterer. Sea Savage takes the opposite position, arguing that the district court correctly held that a time charterer may be held liable for damages that result from directing a vessel to encounter dangerous natural conditions.

Sea Savage cites several cases in its favor, beginning with the *Helaire* case cited above. In that case, Edmond Helaire was employed by Mobil as a roustabout and was ordered to unload casing onto a fixed platform from a supply vessel during rough weather. *Helaire,* 709 F.2d at 1032-33. He slipped and injured his knee, *id.* at 1034, and sued both Mobil, which was the time charterer of the vessel, and the vessel owner under the LHWCA. In a jury trial, Mobil was found 1007 liable and the vessel owner was exonerated, and the district court granted Mobil recovery from the vessel owner's underwriters pursuant to protection and indemnity insurance that named Mobil as an additional insured. *Id.* Mobil and the underwriters then engaged in a dispute over whether Mobil's negligence had been committed in its capacity as platform owner or as time charterer. *Id.* at 1041. We held that the district court properly predicated Mobil's negligence on its actions as time charterer, based on Mobil's acts or omissions in permitting the unloading of cargo from the vessel to continue "despite the obvious danger created by the poor weather conditions." *Id.* at 1042.

There are other precedents for the district court's assignment of fault to Chevron as time charterer. In *Graham v. Milky Way Barge, Inc.,* 824 F.2d 376, 378 (5th Cir.1987), Chevron had time chartered the M/V * II to service equipment in the Gulf. Chevron dispatched the * II into the Gulf at a time when it was aware of a forecast of dangerous weather conditions, and the vessel capsized, killing one and injuring three others. *Id.* at 387, 378. The district court found that Chevron's negligence as time charterer in failing to inform the vessel's captain of the weather forecast and in dispatching and failing to recall the vessel was 307 responsible for the injuries and losses sustained. *Id.* at 387. We affirmed this finding. *Id.* Likewise, in *In re P & E Boat Rentals, Inc.,* 872 F.2d 642, 646-47 (5th Cir.1989), in which two vessels collided, we affirmed a finding that Chevron as time charterer was liable for its negligence in ordering the captain of one vessel to operate his vessel at high speeds in heavy fog. *See also Kerr-McGee Corp.,* 830 F.2d at 1341 ("The time-charterer directs where and when the vessel will travel, so if it forces it out in hurricane weather or similarly treacherous conditions, it may be liable under section [905(b) of the LHWCA].").

Chevron counters by referring this court to our decision in *M.O.N.T. Boat Rental Servs., Inc. v. Union Oil Co.,* 613 F.2d 576 (5th Cir.1980). In that case, Union Oil chartered the vessel BOBBY O from M.O.N.T. to transport personnel and supplies off the coast of Nicaragua. *Id.* at 577. A crew member was injured after the BOBBY O put to sea on Union Oil's orders, and he recovered against M.O.N.T. under a claim of Jones Act negligence. *Id.* at 577-78. M.O.N.T. then sued Union Oil, and the district court dismissed. We affirmed, first noting that the time charter contained the usual understanding that the vessel captain could refuse to carry out tasks without breaching the charter if his refusal was based on a good faith belief that the task was unsafe. *Id.* at 578. Thus, we held that, if Union Oil's order was at all negligent, it could not be "active or primary negligence relative to M.O.N.T.'s negligence in bringing about [plaintiff's] injuries." *Id.* at 581-82. Thus, M.O.N.T. was not entitled to tort indemnity from Union Oil. *Id.* at 582.

Chevron also directs our attention to *Smith v. Southern Gulf Marine Co. No. 2, Inc.,* 791 F.2d 416 (5th Cir.1986). The time charterer in that case ordered a vessel to deliver personnel to a platform in rough seas. *Id.* at 418. Just before leaving the vessel, the plaintiff, Ronald Smith, slipped and fell. *Id.* He sued several parties, including the time charterer of the boat (his employer, McMoran Offshore Exploration Co.), and the trial court ruled in favor of McMoran. *Id.* at 419. We affirmed, holding that Smith could not recover from McMoran on the theory that McMoran was responsible for any injuries occurring as a consequence of its decision to transport workers by crewboat, because the ultimate decision about whether to proceed rested with the crewboat captain. *Id.* However, we also agreed with the trial court that "the decision to proceed by crewboat was not unreasonable." *Id.*

The trend of our more recent decisions, as demonstrated by Sea Savage, plainly favors imposing a duty of care on a time charterer who orders the vessel he has hired to put to sea in dangerous weather. We distinguished M.O.N.T. Boat Rental in *Graham,* noting that *M.O.N.T. Boat Rental* "implicitly recognizes that there is a distinction between a time charterer's potential liability under the time charter and independent tort liability which is not governed by the time charter." *Graham,* 824 F.2d at 388. Additionally, the concepts of active and passive negligence have fallen by the wayside with the advance of the comparative negligence doctrine. *See Hardy v. Gulf Oil Corp.,* 949 F.2d 826, 834 n. 13 (5th Cir.1992); *Loose v. Offshore Navigation, Inc.,* 670 F.2d 493, 500-02 (5th Cir.1982). The force of the language in *Smith* suggesting that the time charterer was not responsible for injuries resulting from sending the vessel into rough seas is undercut by that court's agreement with the district court that the time charterer's decision was "not unreasonable." *Smith,* 791 F.2d at 419.

We think it clear that a time charterer may breach its duty of care if it "forces [the vessel under charter] out in hurricane weather or similar treacherous conditions." *Kerr-McGee Corp.,* 830 F.2d at 1341; *see also Moore v. Phillips Petroleum Co.,* 912 F.2d 789, 791-92 (5th Cir.1992); *Graham,* 824 F.2d at 388; *Helaire,* 709 F.2d at 1041-42. The district court was correct to hold that Chevron could be held negligent in its capacity as time charterer and that such negligence was negligence committed as a "vessel" within the meaning of the LHWCA.***

D. *Indemnity and Insurance*

As is often the case in this type of dispute, the most hotly contested issue is not whether the accident victim or his family should be compensated but rather who should ultimately bear the cost of that compensation. The district court decided that Chevron was entitled to both indemnification for its liability from Sea Savage and insurance coverage for its liability from the underwriters of the insurance procured for Chevron by Sea Savage. We address these holdings in turn.

1. *Indemnity*

Sea Savage mounts a two-pronged attack on the district court's holding that it was liable to indemnify Chevron in this case. First, Sea Savage argues that the language of the indemnity clause contained in its time charter with Chevron does not entitle Chevron to indemnification for damages arising out of Chevron's own negligence. Second, Sea Savage argues that Chevron's liability in this case does not arise out of the "management or control" of the SEA SAVAGE as required by the time charter. Because Sea Savage's first argument is meritorious, we do not reach Sea Savage's second point.

We begin our analysis with the words of the time charter themselves. That contract provides, in pertinent part, as follows:

Owner shall man, operate, and navigate the vessel. The vessel shall prosecute its trips and perform its services with dispatch, as directed by the charterer, but responsibility for the management and navigation and operation of the vessel shall remain at all times in the owner, same as when trading for owner's account; and nothing herein contained shall be construed as making this a demise.... Owner hereby agrees to defend, indemnify and hold harmless Chevron against all claims for taxes or for penalties or fines, as well as against any and all claims for damages, whether to person or property, and howsoever arising in any way directly or indirectly connected with the possession, navigation, management, and operation of the vessel.

As a maritime contract, the time charter is governed by federal law. *Thurmond v. Delta Well Surveyors,* 836 F.2d 952, 952 (5th Cir.1988). Indemnity agreements are valid and enforceable under federal law. *Id.*

Sea Savage argues that *Lanasse v. Travelers Ins. Co.,* 450 F.2d 580 (5th Cir.1971), *cert. denied,* 406 U.S. 921, 92 S. Ct. 1779, 32 L. Ed. 2d 120 (1972), is dispositive. In that case, a crane operator on an offshore oil platform owned by Chevron accidently injured Porphire Lanasse, a crew member on a vessel receiving equipment from the platform. *Id.* at 582. Chevron argued, as it argues here, that the indemnity provision of its time charter with the vessel owner shifted all liability for the incident onto the vessel owner. *Id.* at 583. Examination reveals that the indemnity provision at issue in the instant case is essentially identical to the one at issue in *Lanasse,* from which we quote:

> Owner shall man, operate, and navigate the vessel. * * * Responsibility for the management and navigation and operation of the vessel shall remain at all times in the owner. * * * Owner hereby agrees to indemnify and hold harmless [Chevron] against all claims * * * as well as against any and all claims for damages, whether to person or property, and howsoever arising in any way directly or indirectly connected with the possession, navigation, management, and operation of the vessel.

Id. at 582 n. 4 (emphasis deleted). The court held that the language of this indemnity agreement could not be stretched so far as to reach the negligence of Chevron's crane operator, as this negligence was "not even remotely related to the operation, navigation or management of the vessel." *Id.* at 583. We also held that, even if the crane accident were covered under the "operation of the vessel" clause, the indemnity provision could not be construed to entitle Chevron to indemnification for liability arising from the negligence of its own employees. *Id.* at 583-84 (stating that contractual indemnity for one's own negligence arises only from the "plainly expressed intention of the parties, manifested by language couched in unmistakable terms").

The district court relied on *In re Incident Aboard D/B Ocean King,* 758 F.2d 1063 (5th Cir. 1985), in reaching its conclusion that this indemnity provision did include an agreement that Sea Savage would indemnify Chevron for losses arising out of Chevron's own negligence. That case involved a gas blow out and fire aboard a jackup drilling rig off the coast of Texas. *Id.* at 1065. The operator of the rig had agreed to bear all costs and liability in the event of a blow out "from any cause," and the contract provided that Louisiana law applied. *Id.* at 1067 & n. 5. Noting that this contract involved an "allocation of risk provision" rather than an "indemnity" provision, we held that, under Louisiana law, the language was broad enough to require the operator to bear the risk of the owner's negligence. *Id.* at 1067 (citing *Polozola v. Garlock, Inc.,* 343 So. 2d 1000 (La.1977), and *Polozola v. Garlock, Inc.,* 376 So. 2d 1009 (La.Ct.App.1979), *cert. denied,* 379 So. 2d 1103 (La.1980)).

Sea Savage argues that *Ocean King* is inapposite because it involved the application of Louisiana law rather than federal law. The district court reached the opposite conclusion, using the following reasoning: (1) Louisiana law requires more specificity than federal law in order for an indemnity provision to include indemnification for an indemnitee's own negligence; (2) the instant indemnity provision would include indemnification for Chevron's own negligence under Louisiana law; and (3) therefore the instant indemnity provision includes indemnification for Chevron's own negligence under federal law. *Randall,* 788 F. Supp. at 1396.

We are not convinced that the district court's basic assumption--that federal law construes indemnity provisions more generously in favor of the indemnitee than Louisiana law--is correct. Our cases reveal many instances in which we have held that "long-established general principles of interpreting indemnity agreements require that indemnification for an indemnitee's own negligence be clearly and unequivocally expressed." *Theriot,* 783 F.2d at 540 (quoting *Seal Offshore, Inc. v. American Standard, Inc.,* 736 F.2d 1078, 1081 (5th Cir.1984)); *see also United States v. Seckinger,* 397 U.S. 203, 211, 90 S. Ct. 880, 885, 25 L. Ed. 2d 224 (1970) (interpreting a government contract according to the principle that "a contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties"); *Orduna S.A. v. Zen-Noh Grain Corp.,* 913 F.2d 1149, 1153 (5th Cir. 1990) ("Before enforcing an indemnification clause for an indemnitee's own negligence, a court must be firmly convinced that the exculpatory provision reflects the intention of the parties." (citations omitted)). Our interpretation of Louisiana law has been consistent with these principles. *See Amoco Prod. Co. v. Forest Oil Corp.,* 844 F.2d 251, 253 (5th Cir.1988) ("Under Louisiana law, however, an indemnification agreement will not be construed to cover losses arising from the indemnitee's negligence unless a mutual intent is expressed in unequivocal terms." (footnote omitted)); *Ocean King,* 758 F.2d at 1068. The applicable standard thus seems to be the same under both Louisiana and federal law.

It may be that the *Ocean King* case, relied upon by the district court, is properly distinguished from the instant case. Our case is somewhat similar to *Amoco Production,* 844 F.2d at 256, in which the court confronted a contractual provision in which the parties agreed that the "specific operation" in question would be conducted at the "sole cost, risk and expense" of one party. The court declined to follow *Ocean King* and instead held that the provision did not demonstrate with sufficient clarity a mutual intent to provide indemnification for Amoco's negligence. *Id.* at 254. In distinguishing *Ocean King,* the court first noted that the indemnity provision in *Ocean King* was much more specific than the general indemnity provision at issue in *Amoco Production. Id.* at 256. The same may be said of the indemnity provision at issue in the instant case. We do not believe that Sea Savage's duty to indemnify Chevron for losses "howsoever arising" is sufficiently clear and unequivocal to shift liability for Chevron's negligence onto Sea Savage. As the *Amoco Production* court also noted, the result in *Ocean King* seems to have been based in part on the fact that the agreement in that case was the product of extensive negotiations, *id.* at 257 n. 9; the time charter in the instant case seems to be a form contract prepared and provided by Chevron. Finally, we note that indemnity contracts are to be strictly construed. *Smith v. Tenneco Oil Co.,* 803 F.2d at 1388.

In the final analysis, however, we need not decide whether *Ocean King* is distinguishable because *Lanasse* is controlling. Confronting the indemnity provision in *Lanasse* we held that damages caused by the indemnitee's own negligence were not covered. *Lanasse,* 450 F.2d at 582 n. 4, 583-84. There are no legally significant differences between that indemnity provision and the one in the instant case--indeed, both appear to be derived from Chevron's own form contracts. Even if *Lanasse* and *Ocean King* are in conflict, we are bound to follow *Lanasse* as the earlier precedent. *Luna v. United States Dep't of Health and Human Servs.,* 948 F.2d 169, 172 (5th Cir.1991). If proof of the continuing vitality of *Lanasse* were required, it would be provided by our disposition in *Lavergne v. Chevron U.S.A., Inc.,* 782 F. Supp. 1163, 1172 (W.D.La.1991), *aff'd mem.,* 980 F.2d 1444 (5th Cir.1992), in which the district court confronted language identical to the indemnity provision in the instant case and held that it did not require indemnification for Chevron's (the indemnitee's) own negligence. Thus, in light of *Lanasse* and our disposition in *Lavergne,* we hold that the district court erred in holding that Chevron was entitled to indemnification from Sea Savage for those damages attributable to Chevron's own negligence.

2. *Insurance*

Although we have concluded that Chevron was not entitled to indemnification from Sea Savage under the terms of the time charter, Chevron may still avoid bearing the ultimate cost for its negligence through the protection and indemnification policy (P & I policy) procured by Sea Savage naming Chevron as an additional insured. Sea Savage was required to provide Chevron with such insurance protection by the terms of the time charter, the relevant portion of which reads as follows:

> During the life of this charter, owner will, at its own expense, provide and maintain insurance covering all liabilities which might arise from the possession, management, manning, navigation and operation of the vessel, which said policies shall be in form and amount, and with companies as required and approved by Chevron; and on which policies Chevron shall be included as party assured and all rights of subrogation against Chevron shall be waived.

Sea Savage obtained primary insurance coverage from Royal Insurance Company, among others, and excess coverage from American Home Insurance Company (collectively, "the underwriters").

The underwriters moved for summary judgment on Chevron's claims against them before trial. The district court granted these motions on the grounds that Randall's accident fell outside the scope of the P&I policy. *Randall,* 788 F. Supp. at 1399-1400. After trial, the court reconsidered its decision and reversed itself, holding that the accident was within the scope of the policy and that Chevron was entitled to insurance coverage. *See id.* at 1406. The court found that no prejudice to the underwriters resulted from their absence from the trial. *Id.* at 1400-01. The underwriters challenge the district court's holding that Chevron is entitled to insurance coverage for its share of the liability for Randall's death.

The pertinent provision in the P&I policy issued to Chevron reads as follows:

> The Assurer hereby undertakes to make good to the Assured . . . all such loss and/or damage and/or expense as the Assured shall *as owners* of the vessel named herein have become liable to pay and shall pay on account of . . . liability for loss of life of, or personal injury to, or illness of, any person. . . .

(emphasis added). The underwriters argue that Chevron's negligence in this case was not committed in the capacity of "owner" of the SEA SAVAGE, and that Chevron thus lacks coverage under the policy. Chevron argued to the district court that this clause had been deleted, but the district court disagreed, *see Randall,* 788 F. Supp. at 1401-03, and Chevron does not challenge this finding on appeal.

The question presented for our decision, quite simply, is whether the district court correctly held that the liability incurred by Chevron in its capacity as time charterer was incurred "as owner" within the meaning of the insurance policy. The court's reasoning, it appears, was largely based on the assumption that the term "owner" has the same meaning in the insurance policy as it does in § 902(21) in the LHWCA. *Randall,* 788 F. Supp. at 1405 ("Because the LHWCA treats a time charterer as a vessel owner and because Chevron's negligence arose from its status as time charterer, Chevron incurred its liability "as owner' of the vessel."). The underwriters' argument that "owner" does not necessarily mean the same thing in the insurance context as it does in the LHWCA is well-taken. We proceed to our de novo review of this issue of insurance contract interpretation, tracing the jurisprudence of this circuit on this recurring question.

Both Chevron and the underwriters acknowledge that *Lanasse* is the seminal case in this area of the law. In *Lanasse,* Chevron claimed it was entitled to insurance coverage "as owner" of the vessel on which the victim was injured by the negligence of Chevron's crane operator. *Lanasse,* 450 F.2d at 583. The court disagreed. In the words of Chief Judge Brown,

> There must be some causal operational relation between the vessel and the resulting injury. The line may be a wavy one between coverage and non-coverage, especially with industrial complications in these

> ambiguous amphibious operations plus those arising from the personification of the vessel as an actor in a suit in rem. But where injury is done through nonvessel operations, the vessel must be more than the inert locale of the injury.

Id. at 584 (footnote omitted). Although the phrase "causal operational relation" does little to clarify the meaning of the phrase "as owner" in the instant case, *Lanasse* clearly suggests that a time charterer may become eligible for insurance coverage "as owner" under some circumstances.

The underwriters direct our attention to *Graham v. Milky Way Barges, Inc.,* 590 F. Supp. 721 (E.D.La.1984), *aff'd in part and rev'd in part*, 824 F.2d 376 (5th Cir.1987). In that case, the court held Chevron responsible in its capacity as time charterer for its negligence in dispatching a vessel in rough weather, leading to the capsizing of the vessel. 590 F. Supp. at 728-29. The court also held that Chevron was not entitled to insurance coverage because its liability arose out of its acts as platform owner rather than as owner or operator of the vessel. *Id.* at 730. We expressed approval of the district court's ruling that Chevron's negligence was independent of any negligence arising from the "maintenance or operation" of the vessel, *Graham,* 824 F.2d at 388, which suggests that Chevron's negligence in dispatching the SEA SAVAGE may have lacked any connection to the operation of the vessel, and thus that the requisite "causal operational relation" to the death of Randall may be absent. However, we did not deny insurance coverage based on Chevron's status or non-status "as owner," but rather decided instead that insurance coverage was not available because Chevron had violated the navigational and operational limits imposed by the policy. *Id.* at 384. *Graham* thus does not represent an absolute repudiation of our statement in *Lanasse* that time charterers may be covered by insurance policies "as owner" in some circumstances.

Chevron cites the *Helaire* case in support of the proposition that any negligence it may have committed as time charterer is within the "as owner" language of the insurance policy. As we have seen, the time charterer in that case was held liable for injuries suffered by a worker who was unloading equipment from a vessel to a platform under § 905(b) of the LHWCA. *Helaire,* 709 F.2d at 1033, 1041-42. The district court in *Helaire* ruled that the time charterer was entitled to insurance coverage under a policy essentially identical to the instant policy, and we affirmed. *Id.* at 1041, 1042 & n. 17. However, as the underwriters point out, we also noted that the words "as owner of the vessel" had been deleted from the policy, so the time charterer was entitled to coverage regardless of the capacity in which it was sued. *Id.* at 1042. The opinion also appears to conflate the meaning of "owner" under the policy with the definition of "vessel owner" in the LHWCA, although this is not clear. *Id.* at 1041-42.

Chevron also relies on *Texas E. Transmission Corp. v. Garber Bros.,* 547 F. Supp. 821 (E.D.La.1982). In that case, Union Oil Company entered into a time charter with Garber Bros. for the use of a vessel; during operations the vessel's anchor collided with a pipeline owned by Texas Eastern Transmission Corporation. Union Oil was named as an additional insured, and the policy apparently included the same "as owner" language as the policy in issue in the instant case. *Id.* at 822. Although the claims against Union Oil were dismissed, Union Oil sought reimbursement for its expenses under the terms of the policy. *Id.* Union Oil argued that it had been sued by Texas Eastern for directing the vessel to undertake the operations that damaged the pipeline and for failing to assist the vessel when the risk of collision became apparent, that these charges were made against Union Oil in its capacity as charterer of the vessel, and that insurance coverage was thus available. *Id.* The district court in *Garber Bros.* reasoned that vessel-related negligence by a party comes within the "as owner of" provision, while negligence committed as platform owner does not. *Id.*

Sea Savage and its underwriters argue that Garber Bros. was implicitly overruled by this court's decision in *Texas E. Transmission Corp. v. McMoRan Offshore Exploration Co.,* 877 F.2d 1214 (5th Cir.), *cert. denied,* 493 U.S. 937, 110 S. Ct. 332, 107 L. Ed. 2d 321 (1989). In that case, McMoRan was one of multiple parties that had hired towing services from Faustug Marine Corporation. 877 F.2d at 1217, 1226. During the towing of a semi-submersible drilling rig that McMoRan had acquired by assignment, an anchor of the towing vessel supplied by Faustug damaged a pipeline owned by Texas Eastern. *Id.* at 1217-19. McMoRan's liability for its role in ordering the retrieval of the anchor was assessed at 107. *Id.* at 1220-21. In the course of discussing whether the contract between Faustug and McMoRan required Faustug to insure McMoRan against this kind of liability, the court noted that "the usual form of Protection & Indemnity insurance, which "insures only against liability resulting from *vessel ownership,*' would not provide coverage for McMoRan, a non-ship-owner." *Id.* at 1227 (footnote omitted).

We do not agree with the position urged by Sea Savage and its underwriters. Their interpretation of *McMoRan* would make it virtually, if not completely, impossible for a time charterer ever to receive insurance coverage under any circumstances, and if *McMoRan* did have such an effect we might be forced to disregard it as inconsistent with our earlier opinion in *Lanasse*. This is not necessary, however, as the underwriters have overstated the breadth of the holding in *McMoRan*. As that court clearly stated,

> Any P&I insurance that Faustug might have obtained would not have covered McMoRan's negligence, since McMoRan's negligence did not arise out of the ownership of a vessel, but out of the operation of an anchor retrieval process in which the vessel was only "the inert locale of the injury."

Id. at 1228 (quoting *Lanasse,* 450 F.2d at 584). *McMoRan* thus does not completely foreclose the possibility that a time charterer can be covered under an insurance policy protecting an insured "as owner" on a proper set of facts.

Additionally, as we have suggested, the interpretation of the insurance policy urged by Sea Savage and its underwriters would render the insurance coverage virtually meaningless. Sea Savage argues that, as owner of the SEA SAVAGE, it retained control of the navigation, management, and operation of the vessel. Sea Savage also argues that "by contract and tradition, Chevron could not act as a manager or operator of the vessel," and that "as a matter of common sense it could not commit fault "as owner' of the vessel." If this were true, then the insurance policy providing coverage for Chevron's liability "as owner" of the vessel could never come into effect. Under this interpretation, no time charterer could ever satisfy the "causal operational relationship" requirement so as to qualify for insurance coverage "as owner" of the vessel. We will not construe an insurance policy in such a way that it provides no coverage whatsoever to the insured.

The only connection a time charterer typically has with the vessel it hires is the right to direct the vessel's movements. We find persuasive the reasoning of the court below and that of the court in *Garber Bros.* that when the time charterer exercises this right negligently, it has committed negligence "as owner" of the vessel within the meaning of that phrase in a marine insurance policy. This type of negligent conduct, it seems to us, has the requisite "causal operational relationship" to the vessel, even though the time charterer wholly lacks the authority to direct the minutiae of the vessel's day-to-day operations. "In this action, Chevron's contribution to Randall's death, ordering the vessel to encounter dangerous seas, clearly is related to the vessel." *Randall,* 788 F. Supp. at 1403. The district court correctly ordered the underwriters to provide insurance coverage to Chevron. ***

Further Reading:

***Theriot v. Bay Drilling Co.*, 783 F.2d 527 (5th Cir. 1986)** (awarding indemnity for the negligence of the indemnitee based on this indemnity clause: “Operator agrees to protect, defend, indemnify and save Contractor harmless from and against all claims, demands and causes of action of every kind and character, without limit and without regard to the cause or causes thereof or the negligence of any party, arising in connection herewith in favor of Operator's employees, Operator’s contractors or their employees . . . .”)

Naquin v. Elevating Boats, *L.L.C.*, 817 F.3d 235 (5th Cir. 2016)

Graves, Circuit Judge:

In this insurance coverage dispute, Elevating Boats, LLC ("EBI") appeals a summary judgment in favor of State National Insurance Company ("SNIC"). For the reasons outlined below, we **AFFIRM** the district court.

I.

This appeal flows directly from a previous decision by this court. In that matter, Larry Naquin was using an EBI land-based crane to relocate a test block when the pedestal of the crane snapped, causing the crane to topple over. *Naquin v. Elevating Boats, L.L.C.,* 744 F.3d 927, 931 (5th Cir. 2014). Upon jumping from the crane house, Naquin sustained a broken left foot, a severely broken right foot, and a lower abdominal hernia. *Id.* Naquin's cousin's husband, another EBI employee, was crushed by the crane and killed. *Id.* Despite reparative surgeries and physical therapy sessions, Naquin was unable to return to physical work. *Id.*

Naquin subsequently sued EBI pursuant to the Jones Act, and the suit proceeded to trial. *Id.* After a three-day trial, a jury concluded that Naquin was a Jones Act seaman and that EBI's negligence caused his injury. The jury subsequently awarded Naquin $1,000,000 for past and future physical pain and suffering, $1,000,000 for past and future mental pain and suffering, and $400,000 for future lost wages. *Id.* EBI appealed, challenging, among other things, the grant of Jones Act seaman status to Naquin and the sufficiency of evidence to establish EBI's negligence. *Id.* at 932.

Pertinent to this appeal, the *Naquin* majority[1] affirmed the jury's verdict as to liability, concluding that the jury correctly determined that Naquin qualified as a Jones Act seaman; the entire panel, though, agreed that EBI acted negligently in failing to provide a reasonably safe work environment and work equipment. *Naquin,* 744 F.3d at 932-38. Specifically, as to the negligence inquiry, we held: "EBI was the only party responsible for welding the LC-400 crane to its base, a weld which was indisputably defective and the direct cause of Naquin's injuries." *Id.* at 937. We, however, vacated the verdict as it related to damages and remanded the matter to the district court to conduct a new trial on that specific issue. *Id.* at 938-41.

The district court subsequently granted EBI leave to file a third-party complaint against its insurance companies, SNIC and Certain London Insurers ("London Insurers"). In its third-party demand, EBI complained that both SNIC and London Insurers breached their insurance contracts by denying EBI's insurance claims arising from Naquin's accident and by failing to provide EBI with defense and indemnity. EBI, in connection to its claims, also sought statutory bad-faith damages pursuant to Louisiana Civil Code 1997 and Louisiana Recording Statute 22:1973. The district court granted a motion to sever, ordering that EBI's claims against SNIC and London Insurers be severed from the remaining issue of

[1] The *Naquin* panel consisted of Circuit Judges Davis and Jones and District Court Judge Milazzo. Judge Jones dissented, "concur[ring] in all of th[e] good opinion except the decision affirming Naquin's status as a seaman." *Naquin,* 744 F.3d at 941. By her estimation, Naquin was not a Jones Act seaman because he failed both the duration and nature components of the test outlined by the Supreme Court in *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S. Ct. 2172, 132 L. Ed. 2d 314 (1995).

damages and resolved by a separate trial.

SNIC moved for summary judgment, asserting, chiefly, that EBI was not entitled to coverage under its Protection & Indemnity Policy (the "Policy") because coverage did not extend to Naquin's land-based incident and that EBI failed to comply with the notice requirements imposed by the Policy. EBI responded in opposition, explaining that it was entitled to indemnity under the "any casualty or occurrence" language of the Policy. The remaining opposition to SNIC's summary judgment motion concerned EBI's perceived lack of actual notice. Upon consideration of both parties' arguments, the district court granted summary judgment to SNIC. Thereafter, the district court entered final judgment in favor of SNIC, and later denied EBI's *Rule 59(e)* Motion to Reconsider.

II.***

A. Scope of Coverage

The "Indemnity" provision of the Policy at the heart of this appeal, provides:

> Subject to all exclusions and other terms of this Policy, the Underwriters agree to indemnify the Assured for any sums which the Assured, *as owner of the Vessel*, shall have become liable to pay, and shall have paid in respect of *any casualty or occurrence* during the currency of the Policy, but only in consequence of any other matters set forth hereunder . . .

(emphasis added). The district court interpreted this critical language as excluding coverage to EBI due to the circumstances surrounding its liability in *Naquin*. We endorse this interpretation.

In the absence of a specific and controlling federal maritime rule over this dispute, we interpret this maritime insurance contract under Louisiana state law. *See Albany Ins. Co. v. Anh Thi Kieu,* 927 F.2d 882, 886 (5th Cir. 1991). Under Louisiana law, "an insurance policy is a contract between the parties and should be construed using the general rules of contract interpretation set forth in the Louisiana Civil Code." *First Am. Bank v. First Am. Transp. Title Ins. Co.*, 585 F.3d 833, 837 (5th Cir. 2009); *see also Cadwallader v. Allstate Ins. Co.*, 848 So. 2d 577, 580 (La. 2003).

Words and phrases used in an insurance policy should be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning. *Cadwallader,* 848 So. 2d at 580; *Carbon v. Allstate Ins. Co.,* 719 So.2d 437, 439-40 (La. 1998). Thus, when the words of the insurance contract "are unambiguous and the parties' ntent is clear, the insurance contract will be enforced as written." *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 124 (La. 2004) (citing La. Civ. Code Ann. art. 2046). [A contractual "provision susceptible of different meanings must be interpreted with a meaning that renders it effective and not with one that renders it ineffective," so as to avoid rendering any provision in the contract superfluous. La. Civ. Code Ann. art. 2049; *Berk-Cohen Assocs., LLC v. Landmark Am. Ins. Co.*, No. 07-9205, 2009 U.S. DIST. LEXIS 103201, 2009 WL 3738152, at *3-4 (E.D. La. Nov. 5, 2009). The provisions of the contract "must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole." La. Civ. Code Ann. art. 2050; *First Am. Bank*, 585 F.3d at 837.

As relevant here, SNIC avers that the terms of the subject Policy—specifically, the "as owner of the Vessel" clause—does not provide coverage for the land-based incident due to EBI's negligence as described in *Naquin*. Before the district court, EBI urged a blanket reading of the Policy that would provide coverage for "any casualty or occurrence" for which EBI might become liable.

We are persuaded, guided by the law and facts before us, that EBI's strained interpretation of the Policy is unreasonable in this context. *See* La. Civ. Code Ann. art. 2050; *First Am. Bank,* 585 F.3d at 837. We, therefore, follow the district court in holding that there is no genuine issue that the scope of coverage of the Policy does not extend to EBI's liability for the *Naquin* incident. In reaching this conclusion, we decline EBI's invitation to read the provision in the piecemeal fashion that it prefers—a construal that would directly contradict the well-established Louisiana rules regarding contractual interpretation. *See Foret v. La. Farm Bureau Cas. Ins. Co.,* 582 So. 2d 989, 991 (La. App. 1 Cir. 1991) ("An insurance contract must be construed as a whole; one section is not to be construed separately or at the expense of disregarding other sections."). The only way to give meaning to both provisions of the Policy is to construe the Policy as limiting coverage to "any casualty or occurrence" which arises out of EBI's conduct "as owner of the Vessel."

Moreover, our holding is required under our precedent. *See Lanasse v. Travelers Ins. Co.,* 450 F.2d 580 (5th Cir. 1971). In *Lanasse*, the plaintiff was injured when the operator of a platform owned by Chevron allowed a welding machine to swing against the vessel's railing. *Id.* at 582. Chevron claimed, in part, that its liability was covered under the terms of a standard P&I Policy. *Id.* at 583. Chevron, the *Lanasse* court reasoned, "was found at fault for the manner in which the crane was operated. The vessel offered nothing further than a condition or locale for the accident." *Id.* at 584. As we explained:

> *There must be at least some causal operational relation between the vessel and the resulting injury*. The line may be a wavy one between coverage and noncoverage, especially with industrial complications in these ambiguous amphibious operations plus those arising from the personification of the vessel as an actor in a suit in rem. *But where injury is done through nonvessel operations, the vessel must be more than the inert locale of the injury. Nothing more occurred here, for it was*

> *Chevron's actions as a platform operator or as a crane operator that caused the harm, and that does not make it a liability of a shipowner.*

Id. (emphasis added). It follows then that the holding required under this indistinguishable and controlling decision could not be clearer. Naquin's incident in no way arose out of EBI's conduct as "owner of the Vessel." *Naquin*, devoid of any indication that EBI was liable due to such conditions, confirms as much; this understanding alone forecloses EBI's arguments to the contrary. *See Naquin,* 744 F.3d at 937 ("EBI was the only party responsible for welding the LC-400 crane to its base, a weld which was indisputably defective and the direct cause of Naquin's injuries."). Furthermore, the land-based crane did not break on or even in close proximity to a vessel. Thus, EBI's attempts to craft a causal connection to a vessel are discharged, plainly and simply, by the underlying facts and *Naquin's* holding. Where there is no causal operational relation between the vessel and the resulting injury, there is no extension of coverage for liability. We, therefore, arrive at the identical conclusion as the *Lanasse* court: "it was [EBI's] actions as platform operator or as a crane operator that caused the harm, and that does not make it a liability of a shipowner." 450 F.2d at 584.***

***Gabarick v. Laurin Maritime (America), Inc.*, 650 F.3d 545 (5th Cir. 2011)**

Higginbotham, Circuit Judge**:**

The M/V TINTOMARA, an ocean-going tanker, collided with the barge DM-932, in the tow of the M/V MEL OLIVER, splitting the barge in half and spilling its cargo of oil into the Mississippi River. Following the filing of numerous lawsuits, including personal injury claims by the crew members and class actions by fishermen, the primary insurer filed an interpleader action, depositing its policy limits with the court.

We are asked to review allocations of interpleader funds as well as the district court's finding that the maritime insurance policy's liability limit included defense costs. We affirm the district court's decision that defense costs erode policy limits but are persuaded that its orders allocating court-held funds among claimants were tentative and produced no appealable order.

I.

The TINTOMARA was owned and operated by Laurin Maritime (America), Inc., Laurin Maritime AB, Whitefin Shipping Co. Limited, and Anglo-Atlantic Steamship Limited (collectively, "Laurin Maritime"). American Commercial Lines, LLC owned the tug, barge, and fuel oil. D.R.D. Towing, LLC provided the crew for the tug boat pursuant to a bareboat charter.

The towing company was covered by a protection and indemnity policy issued by Indemnity Insurance Company of North America ("IINA"). This policy contained the SP-23 Form, with some modifications, and provided a $1 million limit of liability for any single occurrence, with a $15,000 deductible. After the collision, the towing company and the barge owner demanded that IINA defend and indemnify them. IINA responded with an interpleader action for determination of its rights and obligations under the policy. Around the time of its filing, IINA deposited $985,000 into the registry of the court, which was its full liability limit less the deductible.

The barge owner moved to dismiss under Federal Rules of Civil Procedure Rule 12(c), arguing that IINA could not avoid its obligation to defend by depositing its policy limits with the court. The district court denied the motion to dismiss the interpleader action and held that IINA had a duty to reimburse defense costs but no duty to defend.

The towing company and the barge owner then sought release of funds to recover defense costs. IINA responded that defense costs were included within the policy limits—that is, monies paid for defense costs would come from funds capped by the policy limits. The district court agreed and found that defense costs eroded the limit of liability. Further, the court granted the towing company's motion for release of funds and denied the barge owner's motion.

The barge owner and Laurin Maritime timely filed notices of interlocutory appeal under 28 U.S.C. § 1292(a)(3), challenging the district court's decision that defense costs eroded the liability limits and allocating interpleader funds. We have jurisdiction over interlocutory appeals from orders that "determin[e] the rights and liabilities of the parties to admiralty cases."***

III.

We review a district court's interpretation of an insurance contract de novo. "[I]n the absence of a specific and controlling federal rule," the interpretation of marine insurance policies is "to be determined by reference to appropriate state law." Here, there is no entrenched maritime law addressing whether legal expenses are included within or in addition to a protection and indemnity policy's liability limit. However, marine insurance commentators have recognized that defense costs are typically included within the P&I policy's liability limit. The Maritime Law Association of the United States instructs that for P&I policies "[t]here is no coverage for legal expenses in excess of the policy limits, such expenses being included within, and no[t] in addition to, policy limits." P&I policies do not ordinarily create a duty to defend and are indemnity policies, not liability policies. With only a duty to pay covered claims and no duty to defend, reimbursement of defense costs must be footed on the indemnification, which is limited to the agreed upon policy limit.[16]

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[16] *See* DAVIS, *supra* note 13, at 574-75; *cf. N. Am. Specialty Ins. Co. v. Royal Surplus Lines*

Turning to Louisiana law, courts interpreting insurance contracts should "seek to determine the parties' common intent, as reflected by the words in the policy." Words used in the policy "must be given their generally prevailing meaning." "When those words are clear, explicit, and lead to no absurd consequences, the contract must be interpreted within its four corners . . . ."

"A provision in an insurance contract is ambiguous if it is susceptible to two or more reasonable interpretations or if the intent of the parties cannot be ascertained from the language employed." "If after applying the other general rules of construction an ambiguity remains, the ambiguous contractual provision is to be construed against the drafter, or, as originating in the insurance context, in favor of the insured." However, Louisiana's presumption in favor of the insured does not apply where the insured is a sophisticated commercial entity that drafted the policy or used an agent to secure the desired policy provisions.

With regard to P&I policies, we have noted that the general law in Louisiana is "for legal expenses incurred in defending a liability covered by the policy to be treated as part of the overall claim. That claim [inclusive of legal expenses] is limited by the amount insured in the primary policy." Thus, the barge owner must present evidence that this contract should be treated differently than traditional Louisiana P&I policies.

IV.

The towing company's insurance contract sets forth three distinct but related coverages: 1) the hull and machinery coverage (excluding collision liability), 2) collision and towers liability, and 3) protection and indemnity coverage. The collision and P&I policies are at issue here. For P&I coverage, the contract is based on a standard maritime insurance form, SP-23, with some modifications, known as manuscript provisions. One modification is the addition of a collision and towers liability clause.

The SP-23 Form provides coverage for "[c]osts, charges, and expenses, reasonably incurred and paid by the Assured in defense against any liabilities insured against hereunder in respect of the vessel named herein, subject to the agreed deductibles applicable, and *subject further to the conditions and limitations hereinafter provided*." Under the conditions subsequently provided, the policy states: "Liability hereunder in respect of any one accident or occurrence is limited to the amount hereby insured." Giving these words their generally prevailing meanings, the policy provides coverage for the insured's defense subject to the conditions of

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Ins. Co., 541 F.3d 552, 559 (5th Cir. 2008) (noting that "[l]iability insurance policies often have two components: defense and indemnity," and when the policy limits only apply to the indemnity section, the obligation to defend is not capped by the policy limits). When there is no "defense" component of the insurance policy, the duty to defense must be encompassed within the indemnity provision and corresponding limit of liability.

the overall policy, including the liability limit. There is no ambiguity in the SP-23 Form on the erosion of policy limits by payment of defense costs.

V.

The barge owner urges the agreement is ambiguous, in part because of language from the Collision and Towers Liability Clause, which was added as a manuscript provision and is not part of the SP-23 Form. This clause reads:

> (a) if the vessel hereby insured shall come into collision with any other vessel . . . or shall cause her tow to come into collision with any other vessel . . . and the Insured or the Surety, in consequence of the insured vessel being at fault, shall become liable to pay and shall pay . . . we, the Underwriters, will pay the Insured or the Surety, whichever shall have paid, such proportion of such sum or sum so paid provided always that our liability shall not exceed the limit of liability afforded under this policy;
>
> (b) and in cases where the liability of the Vessel has been contested or proceedings have been taken to limit liability, with our consent in writing, we will *also pay* the costs which the Insured shall thereby incur or be compelled to pay.

In addition to these sections, the collision clause excludes coverage if the insured's liability arises from either personal injury claims or oil spills.

The barge owner points to our decision in *Exxon Corp. v. St. Paul Fire & Marine Insurance Company*, [129 F.3d 781, (5th Cir. 1997)], where we found that defense costs were not included within the P&I liability limit in a policy with similar language. Exxon's policy read:

> We will, subject to the reservations herein mentioned, pay to the Assured such proportion of the sum or sums so paid, for such loss, as our respective subscriptions bear to the policy value of the ship hereby insured, and in case the liability of the Assured has been contested, with the consent in writing of two-thirds of the Underwriters on the ship hereby insured in the amount, we will, subject to the conditions of the policy, *also pay* a like proportion of the costs which the Assured shall thereby become liable for and shall pay.

The barge owner asserts that because its policy, like the one in *Exxon*, includes the term "also pay," the policy is at least ambiguous as to whether defense costs are included within the liability limit. More likely, the argument continues, "also pay" demands that defense costs be excluded from the regular liability limit. The barge owner urges that the similarity in the language between this clause and *Exxon's* clause requires this court to find an ambiguity in the policy, as we did in *Exxon*.

This reasoning is flawed. First, *Exxon* involved a personal injury suit based on inhalation of noxious fumes, not a collision. Therefore, the "also pay" language must have been included in the P&I policy itself. By contrast, here, the SP-23 Form and other P&I elements of the policy unambiguously include defense costs within the liability limit. This leaves the barge owner's contest only applying to the collision clause's "also pay" language, and that language here will not carry the freight.

The barge owner asserts in its brief that the collision clause "is indisputably triggered in this case because the liability arises out of a collision involving a towed vessel." In a footnote, the barge owner then describes its claims for loss of barge and cargo, for wreck removal, and cleanup expenses, as well as numerous claims for property damage by commercial fishermen. However, all of the claims mentioned would be excluded from the collision clause coverage. The collision coverage refuses to indemnify the insured for damages arising out of "removal or disposal of obstructions, wrecks or their cargoes under statutory powers or otherwise pursuant to law;" "cargo or other property on or the engagements of the Vessel;" "loss of life, personal injury or illness;" and "the discharge, spillage, emission or leakage of oil, petroleum products, chemicals or other substances of any kind or description whatsoever." Further, loss or damages to vessels owned by the insured are also excluded from collision coverage. Therefore, all claims pointed to by the barge owner are excluded from collision coverage, and any recovery must come under the standard P&I section of the policy, not its collision clause.

That the parties added a collision provision to the P&I section does not necessarily indicate the collision coverage is subject to the benefits and requirements of the other P&I coverages. Commentators, including one relied upon by the barge owner, explain that a collision clause "is a *separate* contract which provides coverage against certain liabilities to third parties." Any ambiguity created by the "also pays" language is restricted to the collision clause and does not infect the main P&I provisions.

Even if this policy were ambiguous, the barge owner would not automatically be entitled to a presumption favoring its interpretation, as was the case in *Exxon*. Again, Louisiana does not apply the presumption in favor of the insured when a broker has negotiated the policy on the insured's behalf. Both the barge owner and IINA are sophisticated parties, and it is undisputed that Marsh, an insurance broker, issued the policy. Although the barge owner now implies that Marsh was acting as an agent for IINA, in the district court, the towing company asserted that the policy at issue here "was a ;manuscript' or 'specifically written' policy that was prepared by [the towing company]'s broker, Marsh.'" Given that the towing company arrived at its policy using a broker, the presumption in favor of the insured does not apply.

In sum, the barge owner's assertions of ambiguity demand reliance upon the collision clause, which is not only severable but also inapplicable because all of the damages incurred are excluded from that coverage. Returning to the pure P&I coverage, the policy is clear that defense costs were intended to be included within the policy limits. This P&I policy is unambiguously written against the backdrop of traditional principles of maritime law that defense costs erode P&I limits of liability. It is evident that viewed objectively the parties expectations were as we have today held.***

Cal-Dive International, *Inc. v. Seabright Insurance Co.*, 627 F.3d 110 (5th Cir. 2010)

Davis, Circuit Judge:

In this battle between two insurers, State National Insurance Company ("SNIC") and Seabright Insurance Company ("Seabright"), we must determine which insurer had the obligation to defend Horizon, a defendant in an underlying tort action. We conclude that Seabright had no obligation to defend Horizon based on an exclusion in its policy that excluded coverage if its insured maintained a Protection and Indemnity policy that covered injuries to its crew. It is uncontested that Horizon had such a policy. We, therefore, reverse and render judgment in favor of Seabright.

I.

This coverage dispute was triggered when David Brown was injured and filed a Jones Act suit against Coastal Catering and Horizon for failing to provide him with a reasonably safe workplace aboard the vessel M/V AMERICAN HORIZON, owned by Horizon.

Coastal had entered into a contract to provide catering services aboard Horizon's vessel, and Coastal sent Brown to work on the vessel pursuant to that contract. When Brown was injured aboard the vessel, he filed suit against both companies. In his complaint, Brown alleged that both Coastal and Horizon were his employers. According to the Horizon-Coastal Contract, Coastal was obligated to defend Horizon, which Coastal did through SNIC, its Maritime General Liability (MGL) insurer. Horizon accepted SNIC's defense. Coastal also had in effect a Maritime Employer's Liability (MEL) policy with Seabright, and Seabright defended Coastal in the Brown litigation. After the Brown litigation was settled with SNIC and Seabright each paying 50% of the agreed settlement amount, SNIC sought reimbursement from Seabright for the costs SNIC incurred in defending Horizon. SNIC argued that under the Alternate Employment Endorsement in Seabright's MEL policy insuring Coastal, Seabright was obliged to provide a defense for Horizon. The endorsement provides:

> This endorsement applies only with respect to death, bodily injury or illness to your employees while in the course of temporary employment by an alternate employer. This endorsement will

> apply as though the alternate employer is insured.
>
> This endorsement applies only to the work you perform under a contract or at the project denoted and covered by this policy.
>
> The coverage afforded by this endorsement is not intended to satisfy the alternate employer's duty to secure its obligations under workmen's compensation or any other similar laws. We will not file evidence of this insurance on behalf of the alternate employer with any government agency.
>
> We will not ask any other insurer of the alternate employer to share with us a loss covered by the endorsement.

SNIC argued that Brown's allegation that Coastal and Horizon were both his employers should be interpreted as an allegation that: (1) Coastal was Brown's direct employer, and (2) Horizon was Brown's alternate employer. It follows, according to SNIC, that because Horizon was Brown's alternate employer, the above endorsement would require Seabright to defend Horizon.

Seabright refused to reimburse SNIC, arguing that the allegations in Brown's petition were not specific enough to trigger its duty to defend and, alternatively, that a separate exclusion in its policy absolved it of defending Horizon even if Horizon were Brown's alternate employer. The exclusion states that the Seabright policy does not cover:

11. bodily injury to your master and crew covered by a Protection and Indemnity Policy or similar policy issued to you or for your benefit. This exclusion applies even if the other policy does not apply because of another insurance clause, deductible or limitation of liability clause, or any similar clause or self-insured retention. This insurance does not apply as an excess to any other Protection and Indemnity policy or any other policy issued for your benefit.

Because Horizon maintained a Protection and Indemnity (P&I) policy with AEGIS covering the crew on its vessel, Seabright argued that the exclusion unambiguously freed it from any duty to defend Horizon. After Seabright refused to reimburse SNIC, SNIC and Horizon filed suit against Seabright in the district court to recover the attorney's fees SNIC spent in defending Horizon.

SNIC (and Horizon) and Seabright filed cross-motions for summary judgment. The district court granted SNIC's motion and denied Seabright's motion, holding that Seabright was obliged to reimburse SNIC for sums it spent defending Horizon. The district court reasoned that Brown's allegation that both Coastal and Horizon were his employers was sufficient to assert a claim of alternate employer status under the policy's endorsement, thus triggering Seabright's duty to defend Horizon. The court further found that the Alternate Employer Endorsement and the P&I Exclusion in Seabright's policy were in conflict and created an ambiguity that had to be interpreted in favor of providing coverage for Horizon. Seabright lodged this appeal.***

III.

Seabright argues first that the district court erred in finding that the allegations in Brown's complaint were sufficient to trigger coverage of Horizon under the Alternate Employer Endorsement contained in the Seabright MEL policy. Under the eight corners rule that persists in Louisiana, an insured's duty to defend arises whenever the suit filed against the insured discloses a possibility of liability under the policy.

The complaint alleged that "Coastal . . . at all times pertinent . . . [was] the employer of David Brown." In a separate allegation, Brown's complaint alleged that "Horizon . . . at all times pertinent . . . [was] the employer of David Brown and/or the owner and/or operator of the [vessel]." The term "alternate employer" is not found in the complaint.

We conclude that we need not decide whether Brown's complaint should be read as sufficient to assert that Horizon was Brown's alternate employer so as to trigger coverage for Horizon under the Seabright policy. Assuming without deciding that Seabright's coverage of Horizon was invoked under the policy's Alternate Employer Endorsement, we conclude that Seabright's coverage of Horizon is nevertheless excluded under the P&I Exclusion in Seabright's policy.

The P&I Exclusion in Seabright's policy excludes coverage under that policy if the insured (Horizon) had a P&I policy in effect that covers claims for bodily injury to crew members aboard the vessel.

It is uncontested that Horizon had a P&I policy in effect at the relevant time with AEGIS that covered claims for bodily injury to the crew aboard Horizon's vessel.
The district court concluded that the Alternate Employer Endorsement in Seabright's policy that extended coverage to Horizon for Brown's claim conflicted with the P&I Exclusion, which purported to exclude coverage for the same claim. The district court reasoned that this created an ambiguity that it was required to resolve in favor of Horizon. The court, therefore, concluded that the P&I Exclusion did not defeat coverage under Seabright's policy.

SNIC argues first that the exclusion only applies to Coastal, Seabright's named insured, and the exclusion does not apply to additional insureds like Horizon. SNIC reasons that the exclusion only purports to exclude coverage for bodily injury to "your" master and crew covered by a P&I policy issued to "you" for "your" benefit. SNIC argues that it is plain that the "you" and "your" in the exclusion refer only to Coastal, the named insured, and do not exclude coverage to additional insureds who happen to have a P&I policy in effect. We disagree. The policy as originally issued was designed to insure Coastal as a named insured. But when endorsements such as the Alternate Employer Endorsement add additional insureds to the policy, these additional insureds enjoy the same benefits and are subject to the same restrictions as a named insured absent policy language to the contrary. *See Landerman v. Liberty Services, Inc.*, 637 So. 2d 809, 812-13 (La. App. 1 Cir. 1994). It is significant that the Alternate Employer Endorsement provides that "this endorsement will apply as though the alternate employer is an insured." We are therefore satisfied that Horizon is to be treated as an insured for these purposes and that the P&I Exclusion applies equally to Coastal and Horizon.

Our conclusion is supported by a Louisiana Court of Appeals decision involving an almost identical insurance policy coverage dispute. *Landerman*, 637 So. 2d 809. In that case, Landerman, like Brown, was injured while working on a vessel owned by an entity other than his payroll employer. The court found that the vessel owner was Landerman's alternate employer. The dispute narrowed to whether the alternate employer endorsement in the payroll employer's insurance policy required that insurer to defend the vessel owner even though the same policy excluded coverage if the insured had a P&I policy in effect.

The Louisiana court dealt first with the vessel owner's argument that, as an additional insured, it should not be considered an "assured" under the P&I exclusion. The court stated: "We hold that when a MEL or an EMEL policy does not specifically restrict the term 'assured' to the named insured and does not define the term 'alternate employer,' the alternate employer is considered to be an assured." *Id.* at 812. The court held that because the alternate employer was considered an insured it was excluded from coverage by the P&I Exclusion. *Id.* at 813.

The *Landerman* court then considered the vessel owner's argument that the following language in the alternate employer endorsement rendered the P&I exclusion inapplicable: "We will not ask any other insurer of the alternate employer to share with us a loss covered by this endorsement." *Id.* SNIC makes this same argument in today's case based on identical language in Seabright's policy. The *Landerman* court rejected the vessel owner's argument as follows:

> McDermott's reliance on the above provision is misplaced because that provision is clearly applicable only in the event of "a loss covered by [the] endorsement." McDermott's loss is not a loss covered by the endorsement. As previously determined, McDermott, as an alternate employer, is an assured. Therefore, the P&I provision applies to McDermott, and McDermott is excluded from coverage under Liberty's EMEL policies.

The above holding by the Louisiana court effectively rejects SNIC's argument that the Alternate Employer Endorsement and the P&I Exclusion are conflicting. The Louisiana court found no such conflict. To the contrary, it found: (1) The vessel owner, as Landerman's alternate employer, was an insured, and (2) Because that alternate employer had a P&I policy in effect that covered its crew, coverage to the vessel owner was excluded by the P&I Exclusion. The court reasoned that because the P&I Exclusion was triggered, the alternate employer's loss was not a loss covered by the Alternate Employer Endorsement. One federal district court sitting in Louisiana came to the same conclusion in a factually indistinguishable case. *See Storebrand Arendal A/S v. Point Marine, Inc.*, 1990 U.S. DIST. LEXIS 5937, *8-9 (E.D. La. 1990) (an alternate employer was an 'assured,' and coverage to the alternate employer was excluded by the P&I policy exclusion because the alternate employer had a P&I policy in effect).

CONCLUSION

Based on a plain reading of the Seabright policy and the Louisiana authorities that have interpreted this language, we agree with Seabright that its policy did not afford coverage to Horizon for Brown's claim. Assuming without deciding that Brown's allegations were sufficient to trigger the Alternate Employer Endorsement, those allegations effectively make Horizon an additional insured under the Seabright policy. However, because Horizon had in effect a P&I insurance policy that covered the crew working on the M/V AMERICAN HORIZON, the P&I Exclusion in Seabright's policy excludes coverage to Horizon. For these reasons we reverse the summary judgment entered by the district court and render judgment in favor of Seabright.***

***Insurance Company of North America v. West of England Shipowners Mutual Insurance Association*, No. 93-0076, 1995 U.S. DIST. LEXIS 14291, 1995 WL 572051 (E.D. La. Sept. 27, 1995)**

Vance, District Judge:

ORDER

This matter is before the Court on the motion of third-party plaintiff West of England Shipowners Mutual Insurance Association ("West of England") to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e). The motion is granted . . . . The Court therefore rules as follows on the cross-motions for summary judgment by West of England and third-party defendants 1990-1991 and 1991-1992 Excess MEL Insurers ("Excess MEL"). West of England's motion is granted in part and denied in part, and Excess MEL's is denied for the reasons that follow.

I. Background

West of England seeks reimbursement from Excess MEL for the approximately $ 600,000 it paid to Best Workover, Inc. ("Best Workover") under its protection and indemnity policy ("P&I") arising out of settlements of claims for bodily injuries to members of the crew of the Barge REBSTOCK NO. 3 (the "Barge"). The Excess MEL policy provides for excess maritime liability coverage up to "$ 475,000 excess

of $ 25,000." (West of England's Mem. Supp. Summ. J. at Ex. H.) The Excess MEL policy, however, is subject to . . . several "other insurance" provisions.***
Other Excess MEL provisions at issue are two clauses that the Excess MEL policy adopted from the policy of the primary insurer, the Insurance Company of North America ("INA").[1] One of the adopted clauses excludes coverage for all bodily injury covered by P&I insurance (the "P&I exclusion"):

This policy does not cover:

> 8. Bodily injury covered by a Protection and Indemnity Policy, or similar policy issued to you or for your benefit. This exclusion applies even if the other policy does not apply because of an other insurance clause, deductible or limitation of liability clause or any similar clause.

(INA's Mem. Supp. Summ. J. at Ex. A and B.)

The Excess MEL policy also adopts a pro-rata insurance clause from the INA policy. The provision reads:

F. Other Insurance

> We will not pay more than our share of damages and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance and self-insurance will be equal until the loss is paid.

(INA's Mem. Supp. Summ. J. at Ex. A and B.)

West of England's P&I policy, on the other hand, contains an escape clause. It allows West of England to escape coverage in the event the insured is covered by other insurance:

Provided that where the Assured is, irrespective of this insurance, covered or protected against any loss or claim which would otherwise have been paid by the assurers, under this policy, there shall be no contribution by the assurers on the basis of double insurance or otherwise.

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[1] The Excess MEL policy contains the following language:

> 8. This Certificate is subject to the same warranties, terms, and conditions, (except as regards the premium, the amount and limits of liability, the obligation to investigate and defend, the renewal agreement, if any, and except as otherwise provided herein) as are contained in or as may be added to said policy/policies of the primary insurer.

(West of England's Mem. Supp. Summ. J. at Ex. I.)

II. Discussion

The Court will analyze the effects of the relevant policy provisions in turn.***

B. Excess MEL's P&I Exclusion and West of England's Escape Clause***

Turning to the remaining clauses in issue, there is no dispute that the West of England P&I policy contains an escape clause and that the Excess MEL policy contains a pro-rata clause. The controversy centers around the characterization of the P&I exclusion in the Excess MEL policy.

After considering the caselaw presented to the Court for the first time in West of England's motion to alter or amend the judgment, the Court finds that the P&I exclusion is in fact an escape clause and not a mere exclusion, as the Court held in its earlier order. In *Sifers v. General Marine Catering Co.*, 892 F.2d 386, 392-94 (5th Cir. 1990), the Fifth Circuit considered a P&I exclusion similar to the one found here. The court held that

> [any clause that permits an insurer to deny coverage can be accurately characterized as an 'escape' clause. The effect of the [P&I] exclusion] is to deny coverage under that policy or, in other words, to allow the issuer of the policy to 'escape' liability thereunder completely. The effect of a more typical escape clause is undeniably the same.

Sifers, 892 F.2d at 393; *see also Backhus v. Transit Casualty Co.*, 549 So. 2d 283, 286-87 (La. 1989) (calling P&I exclusion an escape clause).

Having decided that Excess MEL's P&I exclusion is an escape clause and that West of England's policy also contains an escape clause, the Court is left with the possibility of having neither policy provide coverage. However, the Fifth Circuit, construing Louisiana law, has determined that when faced with two escape clause that threaten coverage, the court must find them "mutually repugnant" and make both policies liable for the claim. *Sifers,* 892 F.2d at 393; *see Graves v. Traders & General Ins. Co.,* 252 La. 709, 214 So. 2d 116, 118 (La. 1968) (making both policies primarily liable when faced with mutually repugnant clauses). Therefore, neither of the escape clauses can be given effect, and the responsibility for coverage must be shared by the two parties. In accordance with Excess MEL's pro-rata clause, all shares will be equal, subject to any limits of liability that apply, until the loss is paid.***

Seabord Shipping Corp. v. Jocharanne Tugboat Corp., 461 F.2d 500 (2d Cir. 1972)

J. Joseph Smith, Circuit Judge:

Interpretation of the hoary and often poetic provisions of two marine insurance policies is necessitated by this appeal by Oceanus Mutual Underwriting Association, Ltd. (Oceanus) from a judgment of the United States District Court for the Southern District of New York (Dudley B. Bonsal, Judge) requiring the company to contribute a portion of a sum expended by Lloyd's of London to remove from its grounding a stranded and damaged barge insured by both parties. The court found that the salving operation redounded to the benefit of all three of the vessel's insurers and ordered each to reimburse Lloyd's for one-third of the costs. Oceanus appeals, and we reverse that portion of the lower court's order which held it liable to Lloyd's.

On June 16, 1964, the VAL 51, a barge owned by the Jocharanne Tugboat Corporation (Jocharanne), carrying 50,000 barrels of gasoline, went aground in Lake Ontario, immediately offshore Oswego, New York, and began leaking gasoline into the water and onto the adjacent shoreline. Notified of the grounding and of the possibility of explosion of the vessel, the Salvage Association of London appointed an independent surveyor, Mr. Paul J. Ranahan, to survey the casualty and proceed with salvage operations. Though Mr. Ranahan testified that he was acting on behalf of "all concerned underwriters," Lloyd's was the insurer actively involved in the project, and Oceanus was not notified of the incident until completion of the salvage work. Seaboard Shipping Corporation (Seaboard) was hired to offload the usable gasoline cargo remaining on the barge; Sequin Salvage Company was employed to refloat and work on the hull, which continued to present an explosion hazard. The ship was made ready for towing by June 29, and arrived in New York City, where it was declared a constructive loss, on July 4, 1964.

In November, 1965, Seaboard instituted this action against Jocharanne to collect the $7,800 owed for Seaboard's services in off-loading the gasoline from the VAL 51. Seaboard obtained a default judgment against the insolvent Jocharanne and, after Jocharanne had tendered the policies on the vessel to the court, Seaboard was permitted to amend its complaint to name the insurers as defendants. At the time of the accident, Jocharanne had three policies covering the barge: a $200,000 Hull and Machinery policy issued by Lloyd's of London, an $80,000 Open Cargo Legal Liability policy issued by Phoenix Assurance Company of New York (Phoenix), and a $200,000 Protection and Indemnity (P&I) policy issued by appellant Oceanus. The coverage of the three policies was not redundant, as Lloyd's insured for damage to the hull and machinery of the vessel; Phoenix was liable for loss or damage to the cargo; and Oceanus was responsible for personal injury, loss of life, damage to docks, piers, etc., and certain other extraordinary expenses.[2]

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[2] The Oceanus policy is a representative protection and indemnity agreement; the historical roots of this variety of marine insurance explain certain of its unique characteristics. The policies were first issued by clubs of shipowners to insure against risks for which they could not obtain commercial coverage; therefore, classically and in this Oceanus policy, claims for any loss, damage, or liability which could be covered or

In its answer to the amended complaint, Lloyd's cross-claimed against Oceanus and Phoenix to recover part of the $83,000 Lloyd's had paid in settlement of state court actions brought by Sequin and other local salvors for labor and materials used to remove the VAL 51 and its cargo. The Seaboard claim was settled before trial; the only remaining issue was the liability as between the insurers for the state court settlement costs.[3]

These expenses, for removal of cargo and barge, are known in maritime insurance circles as "sue and labor" expenses; they are sums spent by the insured or its representative in an effort to mitigate damage and loss once an accident has occurred; and the insurance company pays them even where, as in this case, the ship is ultimately declared a total loss, in order to encourage diligence in the prevention of excessive liability or loss. See Gilmore and Black, The Law of Admiralty (1957), pp. 64- 69; *Home Ins. Co. v. Ciconett,* 179 F.2d 892 (6th Cir. 1950); *White Star SS Co. v. North British and Mercantile Ins. Co.,* 48 F. Supp. 808, 812 (E.D.Mich.1943). The Lloyd's and Phoenix policies contained a "sue and labor" clause; that of Oceanus did not.

The court below found that the leaking and damaged condition of the ship threatened the separate and distinct interest of each insurer and that Jocharanne, in incurring towing and removal charges, was seeking to protect the hull, save the cargo, and prevent explosion and resultant disaster. The terms of the Lloyd's and Phoenix policies which authorize sue and labor efforts to protect the hull and cargo in case of accident were held the source of those underwriters' responsibility. The basis for Oceanus' obligation to reimburse Lloyd's was found in a term of the Oceanus policy which insures against "costs or charges of raising or removing the wreck of the ship named herein when such removal is compulsory." It is not clear whether the court considered the salvors' charges "costs of raising the wreck" under the policy or preventive medicine which by forestalling explosion and sinking would relieve Oceanus of the future obligation to raise or remove the wreck.

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would be payable under the standard form of hull policy are excepted from the P&I policy. Clause 2, Oceanus policy (42a) . . . .The risks covered by the policy are therefore a somewhat miscellaneous group of "left-overs," including those caused by rare and catastrophic occurrences such as plague, as well as those posed by more mundane difficulties.

[3] It is important to distinguish this situation from that in which several insurers of the same risk are involved. In that instance, when losses are suffered or sue and labor expenses incurred, all contribute ratably to the payment. Great West Casualty Co. v. Truck Ins. Exchange, 358 F.2d 883 (10th Cir. 1966); *American Dredging Co. v. Federal Ins. Co.,* 309 F. Supp. 425 (S.D.N.Y.1970); *Milan v. Providence Washington Ins. Co.,* 227 F. Supp. 251 (E.D.La.1964). In this case, different risks were insured against by the three policies and the equitable doctrine of contribution between co-insurers of the same risk does not apply.

If the court meant the former, Oceanus argues persuasively that the clause was not applicable to this situation. Lloyd's argues that the pressure from the Coast Guard and other governmental authorities in the Oswego area made the removal of the barge compulsory. But "compulsory removal" is a term of art in admiralty law and refers to a situation in which a hull has been abandoned by the owner and the hull underwriter but, pursuant to government order, must be removed from navigable waters. Under those circumstances, the P&I underwriter, absorbing costs which no one else remains liable to pay, must remove the wreck or reimburse the government for removal. *See* the Wreck Removal Act, 33 U.S.C. §§ 409-414; Dover, A Handbook to Marine Insurance (6th ed. 1964) at 439. *Cf. Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967). There was no "compulsory removal" of the VAL 51. Lloyd's and Jocharanne, far from abandoning their interest in the vessel, had it towed to New York in the vain hope of salvaging the hull. No governmental order was necessary to spur the removal and the costs of the operation were therefore not chargeable to Oceanus as removal costs under its policy.[5]

The other possibility is that the benefit the lower court found Oceanus had received from the sue and labor efforts was the avoidance of explosion and potential liability for injury to persons and damage to docks or piers as well as for wreck removal. Oceanus admits that had such a disaster occurred, it might have been liable for substantial amounts, but it claims that any calculation based on that possibility is extremely hypothetical and insists that the terms of its policy preclude holding it for any part of the expenses even if they tended to lessen the chance of explosion. Although we appreciate the motives of the district court in apportioning the costs, we are constrained to conclude that Oceanus is correct.

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[5] Further, any attempt to place liability on Oceanus on the basis of its "wreck removal" clause 1(g) would have to withstand the language of that clause providing that Oceanus "is not liable for such costs, or expenses as would be covered by full insurance under the standard form of policy on hull, machinery, etc., issued by the American Marine Insurance Syndicate. [Identical in all material respects to Lloyd's policy.]

Moreover, Oceanus claims that even were this a wreck removal for which it might be liable, it was obligated under its policy to indemnify Jocharanne only when the latter "shall have in fact paid" the costs of removal. *Stuyvesant Ins. Co. of New York v. Nardelli,* 286 F.2d 600 (5th Cir. 1961); *Burke v. London Guarantee & Accident Co.,* 47 Misc. 171, 93 N.Y.S. 652 (Sup.Ct.1905), *aff'd* 126 App. Div. 933, 110 N.Y.S. 1124 (1908), *aff'd* 199 N.Y. 557, 93 N.E. 1117 (1910). This court recently held that this condition is fulfilled when the judgment against the insured is satisfied in some fashion and the loss has been sustained (*Liman v. American Steamship Owners Mutual Protection & Indemnity Association,* 299 F. Supp. 106 (S.D.N.Y.), *aff'd* 417 F.2d 627 (2d Cir. 1969), *cert. denied*, 397 U.S. 936, 90 S. Ct. 946, 25 L. Ed. 2d 116 (1970) but Oceanus claims that despite this liberalization, there must at least have been a judgment against the insured and the action for reimbursement must have been brought in its name We need not determine whether these conditions on indemnification existed or were met here.

First we note that despite Lloyd's rhetoric, none of the expenses was incurred solely to avert those occurrences or protect those interests for which Oceanus alone was liable. All the costs were essential to any attempt to save the hull and cargo, so any benefit to Oceanus was in a sense incidental. More important, clause 2 of the Oceanus policy excepts from coverage "claims for any loss, damage, liability, or expense which would be payable under the present standard form of policy of the American Marine Insurance Syndicate on hull and machinery [identical in all essential respects to the Lloyd's policy] . . . and sufficient in amount to pay such loss, damage, liability or expense in full." As sue and labor expenses are covered by hull policies, they normally would not be recovered from the P & I policy underwriter. *United States v. American Ins. Co. of Newark, N.J.,* 89 F.2d 8 (2d Cir. 1937); *Landry v. Steamship Mutual, supra.*

Despite the lack of coverage under the Oceanus policy, one might under these circumstances consider applying equitable principles and hold those who benefited from the services rendered for a portion of their cost, under a theory of equitable contribution or restitution. *See* Restatement of Restitution § 115. Within certain limits, courts sitting in admiralty are free to apply these equitable rules. *See* Gilmore and Black, pp. 37-39; *Swift & Co. Packers v. Compania Colombiana Del Caribe,* S.A., 339 U.S. 684, 70 S. Ct. 861, 94 L. Ed. 1206 (1950). Whether such principles could and ought to be applied here, however, is rendered academic by the presence of a contractual provision on this very point, which states that "where the Assured is, irrespective of this Association, insured or deemed to be insured against any loss or claim which would otherwise have been paid by the Association, there shall be no contribution by the Association on the basis of double insurance or otherwise." Clause 5, Oceanus policy. It is clear that in the absence of Oceanus Lloyd's would have been liable for the whole of the salvage expense, at least until the hull was abandoned in New York. Therefore, as these "escape" or "no-contribution" clauses have repeatedly been held valid and legal, Oceanus has successfully contracted out of liability for contribution, under any theory, to a sum paid by another insurer, even though Oceanus might have otherwise been liable for that sum. Although this term, permitting Oceanus to reap benefits at no expense, seems somewhat odd, the intent that P&I insurance apply mainly or exclusively in situations to which no other coverage extends and the fact that Lloyd's has spent no more than it would have had there been no Oceanus policy mitigate the seeming harshness of the clause. ***

***Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365 (5th Cir. 1983) (en banc)**

Rubin, Circuit Judge, joined by Clark, Chief Judge, and Reavley, Garwood, Jolly, and Higginbotham, Circuit Judges:

Conoco, the operator of an offshore drilling rig, chartered a vessel that, due to negligence of its master, sank beneath the rig. Conoco removed the wreck and seeks to recover the cost of removal under a marine protection and indemnity (P&I) insurance policy that covers amounts the vessel owner has become legally liable to pay and has paid either for removal when it is "compulsory by law" or "in connection with any fixed or movable object." Finding that Conoco's unilateral decision to remove the wreck was neither compulsory nor to avert legal liability, we reverse the district court decision ordering Conoco's indemnification.

Conoco also sought a declaration that Bonanza Corporation (Bonanza), the owner of the chartered vessel, was liable to it for the cost of removal because the vessel's sinking was caused by the negligence of the vessel's captain and deckhand, who were employees of Bonanza under Bonanza's exclusive control. The district court, 511 F. Supp. 62, held Bonanza liable and denied limitation of liability on the theory that the vessel's captain was Bonanza's managing agent with respect to the vessel's operations. Finding that the district court's findings of fact are adequately supported by the record and that the legal conclusions reached in those findings are correct, we affirm the denial of limitation.

I. FACTS

Conoco time-chartered the Aqua Safari, a 65-foot vessel, fully manned, from Bonanza, to remain near a Conoco drill tender in the Gulf of Mexico, do standby duty, and carry messages, including daily drilling reports, between the drill tender and the drilling rig it served. Bonanza retained exclusive control of the vessel.
Both Conoco and Bonanza were named as assureds in a standard P&I policy issued by Republic Insurance Company (Republic) to cover the Aqua Safari's operations. The policy provided one million dollars in coverage for:

> such sums as the assured, as owner[,] . . . shall have become legally liable to pay and shall have paid on account of:
>
> Loss of, or damage to, or expense in connection with any fixed or movable object or property of whatever nature;
>
> Costs or expenses of, or incidental to, the removal of the wreck of the vessel . . . when such removal is compulsory by law. . . .

While maneuvering alongside the drilling rig one morning, preparing to pick up a drilling report, the Aqua Safari became entangled in a steel cable hanging from the rig. The vessel drifted into one of the rig's legs, began taking on water in her after-compartment, and sank directly beneath the rig. The Aqua Safari's captain and deckhand swam to safety.

Initially concerned that the sunken vessel might hamper the scheduled removal of the drilling rig fourteen days later, Conoco demanded that Bonanza remove the wreck. Bonanza refused, and announced that it abandoned all interest in the vessel.

In spite of the wreck, the rig was moved without difficulty.

Conoco, however, continued to demand that Bonanza remove the wreck, which lay in 34 feet of water and was by then half-covered with mud. Conoco asserted that the sunken Aqua Safari interfered with installation of a permanent offshore platform on the site. Republic, as Bonanza's insurer, instructed Bonanza to turn a deaf ear to Conoco's request. Two and a half months after the sinking, when construction of the offshore platform began, Conoco raised the Aqua Safari with a derrick barge brought to the site for the platform's installation. It then moved the Aqua Safari to a Louisiana shipyard, incurring a total cost of $109,000.

After raising the Aqua Safari, Conoco sued Bonanza and Republic for the cost of removal. Bonanza denied liability, but argued that, if it were held liable, it should be allowed the protection of the Limitation of Liability Act, 46 U.S.C. § 183 et seq. (1976). Republic denied that the policy covered Conoco's removal of the wreck because Conoco was not the vessel's owner.

The district court held that Bonanza's negligence was the sole cause of the sinking of the Aqua Safari. It found that the vessel's captain was Bonanza's managing agent with respect to the Aqua Safari's operations. Although Bonanza could have limited its liability to Conoco for the cost of the Aqua Safari's removal if the vessel's sinking had occurred without Bonanza's privity and knowledge, limitation was foreclosed here because the captain's negligence in navigating the vessel was attributable to the corporation as occurring with its privity and knowledge.

The district court found that Conoco could also proceed directly against Republic to recover the cost of removal. Because Conoco was an assured under the P&I policy covering the Aqua Safari, Conoco could claim the same rights as any other assured under that policy. Conoco was compelled by law to remove the Aqua Safari because its lease and federal regulations required removal of all equipment from its leasehold within one year after the lease terminated. Earlier removal had been a prudent gesture that in no way jeopardized Conoco's right to recover its expenses. In addition, Conoco could reasonably believe that it was exposed to potential liability, as owner of the wreck, for damages that the wreck might cause to other property. Alternatively, because Conoco was a third-party beneficiary of the insurance contract between Republic and Bonanza, Conoco had standing to proceed against Republic for enforcement of the policy provisions.[2]

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[2] We need not consider at this time Conoco's standing to compel Republic to make payments to Bonanza under the policy. Bonanza has as yet incurred no expenses with regard to the removal of the Aqua Safari, and so has submitted no policy claims to Republic. Following our affirmance of the district court's judgment that Bonanza is liable to Conoco without limitation for the cost of the Aqua Safari's removal, 511 F. Supp. at 66, Bonanza may well seek indemnification from Republic. Any ruling now that, in the event Republic should demur, Conoco has standing to seek enforcement of the policy as a third-party beneficiary, would be premature.

Republic and Bonanza appeal the district court's judgment. They argue that the district court erred in holding that (1) Conoco's removal of the sunken Aqua Safari was compulsory by law; (2) Conoco could recover the cost of removal under the policy provision covering expenses Conoco became legally liable to pay "in connection with any fixed or movable object"; (3) Conoco was liable for removal of the Aqua Safari as owner of the vessel; and (4) neither Republic nor Bonanza was entitled to limit liability for the cost of removal to the value of the Aqua Safari. We examine each of these contentions in turn.

We consider first whether Conoco may recover the cost of removing the sunken Aqua Safari under either clause of the P&I policy. The first directs reimbursement of the assured for sums that, as owner, it has become legally liable to pay and has paid in connection with a fixed or movable object. The second indemnifies the assured for wreck removal expenses paid by it as owner when removal is compulsory by law. We consider these, in Parts II and III, in the reverse of the order in which they appear in the policy.

Apart from recovery under the P&I policy, the district court's judgment allows Conoco to recover the cost of removal from Bonanza, the owner of the vessel negligently sunk. Because we decide that Conoco may not recover removal costs under the policy, we address finally in Part IV Bonanza's assertion that the district court incorrectly denied limitation of its liability to Conoco.

II. COMPULSORY BY LAW

A. Policy Coverage for Wreck Removal

The P&I policy requires Republic to pay only when its assured "shall have become legally liable to pay and shall have paid. . . ." Thus the assured must prove a legal liability in order to recover. Bonanza did not pay for the removal of the wreck and has never made a claim under the policy. Conoco cannot, therefore, recover on the basis that removal was compulsory as to Bonanza. We turn to the claim that Conoco can recover because it was compelled to remove the wreck.

The policy extends coverage only when removal is compulsory by law. Unlike the Second Circuit, we do not find this phrase to be a term of art. *See Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.,* 461 F.2d 500, 504 (2d Cir.1972). Instead its words are to be construed in their "plain, ordinary, and popular sense." *Boudreaux v. Fireman's Fund Ins. Co.,* 654 F.2d 447, 449 (5th Cir.1981); *Calcasieu Marine Nat'l Bank v. American Employers' Ins. Co.*, 533 F.2d 290, 295 (5th Cir.), *cert. denied*, 429 U.S. 922, 97 S. Ct. 319, 50 L. Ed. 2d 289 (1976).

The Random House Dictionary (8th ed. 1981) defines "compulsory" in two different senses. One is "using compulsion; compelling; constraining." The other is "required without exception; mandatory; obligatory." The first sense betokens that compliance is impelled, perhaps by sanctions. The second more closely suggests an unavoidable mandate. The policy does not unambiguously adopt either definition. We must consider not only what is "compulsory," but also what is meant by compulsion effected by "law." *Jocharanne* decided that, as a term of art, the phrase had the second meaning: removal is compulsory by law only when a governmental, or, perhaps, judicial body directs it. Restricting "compulsion" to the mandate of a governmental agency rather than according it the usual significance of the generalized command of a statute or judicial decision narrows the meaning of the term considerably and, we think, unjustifiably. A statute requiring a warning on cigarettes that smoking may be harmful to the smoker's health would appear to make the warning "compulsory by law" without the intervention of an administrative official. Compulsion is not exerted only by direct command. Conduct is compelled whenever there is a sanction for disobedience. The criminal law does not state, "You must leave bank money in bank tills." Instead, it makes bank robbery a crime and imposes penalties on those convicted, thus engendering compulsion not to steal. We are, therefore, unable to restrict the meaning of "compulsory" to acts performed in response to order.

Practical considerations also indicate that removal should not be considered compulsory by law only after specific mandate has issued. If removal were compulsory by law only after competent governmental authority had given its edict, then the vessel owner who removed a vessel he had negligently sunk could not recover the costs of removal even after other vessels had run aground on the wreck until some governmental agency gave the peremptory command. The owner (and consequently its insurer) would be exposed to repeated damage claims without being able to rely on policy coverage to eliminate the hazard, unless a governmental agency ordered removal. Even removal to avoid criminal sanctions[6] would not be covered.

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[6] 33 U.S.C. § 411 (1976) provides criminal penalties for the owner of a sunken vessel who violates 33 U.S.C. § 409 (1976), which makes unlawful voluntary or careless sinking of vessels in navigable channels, and requires their removal. The statutes read in relevant part:

> It shall not be lawful . . . to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels. . . . And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidently or otherwise, . . . it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for.

33 U.S.C. § 409 (1976).

> Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections thirteen, fourteen, and fifteen of this Act [33 U.S.C. §§ 407, 408, 409] shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or

Thus, the clause should be so construed that removal does not become compulsory by law only when a court has rendered judgment requiring it or when an official has issued a fiat. This does not mean that any removal undertaken to minimize possible exposure to legal liability is covered. There must be a compulsion, a legal duty. To be compelling, the duty must be clear and the sanctions for its violation both established and sufficiently severe to be impelling, that is to warrant the cost of removal. But removal occasioned by a reasonable apprehension of slight consequences for inaction or by an unreasonable apprehension even of grave consequences is not compelled.

In determining whether removal is legally compelled, we look to the state of affairs as they would appear to a reasonable owner under the circumstances. This is the traditional objective test applied to determine the legal propriety of conduct. It does not look to the bona fides or the state of mind of the owner, an area as difficult to explore as any terra incognita and one whose real condition may readily be masked or feigned. *Cf.* 2 F. Harper & F. James, The Law of Torts § 16.2 (1956) (on the whole, torts law evaluates defendant's actions by objective standard of conduct, in part because of "practical impossibility of administering any standard which would call for measuring the infinite and imponderable differences among men"); W. Prosser, Handbook of the Law of Torts § 32 (4th ed. 1971) ("The standard of conduct which the community demands must be an external and objective one,

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> by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

33 U.S.C. § 411 (1976).

This circuit has also interpreted 33 U.S.C. § 403 (1976) to prohibit the obstruction of navigable waters by sunken vessels, *United States v. Cargill, Inc.*, 367 F.2d 971, 975 (5th Cir.1966), *aff'd on other grounds sub. nom. Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 88 S. Ct. 379, 19 L. Ed. 2d 407 (1967), and thus the criminal penalties set out in 33 U.S.C. § 406 (1976) for violation of § 403 may be invoked in this circuit for failure to remove a sunken vessel. 33 U.S.C. §§ 403 and 406 read in relevant part:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited. . . .

33 U.S.C. § 403 (1976).

> Every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this Act [33 USC §§ 401, 403, and 404] . . . shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court.

33 U.S.C. § 406 (1976).

rather than the individual judgment, good or bad, of the particular actor. . . ."). The test is similar to the inquiry now required to support a government official's good faith immunity defense. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 2738-39, 73 L. Ed. 2d 396, 410 (1982) (abandoning subjective element of good faith test and announcing standard that "conduct [must] not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . .").

Thus we adopt the test applied by a panel of this court in *Progress Marine, Inc. v. Foremost Insurance Company,* 642 F.2d 816 (5th Cir.1981), *cert. denied*, 454 U.S. 860, 102 S. Ct. 315, 70 L. Ed. 2d 158 (1982), but we eliminate the second inquiry, "whether removal was performed as a result of a subjective belief on the part of the insured that such was reasonably necessary. . . ." *Progress Marine*, 642 F.2d at 820. We focus on what the reasonable assured would have done, not on the thought processes of the actual assured or his counsel on a given day.

B. Conoco's Duty as Lessee

Conoco's lease agreement[7] and former federal regulations[8] required Conoco within one year after its lease terminates to remove all equipment from the leasehold except property permitted to remain by the United States as lessor. The district court determined that, because of the terms of the lease and regulations, "earlier removal by CONOCO was prudent in order to mitigate damages and losses and to enable CONOCO to continue drilling and producing the lease." *Continental Oil v. Bonanza Corp.*, 511 F. Supp. 62, 65 (S.D.Tex.1980). We find that the policy does not insure against removal required of an insured unless the duty is occasioned by its ownership of the vessel and that, in addition, neither the lease nor the regulations impose the legal compulsion contemplated by the policy.

The district court's conclusion that Republic's indemnity policy covers obligations Conoco owes as a federal lessee fails sufficiently to consider the explicit policy language. Coverage is limited to sums Conoco pays "as owner" of the Aqua Safari. The constrictive effect of this language is well recognized. *St. Paul Fire & Marine*

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[7] Section 9 of the lease agreement with the United States provides in pertinent part: "Upon termination of this lease[,] . . . Lessee shall within a period of one year thereafter remove from the premises . . . all structures, machinery, equipment, tools, and materials *in accordance with applicable regulations* and orders of the Supervisor. . . ." (Emphasis added.)

[8] The regulations in force at the time the lease was executed and at the time of the sinking and removal of the Aqua Safari provide: "Upon the expiration of any lease, or the earlier termination thereof as provided in the regulations in this part, the lessee shall within a period of one year thereafter remove from the premises all structures, machinery, equipment, tools and materials other than improvements needed for producing wells or for drilling or producing other leases, and other property permitted by the lessor to be maintained." 43 C.F.R. § 3307.3-6 (1978). The regulations have since been changed.

Ins. v. Vest Transp., 666 F.2d 932, 945 (5th Cir.1982); *Wedlock v. Gulf Miss. Marine,* 554 F.2d 240, 244 (5th Cir.1977); *Lanasse v. Travelers Ins.,* 450 F.2d 580, 584 (5th Cir.1971), *cert. denied*, 406 U.S. 921, 92 S. Ct. 1779, 32 L. Ed. 2d 120 (1972). The policy's protection does not embrace Conoco's obligations as a lessee.

Even if the policy extended coverage to a lessee's obligations, however, it would not indemnify against the expense of removal in Conoco's situation. The regulations imposed no present duty to remove the wreck, as the district court recognized, but only the duty to remove property "upon termination" of the lease, an event that would not occur until Conoco either violated the lease or mineral production ceased. There was uncontroverted testimony that production from existing wells was likely to continue for at least eight to ten years and that the lease could be renewed thereafter for as long as the leasehold continued producing oil or gas or as long as drilling continued. Thus, Conoco's duty would not arise for many years. In any event, Conoco was not unconditionally bound even then to remove the wreck. The regulations exempted from removal "property permitted by the lessor to be maintained." It was possible that the United States as lessor might, at termination of the lease, permit the wreck to remain for, half-covered two years after the wreck, she might in another decade have been fully blanketed. The district court found that considerations of prudence and convenience warranted earlier removal. Republic did not undertake, however, to pay the costs of Conoco's exercise of good judgment, but only those paid as owner when removal was compulsory by law.

C. Conoco's Duty as Owner

Conoco was never the owner or even the bareboat charterer of the Aqua Safari. Under the time charter, the vessel was but a maritime taxi, manned, victualled, supplied, and navigated by Bonanza to run Conoco's errands. *Compare* 46 U.S.C. § 186 (1976)(charterer deemed owner for purposes of limitation if it mans, victuals, and navigates the vessel). The district court reasoned that, "as an additional assured, CONOCO has the same rights as any other assured under the policy," 511 F. Supp. at 65, and could, therefore, recover the cost of removing the Aqua Safari. The premise does not support the conclusion. The policy does not cover all of the expenses incurred by anyone named as an assured, but affords protection only for the risks enumerated. Neither assured, Conoco or Bonanza, may recover the cost of removal unless it was obliged to remove the wreck because of its status as owner of the vessel. Conoco's status as a time charterer, alone or in combination with its leasehold interest in the property on which the Aqua Safari sank, did not amount to an ownership interest imposing on Conoco the legal duty to remove the sunken wreck. G. Gilmore & C. Black, The Law of Admiralty § 4-23 (2d ed. 1975).

Even if Conoco's interest constituted ownership for purposes of this policy provision, Conoco would not have been liable *as owner* to remove the wreck because the sinking of the Aqua Safari was not attributable to Conoco's negligence. A non-negligent owner is not personally liable for the cost of removing a sunken vessel, even if the vessel constitutes a hazard to navigation. *St. Paul Fire & Marine Ins.*, 666 F.2d at 940; *Tennessee Sand and Gravel v. M/V DELTA,* 598 F.2d 930, 934 (5th Cir.1979), *modified on other grounds*, 604 F.2d 13 (5th Cir.1979) (per curiam). Nor could Conoco be held vicariously liable for Bonanza's negligence. A time charterer who does not control the operation or navigation of the chartered vessel is not responsible for the consequences of the vessel owner's negligence. *Agrico Chemical v. M/V BEN W. MARTIN,* 664 F.2d 85, 91 (5th Cir.1981).

Nothing in the circumstances of this case justifies shifting the duty of removal from Bonanza, the shipowner whose negligence caused the sinking, or extending that duty to Conoco. That both Bonanza and Conoco were named as assureds does not justify treating them as a composite entity in which each assumed the qualities of the other. Conoco's recovery under the policy extends only to the reimbursement due it for sums for which it became liable in the capacity designated by the policy.

D. Exposure to Liability

The test we have adopted, like the one formulated in *Progress Marine*, makes removal compulsory when a reasonable owner, fully informed, would conclude that failure to remove would likely expose him to liability imposed by law sufficiently great in amount and probability of occurrence to justify the expense of removal. The compulsion of law is not restricted to a categorical duty, attended by criminal sanctions. It extends to a legal duty imposed either by statute or general maritime law, including those duties for whose non-performance the sanction is payment of damages to persons injured. Even thus interpreted, the policy nonetheless extends only to a duty to remove "imposed by law."[10] *Id*. Such a duty must be present and unconditional, not remote and contingent. The possibility that, by an extension of maritime law not yet decreed, Conoco might be held liable in the future should the Aqua Safari be dislodged from the mud and propelled against other structures, is not such a legal obligation.

No decision or statute has been cited to us imposing on Conoco liability to third parties in the event of such an occurrence. The district court found no such predicate. Conoco relied only on the apprehension that it might become liable on some as yet unformulated basis should the Aqua Safari damage other property. It now conjectures that the legal buck might have come to rest on it in various ways: vicarious liability for Bonanza's negligence; some thesis that it was independently

[10] *Compare St. Paul Fire & Marine Ins. v. Vest Transp.,* 666 F.2d 932, 945 (5th Cir.1982) (per curiam) (by judicial decisions, owner of sunken barge not liable to U.S. government for removal costs when sinking caused by negligence of towing vessel and, therefore, policy indemnifying owner for removal that is compulsory by law did not provide coverage to owner); *M.J. Rudolph Corp. v. Lumber Mut. Fire Ins.,* 371 F. Supp. 1325, 1327 (E.D.N.Y.1974) (removal compulsory by law when owner served with court summons charging obstruction of waterfront property pursuant to harbor regulation prohibiting obstruction of waterfront property by sunken vessel).

negligent for allowing the wreck to remain on its leasehold; that it allowed a nuisance to continue unabated; or the possibility that it might be held not to have exercised reasonable care in choosing Bonanza for its chartering mission. Those are interesting exercises in legal imagination, but they do not define what is compulsory by law. In the absence of an established legal obligation to third parties, Conoco was not reasonably exposed to liability justifying the expense of removal.

Not only was there no settled principle of law on which a potential claimant might ground Conoco's liability, but the factual circumstances on which such an assertion of liability would rest were only remote possibilities. The wreck lay directly beneath the rig, half-covered with mud, and apparently still sinking. It was approximately 2000 feet from the nearest property owned by third parties. The probability was slight that it could be uprooted and carried across the leasehold by strong currents, and even slighter that any object navigating on the surface would be disturbed by the wreck thirty-four feet below, directly beneath the drilling rig. There was not a hint of evidence that Conoco failed to exercise due care in selecting Bonanza.

Usually a finding that a belief is reasonable would be a finding of fact, reversible only if clearly erroneous. Fed. R. Civ. P. 52(a). Resting as it does on the misinterpretation of policy coverage, however, the finding that Conoco had a reasonable apprehension of liability is not supported by the Rule 52(a) imprimatur. Conoco could not reasonably have believed that it faced potential liability sufficiently great to justify the expense of removing the sunken Aqua Safari. *See Progress Marine*, 642 F.2d at 820 ("Removal occasioned by an . . . unreasonable apprehension of criminal or civil liability c[an] not be considered 'compelled by law. '")

III. OWNER'S LEGAL LIABILITY IN CONNECTION WITH FIXED OR MOVABLE OBJECT

Our conclusion that Conoco had no legal obligation as owner to remove the Aqua Safari disposes of Conoco's alternate contention that it is entitled to recover its expenses under the policy provision covering indemnity of sums that "*as owner* [Conoco] . . . shall have become *legally liable* to pay and shall have paid on account of loss of, or damage to, or expense in connection with any fixed or movable object. . . ." (emphasis supplied). A nonnegligent owner, let alone charterer, [12] has never been held liable to third parties, who ran onto a sunken wreck on the basis that he had a duty to remove the wreck, and no third party had even expressed fear that the Aqua Safari posed a danger.

[12] *Agrico Chemical v. M/V BEN W. MARTIN,* 664 F.2d 85, 91 (5th Cir.1981). In *Winter v. Eon Production, Ltd.,* 433 F. Supp. 742 (E.D.La.1976), a vessel owner was held not liable for negligent acts of anyone but his servants. A *fortiori* a time charterer would not incur liability for the acts of the master who was not his employee.

The legal-liability clause, of course, provides coverage different from that afforded by the compulsory-removal clause. The wreck-removal clause indemnifies the assured for taking measures (*i.e.* removal) that not only comply with law but that are also preventive, avoiding future liability for wrecks. The legal-liability clause indemnifies for sums paid in consequence of damage to and expense incurred in connection with property, contemplating reparative measures. It does not accord protection for steps taken to avert liability. The clause "expense in connection with . . . property" cannot be wrested from context to provide separate coverage for any expense the assured might undertake to incur so long as it is in connection with property. The insuring provision covers only "such sums as the assured, as owner . . . shall have become legally liable to pay and shall have paid on account of . . . expense in connection with . . . property. . . ."

Conoco argues, nonetheless, that it was concerned about the possibility of third-party claims. The mere possibility of future liability does not trigger coverage. The policy does not provide a self-energizing doctrine by which coverage extends not only to the risks stated but to those feared by the assured. Republic did not underwrite the legal opinions of Conoco's house counsel. It has no obligation to indemnify Conoco for the cost of preventive measures that house counsel deemed prudent.

Judge Williams's dissent rests in part on the thesis that, when Bonanza sought to abandon the Aqua Safari, the "derelict vessel . . . was then still time chartered to" Conoco. The time charter probably terminated when the vessel sank. Even if it did not, the charter expired by its terms on January 27, 1977, for the charter party, entered into on December 28, 1976, was only for renewable thirty-day periods. The vessel sank on January 1, 1977, and Bonanza gave Conoco notice of abandonment on January 13, 1977. When Conoco moved the hull in mid-March, 1977, its charter had certainly ended.***

V. CONCLUSION

Removal of a wreck is not compulsory by law unless there is a clear legal obligation to remove, imposed by statute or by judicial decision, on the party who effects removal. Conoco having failed either to demonstrate such an obligation here, or to show that governmental authorities had directed removal of the Aqua Safari, we hold that its removal of the Aqua Safari was not covered by the P&I policy. Because Conoco was not legally liable to take any action with regard to the Aqua Safari, it is not entitled to indemnity for the cost of removal under the policy provision covering expenses an owner becomes legally liable to pay in connection with a fixed or movable object.***

Jerre S. Williams, Circuit Judge, with whom John R. Brown, Politz, Tate, and Johnson, Circuit Judges, join, dissenting:

We disagree with the majority of the Court as to the liability of the Republic

Insurance Company for Conoco's expenses in raising the sunken vessel AQUA SAFARI. Our disagreement lies in the interpretation and application of Conoco's insurance policy with Republic. To find the insurance company responsible to Conoco, we must find that within the terms of the policy Conoco was an "owner" of the vessel and that raising the vessel was "compulsory by law". It is our position that Conoco meets these requirements of the insurance policy and should be indemnified under the policy as to its expenses in raising the sunken vessel. While the proper interpretation of these words in the policy is our only disagreement with the majority, it is critical to the holding in this case.

We place our reliance in large measure upon the case of *Progress Marine, Inc. v. Foremost Insurance Co.,* 642 F.2d 816 (5th Cir.1981), *cert. denied,* 454 U.S. 860, 102 S. Ct. 315, 70 L. Ed. 2d 158 (1981). While purporting to follow our decision in *Progress Marine,* the majority of the Court substantially alters the "compelled by law" test carefully constructed in that case. In turn, the application of the modified test leads, in our view, to an erroneous decision. The test, as stated in *Progress Marine,* is as follows:

> Removal occasioned by an unarticulated or unreasonable apprehension of criminal or civil liability could not be considered "compelled by law." On the other hand, where removal was reasonably required by law, or where failure to remove would have reasonably exposed an insured to liability imposed by law sufficiently great to justify the expense of removal, then, we believe, that such removal could be considered "compelled by law" for purposes of recovery. However, an additional inquiry must be made as to whether the removal was in fact "compelled by law," that is, whether removal was performed as the result of a subjective belief on the part of the insured that such was reasonably necessary to avoid legal consequences of the type contemplated by this policy.

642 F.2d at 820 (footnote omitted).

The opinion for the Court alters this test in two ways. A minor way, which is not of significant importance in this case, is to eliminate the subjective test as to the actual motive of the insured in the removal of the vessel. We are not disposed to disagree with the elimination of this subjective element since the critical test lies in an objective evaluation of exposure to possible liability because of failure to remove.

The other change in the test is sweeping and is the source of our disagreement. The opinion of the Court changes the crafted and balanced test of *Progress Marine* to a much more stringent interpretation of the phrase "compelled by law" to require the specific showing of "a legal duty imposed either by statute or general maritime law, including those duties for whose non-performance the sanction is payment of damages to persons injured. Even thus interpreted the policy nonetheless extends only to a duty to remove [the sunken vessel] 'imposed by law '. Such a duty must be present and unconditional, not remote and contingent."

The fallacy of such a narrowly restrictive test, now setting up the requirement that legal duty be present and unconditional, is demonstrated by envisioning a not unlikely scenario based upon the facts of this case. A hurricane sweeps the area of the Gulf where the drilling rig and the sunken AQUA SAFARI are located. The roiled waters force the sunken vessel (only thirty-five feet below the surface) against a pipeline not owned by Conoco approximately a half mile away. The pipeline is ruptured. Because of the storm, there is a period of some hours before the flow of oil can be stanched. There is a loss of a huge quantity of oil, there is substantial damage caused by the oil itself to other property in the vicinity, to marine life, and ultimately to beaches on the shore.

The opinion of the Court tells us that in spite of the huge amounts of damages occasioned to a number of different legal entities, the highly skilled legal counsel of all of those legal entities will give the clear and firm advice that Conoco cannot be found liable in any way for allowing that sunken vessel to remain on its lease, and there is no need to bother to sue Conoco under any theory of the law. The realistic picture, we are certain, differs greatly. The highly skilled and highly paid legal profession will develop plausible legal analyses under which Conoco may be held liable for allowing that sunken vessel to remain on its lease. Bonanza is no longer an active corporation, and Conoco is the only source of recovery for the damages. Conoco will almost surely be sued.

Carrying the scenario one step further, some of the skilled lawyers do convince their clients that Conoco can be held liable for failure to remove the vessel, and suit is brought. The opinion for the Court assures us that no judicial decision can possibly be rendered which would hold Conoco liable under these circumstances. In the analysis of the majority of the Court, Conoco has no more connection with the AQUA SAFARI and the damage it causes than it would have had if the hurricane agitated waters had uncovered a sunken Spanish galleon on Conoco's lease and had impelled it against the pipeline.

In contrast to the certainty exuded by the opinion of the Court, this scenario, which might well have happened, realistically makes reasonable the possibility that Conoco would be held liable for not having removed this vessel which it had time chartered and which it had caused to be brought to the location where it was sunk as a result of the negligence of Conoco's hired contractor, Bonanza. Under the *Progress Marine* test, the removal of the vessel by Conoco was "compelled by law": "Removal was reasonably required by law, or . . . failure to remove would have reasonably exposed an insured to liability imposed by law sufficiently great to justify the expense of removal." 642 F.2d at 820.

The magnitude of potential damages is an important aspect of this case. In *Progress Marine*, as well, we emphasized this consideration. There a barge went to the bottom because of the negligence of the owners. Pipelines were nearby. Hurricane season was drawing near. As the opinion of the Court said: "Potential exposure to (Progress Marine) resulting from its wreck rupturing an oil pipeline . . . could have been enormous." 642 F.2d at 820; *Signal Oil & Gas Co. v. Barge W-701,* 654 F.2d 1164 (5th Cir. 1981), *cert. denied*, 455 U.S. 944, 102 S. Ct. 1440, 71 L. Ed. 2d 656 (1982). So also in this case as to Conoco, the potential damages from a pipeline rupture were in the millions of dollars. The insurance policy itself provided for coverage of one million dollars. The actual cost of removal was $109,000--exceedingly low on a relative basis. The overwhelming amount of potential damage with possible liability of Conoco when related to the far lesser expenditure of removing the vessel, in our view, clearly justifies the conclusion that removal was "compelled by law".

The majority of the Court correctly states that no case has been found in which the time charterer of a vessel under these general factual circumstances was held liable for damage. Nor has any case been found which clearly negatives liability for such damage. We do concede, however, that there is no settled principle of law that would fix liability on Conoco if the AQUA SAFARI, propelled by roiled storm waters from its resting place on Conoco's lease, had severed a pipeline. It is true that Conoco's absence of negligence in the sinking of the AQUA SAFARI *may* exonerate Conoco for liability for damages the wreck may cause. We stated in *Tennessee Valley Sand & Gravel Co. v. M/V Delta,* 598 F.2d 930, 934 (5th Cir. 1979), *modified per curiam on other grounds*, 604 F.2d 13 (5th Cir. 1979), that "if the non-negligent owner exercises his right to abandon [a wreck] he is liable neither for the cost of removal nor for the damages suffered by third parties as a result of the wreck." Further, Conoco was a time charterer. When an owner remains in control of a vessel, the time charterer is not ordinarily liable for damages due to the owner's fault. *Agrico-Chemical Co. v. M/V Ben W. Martin*, 664 F.2d 85, 91 (5th Cir. 1981). It is also uncertain whether Conoco could be held vicariously liable for Bonanza's negligence. In the personal injury context, at least, a time charterer generally has no liability for injuries caused by the owner's negligence. *See Mallard v. Aluminum Co.,* 634 F.2d 236, 242 n. 5 (5th Cir. 1981), *cert. denied*, 454 U.S. 816, 102 S. Ct. 93, 70 L. Ed. 2d 85 (1981).

But these principles do not provide an unequivocal answer to the question of Conoco's liability. A number of facts support a possible potential liability under the scenario. Conoco contracted with Bonanza to employ the AQUA SAFARI's services in Conoco's oil exploration enterprise. The AQUA SAFARI under Conoco's orders entered the area of Conoco's operations--an area crisscrossed with pipelines and studded with free-standing wells. When Bonanza disclaimed responsibility for the AQUA SAFARI's carcass and sought to abandon it, Conoco was left with a derelict vessel that was then still time chartered to it and lying on its lease. The vessel posed at least some threat to all structures in the vicinity. In the light of expanding concepts of enterprise and vicarious liability, Conoco faced a significant prospect of being held liable for damages should the AQUA SAFARI become a floating menace.

Even though Bonanza was an independent contractor, Conoco was not necessarily immune from liability. In Prosser's Law of Torts at 468 (4th Edition 1971), we find a prediction of development in the law:

> The prediction has been made that ultimately the "general rule" will be that the employer is liable for the negligence of an independent contractor, and that he will be excused only in a limited group of cases where he is not in a position to select a responsible contractor, or the risk of any harm to others from the enterprise is obviously slight. The English courts have taken steps in this direction, until the position of the ordinary independent contractor in England approaches that of a servant. The American courts have not gone so far, and have continued to repeat the "general rule" of non-liability with exceptions, whose very number is sufficient to cast doubt on the validity of the rule.

All that is needed to meet the test to establish Conoco's right to recover on its policy is a reasonable potential of liability. This statement warns of such a potential.

Finally, there are sound policy reasons to hold Conoco liable if it were to ignore the hazard posed by the AQUA SAFARI once Conoco knew the owner had abandoned the vessel. Conoco chose Bonanza's services and had ample opportunity to determine whether Bonanza was reliable. After Bonanza refused to remove the wreck, only Conoco was in a position to prevent a potential disaster. Conoco's failure to remove the vessel under these circumstances might be found to be in breach of a legal duty, independent of Conoco's freedom from negligence in the sinking of the vessel.

In spite of this potential, the opinion for the Court tells us that a lawyer asked by Conoco if it could ever be held liable in case the AQUA SAFARI ruptured a pipeline could only advise that there is no reasonable likelihood of any liability. In our view such advice would manifest overconfidence approaching rashness because of the potential for liability which existed while the AQUA SAFARI, having its admitted connection with Conoco, rested only thirty-five feet below the surface and near important pipeline installations in the hurricane-prone Gulf of Mexico. As we said in *Progress Marine*, "it at least cannot be said that no possibility for recovery . . . exists under the legal standard which we have announced." 642 F.2d at 820.

We turn now to the issue of whether Conoco was an "owner" of the vessel under the insurance policy. No persuasive contention is made by Republic with respect to this issue. Conoco was insured under the policy by clear implication as owner. It is true it was only a time charterer. But if the insurance companies knowingly insure and include such time charterers as "owners" under their policies, they should be held liable to time charterers as owners. Republic actually in its argument to this Court does not undertake to any serious extent to deny that Conoco was covered as "owner" under the policy. In its original brief to the panel it referred to the "owner or charterer" of the vessel being covered. Rather, the thrust of its argument is that if the vessel were dislodged and did damage, the liability would be to Conoco not as the "owner or charterer" of the vessel but as the lessee of the lease upon which the vessel rested. Under its argument, Conoco would be liable only if it were liable also for a sunken Spanish galleon which was on its lease and was dislodged and forced against a pipeline and caused a rupture.

Conoco was not a stranger to the wrecked vessel on its lease. To injured third parties it was the time charterer of the vessel which had been abandoned by its owner, Bonanza. It is accurate to state that if any liability against Conoco grew out of any reason other than its interest in the vessel, the Republic policy would not cover it. *See St. Paul Fire & Marine Ins. Co. v. Vest Transportation Co.*, 666 F.2d 932, 945 (5th Cir.1982) (per curiam affirmance on the basis of the district court's opinion); *Wedlock v. Gulf Mississippi Marine Corp.,* 554 F.2d 240 (5th Cir.1977); *Lanasse v. Travelers Ins. Co.,* 450 F.2d 580 (5th Cir.1971), *cert. denied*, 406 U.S. 921, 92 S. Ct. 1779, 32 L. Ed. 2d 120 (1972). But in this case, and under this scenario, the liability of Conoco would arise because of the fact that it had brought the vessel to its lease as a result of its interest in the vessel as time charterer. The vessel had then sunk on its lease and had remained there as a hazard to nearby installations if dislodged.

We accept the other findings of the Court, but our disagreement on the issue of the interpretation and application of the "owner, . . . compulsory by law" provisions of the policy which Conoco held with Republic Insurance Company leads us to conclude that the decision of the district court, holding Republic liable to Conoco under the policy for the costs of raising the sunken AQUA SAFARI, should be affirmed.***

***In re: Settoon Towing, L.L.C.*, 720 F.3d 268 (5th Cir. 2013)**

Emilio M. Garza, Circuit Judge:

This appeal arises out of an allision between the M/V CATHY M. SETTOON (the "CATHY"), a vessel owned by Settoon Towing, L.L.C. ("Settoon"), and an oil well. Settoon appeals the district court's grant of summary judgment in favor of New York Marine and General Insurance Company ("NYMAGIC"), Federal Insurance Company ("Federal"), and St. Paul Fire & Marine Insurance Company ("St. Paul") (together, the "umbrella insurers"), concluding the umbrella insurers are not liable to Settoon for damages resulting from the allision. State National Insurance Company ("SNIC") cross-appeals the district court's grant of summary judgment in favor of Settoon, finding SNIC liable to Settoon for damages and prejudgment interest resulting from the allision. We AFFIRM the district court's judgment in all respects except for the calculation of prejudgment interest. We REVERSE and

REMAND for calculation of prejudgment interest in a manner consistent with this opinion.

I

On January, 20, 2007, the CATHY struck an oil well in Bayou Perot, Louisiana, causing damage to the wellhead and uncontrolled discharge of oil into the water. The captain of the CATHY did not report the allision to the United States Coast Guard or to Settoon. The next day, the captain of the M/V CHERYL SETTOON, another vessel owned by Settoon, saw the oil spill as it passed by the allision site and reported the spill to the Coast Guard and Settoon's management. The Coast Guard conducted an investigation, and the captain of the CATHY initially denied involvement. When the Coast Guard confronted him with a reconstruction of the allision from the CATHY's tracking system on February 23, 2007, thirty-four days after the allision, the captain of the CATHY admitted involvement. Settoon notified its insurers of the event on February 26, 2007, thirty-seven days after the allision.

Three insurance policies belonging to Settoon are at issue in this litigation, all of which provide excess insurance coverage over Settoon's underlying primary policies. SNIC insures the first layer bumbershoot policy ("Bumbershoot 1"), which provides the first $4,000,000 of excess coverage. SNIC sent Settoon a binder for this policy on November 8, 2006, listing the underlying insurance policies and indicating the policy included a "Pollution Liability" endorsement. The binder included a "Conditions" section that stated, "Warranted copies of all underlying policies scheduled in item 5, received within 60 days of attachment." We interpret this as a requirement that Settoon send SNIC the full texts of its underlying policies. The "Conditions" section also stated, "All coverages scheduled to remain in force for the entire term . . . ." The binder stated the insurance policy was effective from November 2, 2006 to November 2, 2007.

On December 13, 2006, SNIC contacted Settoon stating several items were needed to issue the policy, including copies of the underlying policies and the premium payment. On December 28, 2006, SNIC contacted Settoon stating SNIC received the premium payment but still required the underlying policies, among other items. On January 10, 2007, SNIC contacted Settoon again stating it required the underlying policies to issue the insurance policy. On January 23, 2007, three days after the allision, SNIC contacted Settoon again stating it needed the underlying policies to issue the insurance policy. On February 7, 2007, SNIC contacted Settoon again stating it needed the underlying policies to issue the policy. SNIC received all the underlying policies by March 1, 2007, and sent Settoon the Bumbershoot 1 policy on March 2, 2007.

Bumbershoot 1 begins by defining the general scope of the agreement in Section I-A, titled "Coverage." In relevant part, the Coverage section reads:

> The Policy shall indemnify the Insured . . . for the following . . . :

1) All Protection and Indemnity risks covered by the underlying Protection and Indemnity Insurance . . . .
2) . . . marine collision liabilities . . . .
3) All other sums which the Insured shall become legally liable to pay as damages on account of . . . b. property damage . . . .

Section III of Bumbershoot 1 is titled "Exclusions." In relevant part, the Exclusions section reads: "This insurance does not apply to . . . xi. Any liability for, or any loss, damage, injury or expense caused by, resulting from or incurred by reason of: . . . f. pollution liability." One of the endorsements attached to the policy is titled "Pollution Liability," which reads:

> This endorsement forms a part of the policy to which it is attached.
>
> . . .
>
> Exclusion xi.f. "Pollution Liability" of this policy shall not apply, however, provided that the Insured establishes that all of the following conditions have been met:
>
> . . .
>
> > C) The discharge, dispersal, release or escape became known to the Insured within 72 hours after its commencement.
> >
> > D) The discharge, dispersal, release or escape was reported in writing to these underwriters within 21 days after having become known to the Insured.
>
> . . .
>
> Coverage, if any, provided by the endorsement will:
>
> > A) Apply only if such coverage is also provided in the underlying insurance(s) . . . .
>
> . . .
>
> Such coverage, however, shall only apply excess of valid and collectible underlying insurance.
>
> All other terms and conditions remaining unaltered.

NYMAGIC insures the second bumbershoot policy ("Bumbershoot 2"), which provides $5,000,000 over Bumbershoot 1. The first section under the heading "Insuring Agreement" in Bumbershoot 2 is titled "Coverage" and reads in pertinent part:

> This Policy is to indemnify the "Assured" in respect of the following . . .
>
> > (a) All Protection and Indemnity risks. . . .

> (b) . . . Collision . . . Liabilit[y] . . . .
>
> (c) All other sums which the "Assured" shall become legally liable to pay . . . in respect of claims made against the "Assured" for damages . . . on account of . . . "Property Damage" . . . .

Under the heading "Exclusions" Bumbershoot 2 states:

> This Policy Shall Not Apply: —
>
> 1. To any claim directly or indirectly in consequence of the actual or potential discharge, dispersal, release, or escape of smoke, vapors, soot, fumes, acids, alkalis, petroleum products or derivatives, liquids or gases, waste materials, sewerage or other toxic chemicals, irritants, contaminants or pollutants into or upon land, atmosphere or any watercourse or body of water.

Under the heading "Conditions" Bumbershoot 2 lists, among other conditions, the following:

> 9. NOTICE OF OCCURRENCE: Whenever the "Assured" has information from which the "Assured" may reasonably conclude that an "occurrence" covered hereunder involved injuries or damages which, in the event that the "Assured" should be held liable, is likely to involve this policy, notice shall be sent as soon as practicable to the Company, provided, however, that failure to notify the Company of any "occurrence" which at the time of its happening did not appear to involve this Policy, but which, at a later date, would appear to give rise to claims hereunder, shall not prejudice such claims.

Endorsement #8, attached to Bumbershoot 2 and titled "Follow-Form Pollution Endorsement (Sudden & Accidental Limitation)," further explains the pollution exclusion and provides a buyback. The endorsement states in relevant part:

> I. ABSOLUTE POLLUTION EXCLUSION
>
> (A) In consideration of the premium charged, it is hereby agreed that this policy shall not apply to any liability for . . . "property damage" . . . arising out of the . . . "release" of "pollutants" into . . . any watercourse, water supply, reservoir or body of water.
>
> It is further agreed that the intent and effect of this exclusion is to delete from any and all coverage's afforded by this policy any "occurrence",

claim, suit, cause of action, liability, settlement, judgement, defense costs or expenses in any way arising out of such "release" . . . .

. . .

II. SUDDEN AND ACCIDENTAL BUYBACK

(A) It is hereby agreed that the above Absolute Exclusion shall not apply provided that the Named Assured establishes that all of the following conditions have been met:

. . .

(4) The occurrence became known to the assured within 72 hours after its commencement.

(5) The occurrence was reported in writing to those underwriters within 30 days after having become known to the assured.

. . .

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED.

NYMAGIC, Federal, and St. Paul insure the third bumbershoot policy ("Bumbershoot 3"), which provides $40,000,000 over Bumbershoot 2. The second section under the heading "Excess Bumbershoot Liability" in Bumbershoot 3 is titled "Coverage" and reads in pertinent part:

The company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Assured in respect of the following:

A. All Protection and Indemnity risks of whatsoever nature covered by the underlying Bumbershoot policies.

B. . . . Collision Liabilities . . . .

C. All other sums which the Assured shall become legally liable to pay . . . in respect of claims made against the Assured for damages of whatsoever nature, on account of:

. . .

2) Property Damage . . . .

The fourth section under the "Excess Bumbershoot Liability" heading is titled "Conditions" and lists, among other conditions, the following "Notice of Occurrence" condition:

Whenever the Assured has information from which the Assured may reasonably conclude that an occurrence covered hereunder involved injuries or damages which, in the event that the Assured should be held

> liable, is likely to involve this policy, notice shall be sent to the Company as soon as practicable, provided, however, that failure to notify the Company of any occurrence which at the time of its happening did not appear to involve this Policy, but which, at a later date, would appear to give rise to claims hereunder, shall not prejudice such claims.

Endorsement #8 attached to Bumbershoot 3 is exactly the same as Endorsement #8 attached to Bumbershoot 2, containing the same "ABSOLUTE POLLUTION EXCLUSION" and "SUDDEN AND ACCIDENTAL BUYBACK" provisions as reproduced in relevant part above.

The insurers sought a declaratory judgment that they are not liable for the losses arising out of the allision because Settoon did not meet the requirements in the endorsements, which would have provided the pollution liability excluded by the pollution exclusions. The parties filed cross-motions for partial summary judgment. The district court made three holdings: 1) the umbrella insurers are not liable on the Bumbershoot 2) and Bumbershoot 3) policies because Settoon did not comply with the 72-hour knowledge and 30-day notice provisions in the buybacks;***

III

Settoon asserts the umbrella insurers are liable despite Settoon's failure to provide them notice within 30 days. To provide the pollution liability excluded by the pollution exclusion, Bumbershoot 2 and Bumbershoot 3 require the following condition be met in the pollution endorsement: "(5) The occurrence was reported in writing to those underwriters within 30 days after having become known to the assured." Settoon asserts its non-compliance with the 30-day notice provision is not cause for barring liability for three reasons: 1) the insurers must, but cannot, show they were prejudiced by the delay; 2) when the 30-day notice provision is read alongside the general "Notice of Occurrence" provision in the Bumbershoot 3 policy, it is clear that delays beyond 30 days are permitted when the insured does not immediately realize the occurrence gives rise to a claim; and 3) Louisiana's doctrine of impossibility excuses Settoon's failure to provide notice within 30 days. Settoon is mistaken on all three counts; the umbrella insurers are not liable because Settoon failed to provide notice within 30 days.

A

First, Settoon asserts the insurers are required to, but cannot, show prejudice from the delay. The parties rely on Texas law a great deal in debating whether the insurers must show prejudice resulting from the late notice. This case arises under Louisiana law, so Texas law is informative but not controlling. In interpreting Texas law, we have drawn a distinction between "occurrence" policies, where "any notice requirement is subsidiary to the event that triggers coverage," and "claims-made" policies, where "notice itself constitutes the event that triggers coverage," in deciding whether the insurer is required to show prejudice as a result of late notice.

See Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co., 174 F.3d 653, 658-59 (5th Cir. 1999). *Matador* involved a 30-day notice provision in a pollution buyback very similar to the one at issue here, and we held, "The nature of St. Paul's and Matador's bargain . . . resembles the nature of the bargain underlying a 'claims-made' policy. Accordingly, we see no reason to apply a prejudice requirement and not to hold the parties to the specific terms of their bargain." *Id.* at 659; *see also Certain Underwriters at Lloyd's London v. C.A. Turner Constr. Co.*, 112 F.3d 184, 189 (5th Cir. 1997) (interpreting Texas law to require strict compliance with notice provision in pollution endorsement where pollution exclusion was clear). In a pair of decisions after *Matador*, the Texas Supreme Court held that even in claims-made policies, insurers must show prejudice to defeat liability where the insured does not comply with a notice provision that is a condition precedent in the main body of the policy. *Fin. Indus. Corp. v. XL Specialty Ins. Co.*, 285 S.W.3d 877, 879 (Tex. 2009); *Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 375 (Tex. 2009). Those cases applied Texas law and did not address notice provisions in endorsements.

Only one Louisiana case has addressed the interpretation of notice provisions in exceptions to exclusions under Louisiana law, but then only tangentially. *Smith v. Reliance Ins. Co. of Il.,* 807 So. 2d 1010, 1023 (La. Ct. App. 2002) (Daley, J., concurring). The concurring opinion contrasted the position of the insurer in that case, which cited *Matador* for the proposition that notice requirements in buyback endorsements must be strictly construed, with the position of the insured, which asserted Louisiana law, unlike the Texas law holding in *Matador*, requires a showing of prejudice. *Id.* The concurring opinion explicitly recognized Louisiana law does not squarely answer the question: "This unresolved question of law, whether to strictly apply the notice requirements of a Limited Buy Back Endorsement, is an issue upon which the trial court has not yet ruled. This [is an] open question of law . . . ." *Id.*

In Louisiana, an insurer is not liable where a claims-made policy requires notice within the policy period but notice is not given until after the policy period. *Hood v. Cotter*, 5 So. 3d 819, 824-25, 830 (La. 2008). The notice provision in the main body of the policy "provides the scope of coverage bargained for by defendant." *Id.* at 829; *see also Vitto v. Davis*, 23 So. 3d 1048, 1053 (La. Ct. App. 2009) (holding requirement of notice within policy period in the main body of the policy controls scope of coverage by insurer even though injured third party bringing suit could not have known of claim within policy period because of wrongdoing of insured). *Hood* reasoned, "[T]he purpose of the claims-made-and-reported requirement is to ease problems in determining when a claim is made or whether an insured should have known a claim was going to be made." *Hood*, 5 So. 3d at 827 (citing *Livingston Parish Sch. Bd. v. Fireman's Fund Am. Ins. Co.*, 282 So. 2d 478 (La. 1973)).

In an earlier case interpreting Louisiana law, this circuit held where "immediate notice" is an express condition precedent to coverage in the main body of the policy, "failure to comply with the provision precludes coverage" and "prejudice need not enter the calculation." *Joslyn Mfg. Co. v. Liberty Mut. Ins. Co.*, 30 F.3d 630, 633-634 (5th Cir. 1994). Where policy holders are "consumers unlikely to be conversant with all the fine print of their policies," strict adherence to notice provisions that are conditions precedent is not as important as when "both parties are sophisticated businesses, which are expected to be conversant with the terms of their contracts." *Id.* at 634 (citing *MGIC Indem. Corp. v. Cent. Bank of Monroe, La.,* 838 F.2d 1382, 1387 (5th Cir. 1988)); *see also Jackson v. State Farm Mut. Auto. Ins. Co.*, 211 La. 19, 29 So. 2d 177, 179 (La. 1946) (holding delayed-notice cases must balance equities, including prejudice and discovery of injury, in case where injured party was ordinary consumer). On the other hand, where notice is *not* a condition precedent to coverage, an "insurer cannot deny coverage merely because its insured failed to give notice of loss as soon as practicable" without a showing of prejudice. *Peavey Co. v. M/V ANPA,* 971 F.2d 1168, 1172 (5th Cir. 1992). Louisiana case law does not directly address whether, to deny recovery, an insurer must show prejudice resulting from an insured's non-compliance with a condition precedent in an endorsement that requires notice within a set time period after an occurrence. *See Smith*, 807 So. 2d at 1023 (Daley, J., concurring).

Whether a notice provision is a "condition precedent" to recovery depends on the language of the policy; we have held that "the words 'condition precedent' mean exactly what they say, and failure to comply with this provision preclude[s] recovery, regardless of whether prejudice [is] shown." *Gulf Island, IV v. Blue Streak Marine, Inc.,* 940 F.2d 948, 955 (5th Cir. 1991) (citing *MGIC*, 838 F.2d at 1385-86). *Gulf Island, IV* went on to state that certain language short of the exact phrase "condition precedent" may not be sufficient to make a notice requirement a condition precedent to recovery:

> The Lloyd's policy requires notice only when the assured "may reasonably conclude" that a covered occurrence has taken place. This language falls short of the express condition precedent language that we held in *MGIC* and *Auster Oil [& Gas, Inc. v. Stream,* 891 F.2d 570 (5th Cir. 1990)] was necessary to make giving notice a condition precedent to recovery.

Gulf Island, IV, 940 F.2d at 956.

Turning to the insurance contracts at issue, we hold the umbrella insurers are not liable to Settoon regardless of prejudice to the umbrella insurers. First, it is clear that the notice condition in the endorsement is a "condition precedent" despite not using the precise phrase "condition precedent." The buyback clearly indicates the notice provision is a condition precedent to recovery under the endorsement. The absolute pollution exclusion states, "It is . . . agreed that the intent and effect of this exclusion is to delete from any and all coverage's . . . any . . . claim . . . in any way arising out of [pollution]." The buyback states, "It is hereby agreed that the above Absolute Exclusion shall not apply provided that the Named Assured established that all of the following conditions have been met . . . ." Settoon must "establish" that the "conditions" have been met in order for the absolute pollution exclusion not to apply. Short of the exact phrase "condition precedent," there is almost no stronger language that could establish a "condition precedent" to recovery. Further, Settoon is a sophisticated business, not an ordinary consumer. *Cf. Joslyn Mfg.,* 30 F.3d at 633-34. Therefore, we analyze the notice provision in the buyback as a condition precedent directed at a sophisticated business.

The bargain here "delete[s] from any and all coverage[]" pollution liability unless the insured gives notice within 30 days of the occurrence. Pollution liability is not stripped away because of a violation of the notice provision; rather, non-compliance prevents the exception to the exclusion from taking effect in the first instance, meaning the pollution exclusion remains in effect. In Louisiana a violation of a provision mandating notice within the policy period allows the insurer to avoid liability, *Hood*, 5 So. 3d at 824-25, because the notice provision determines the scope of coverage bargained for, *Vitto*, 23 So. 3d at 1053. Here, the notice provision in the buyback reflects the allocation of risk the parties bargained for. Therefore, holding the umbrella insurers liable where the conditions of the buyback were not met would alter the terms of the parties' bargain. Because Settoon did not comply with the 30-day notice provision, which is a condition precedent to recovery under the buyback, the umbrella insurers are not liable under the Bumbershoot 2 and Bumbershoot 3 policies.***

Crown Zellerbach Corp v. Ingram Industries, Inc., 783 F.2d 1296 (5th Cir. 1986)(en banc)

John R. Brown, Circuit Judge, with Clark, Chief Judge, and Thornberry, Gee, Reavley, Davis, Hill, and Jones, Circuit Judges:

The sole remaining issue for en banc determination is the validity of the provision of a marine protection and indemnity (P&I) policy fixing the underwriter's maximum liability to that of the assured shipowner's judicially declared limitation of liability. Stated obversely, the question is whether the P&I underwriter is liable in excess of the assured shipowner's admitted limited liability. Along the way we will determine the continued vitality of our earlier *Nebel Towin*[2] decision on which the trial court and the panel majority relied. We hold that the underwriter is not liable for the excess and in doing so overrule *Nebel Towing*.

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[2] *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230, 1969 A.M.C. 1571 (5th Cir. 1969), *cert. denied*, 397 U.S. 989, 90 S. Ct. 1120, 25 L. Ed. 2d 396, 397-400 and 419 F.2d at 238, Brown, C.J., dissenting from denial of rehearing en banc.

I.

This appeal grows out of an allision on the Mississippi River between the tow in tow of the tug F.R. BIGELOW and Crown Zelerbach's (CZ) water intake structure. Involved also was the tug's (and owners') maritime limitation of liability proceeding in which CZ brought a Louisiana direct action against prime and excess P&I underwriters of the vessel owner-operator. After trial, the District Court held that Ingram Industries, Inc. (Ingram), the tug owner/operator, was liable, but was entitled to limit its liability to the value of the vessel and the pending freight. The excess P&I underwriter was held liable for nearly $2,000,000 of the portion of CZ's damages that exceeded the limited liability of the vessel owner. We approved the trial court's holding of (i) no "privity or knowledge" by the tug owner, (ii) the valuation of the vessel, (iii) the computation of CZ's damages, and (iv) the award of prejudgment interest calculated from a date later than the accident. However, the Court by divided vote determined that the District Court was free of error in holding the tug owner's underwriter liable beyond the dollar limits fixed, or ascertainable, in the P & I policy

How it All Happened

On February 3, 1979, the tugboat F.R. BIGELOW owned (or bareboat chartered) by Ingram, while pushing 15 loaded barges down the Mississippi River in heavy fog and rain, caused its forward lead barge to collide with and damage CZ's water intake structure, located above Baton Rouge, Louisiana. Shortly after this incident, CZ began to repair the structure, but these repairs were interrupted on May 18, 1979, when another tugboat collided with the structure and damaged the remaining portion. The structure was not rebuilt in kind, but was rebuilt in a different form.

CZ filed suit against the tugboat F.R. BIGELOW, and Ingram, her bareboat charterer, in April of 1979. Subsequently, it amended its complaint to include Cherokee Insurance Company (Cherokee), the prime P&I insurer of Ingram, with a policy limit of $1,000,000, and London Steam-Ship Owners' Mutual Insurance Association (London Steam-Ship), excess P & I insurers of Ingram, with a deductible franchise of $1,000,000.

In its answer to the suit based upon the accident of February 3, 1979, Ingram, the charterer-owner/operator of the F.R. BIGELOW, sought limitation of its liability to the value of the vessel plus freight then pending. *See* 46 U.S.C. § 183. Ingram stipulated liability for striking the intake structure, and the issues of damages and limitation of liability were tried. Following trial, the District Court entered judgment for CZ in the "total sum" of $3,948,210.31 with prejudgment interest calculated from December 11, 1980. The District Court granted Ingram's prayer for limitation of liability, valued the vessel at $2,134,918.88, and limited the owner's liability to that amount. Since Cherokee's prime P&I policy was for $1,000,000, the District Court decreed the total sum of CZ's judgment as follows:

Table I

(a) Total Damages to CZ		$ 3,948,210.31
(b) Payable by Owner and Cherokee Prime P & I	$ 1,025,000.00	
(c) Payable by Owner and London Steam Excess P & I	1,109,918.88	
(d) Owner's Limited Liability		2,134,918.88
(e) Balance by London Steam Excess P & I		$ 1,813,291.44

Following the entry of judgment, Ingram and its two P&I underwriters made payments up to Ingram's limited liability ($2,134,918.88).

London Steam-Ship challenged the portion of the District Court's judgment holding that underwriter liable for the amount ($1,813,291.44) of CZ's claim over and above Ingram's fixed limited liability ($2,134,918.88). The panel, by divided vote, affirmed that holding.

The P&I Coverage

For its protection against claims for damage to piers and other fixed (non-vessel) structures, Ingram, as chartered owner of the tug BIGELOW, had two P&I covers. The prime cover was with Cherokee, with the amount of insurance being specified as $1,000,000. London Steam-Ship, through A. Bilbrough and Company as managers, dove-tailing Cherokee's cover with a deductible franchise of $1,000,000, supplied an excess P & I cover in accordance with its Rules.

Louisiana Enters the Fray

In what at one time was thought to be the tranquil waters of *Jensen* [3] with its jealous guard of admiralty uniformity unsettled by *Wilburn Boat*[4] and the intrusion of state laws into these sacred waters, our problem comes about by the Louisiana Direct Action statute, La. R. S. 22:655.[5]

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[3] *See Southern Pac. Co. v. Jensen,* 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917).

[4] *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955).

[5] § 655. *Liability policy; insolvency or bankruptcy of insured; direct action against insurer*

> No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or

This statute, as its name implies, allows a direct action against a liability insurer for Louisiana-incurred damages. But the statute does not create new Louisiana liabilities. On the contrary, by its own terms, reinforced by Louisiana judicial decisions, the statute imposes liability on the insurer subject "to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State."

II.

In our much discussed decision of *Olympic Towing Corp. v. Nebel Towing Co.*,

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> bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, *and an action may thereafter be maintained within the terms and limits of the policy by the injured person*, or his or her survivors mentioned in Revised Civil Code Article 2315, or heirs against the insurer. The *injured person* or his or her survivors or heirs hereinabove referred to at their option, *shall have a right of direct action* against the insurer *within the terms and limits of the policy*; and such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Art. 42, Code of Civil Procedure. *This right of direct action shall exist* whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and *whether or not such policy contains a provision forbidding such direct action*, provided the accident or injury occurred within the State of Louisiana. *Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State*. It is the intent of this Section that *any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured*, provided the terms and conditions of such policy or LY contract *are not in violation of the laws of this State*.
>
> It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insured or additional insureds under the omnibus clause, *for any legal liability said insured may have as* or for *a tort-feasor within the terms and limits of said policy*. Amended by Acts 1958, No. 125; Acts 1962, No. 471, § 1.

LA. REV. STAT. ANN. § 22:655 (West 1978) (emphasis added).

419 F.2d 230, 1969 A.M.C. 1571, *rehearing denied*, 419 F.2d at 238 (5th Cir. 1969) (en banc), *cert. denied*, 397 U.S. 989, 90 S. Ct. 1120, 25 L. Ed. 2d 396 (1970), the Court relied in part on the Louisiana Direct Action Statute to affirm the District Court's award of judgment in excess of the limitation value against the underwriter of the vessel at fault.

The P&I policy in *Nebel Towing* did not by its terms limit the insurer's liability to the vessel owners' limited liability. That meant that the P & I underwriter, in its effort to limit its liability, had to contend that as the insurer it had the right to claim the vessel owner's *statutory* right to limit its liability.

In holding the statutory limitation right unavailable to the insurer, the *Nebel Towing* court reasoned as follows: the enigmatic but undeniable *Cushing*[6] decision declined to hold the Louisiana statute to be preempted by the paramount federal maritime power. Therefore, the Court tested the insurer's claim of entitlement to the shipowner's statutory right to limit liability according to the law of Louisiana. The insurer attempted to rely on a clause in its policy limiting its liability to "such sums as the assured * * * shall have become legally liable to pay and shall have paid on account." This no-action clause, however, directly ran afoul of the Statute.

> The statute simply voids any policy clause which conditions the right of the injured person to enforce against the insurer its contractual obligation to pay the insured's debt upon, as prerequisite, the obtaining by the injured person of a judgment against the insured.

Hidalgo v. Dupuy, 122 So. 2d 639, 644-45 (La. App. 1960), *quoted in Nebel Towing*, 419 F.2d at 237.

The *Nebel Towing* court also held that the limitation of liability defense was a defense "personal" to the shipowner and could not be availed of by the insurer. *See* LA. CIV. CODE ANN. art. 1801 (West 1985); note 15 *infra*. As we discuss below, this holding was the result of a flawed analogy to Louisiana immunity law and was wholly unnecessary to the *Nebel Towing* decision. . . .

III.

Out of the Fog of Nebel Towing

It is here that we must part ways with *Nebel Towing*. In a nutshell, the distinction between this case and *Nebel Towing* is a simple one. *Nebel Towing* dealt solely with the contention that the P&I underwriter was entitled to the shipowner's *statutory* right to limit liability. ***Here the claim is quite different: the P&I underwriter is claiming only that, as prescribed by the Louisiana Direct Action

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[6] *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 74 S. Ct. 608, 98 L. Ed. 806, 1954 A.M.C. 837 (1954).

Statute, the terms of its own insurance policy limits maximum liability to the dollar amount for which the shipowner-assured would be liable upon successfully maintaining the right to limit its liability. The P&I underwriter is not claiming the *statutory* right to the assured. To the contrary, it is here claiming only the limitation of the insurance policy defense itself. As we explain below, this policy limitation cannot be contrary to Louisiana law nor to the public policy of the state.

London Steam-Ship Coverage

London Steam-Ship (known in the parlance as a "P&I Club")[7] promulgated rules which defined its liabilities and defenses.

The uncontradicted record traces the history of London Steam-Ship Rules from 1881-82, when liability was fixed at 30 per entered ton with a limit of 3000 tons, to 1952-53, when the maximum of 3000 entered tons was deleted. The Club realized that, in this day and time of almost unlimited, astronomical liabilities with aggravated uncertainties as to the shipowner's ability successfully to maintain the statutory right to limit liability and the practical demands of its shipowner members, it was faced with the problem of determining in what manner its total liability exposure could be expressed. Beginning in 1955--long before *Nebel Towing* was decided--this was handled by Rule 8(i):

> When a Member for whose account a ship is entered in this Class, is entitled to limit his liability, the liability of the Class shall not exceed the amount of such limitation. . . . [8]

In sharp contrast to the situation in *Nebel Towing* in which the P & I claimed only the right to a *statutory* defense, London Steam-Ship's excess P & I policy by Rule 8(i) has a policy term which limits its liability to that of the owner's limited liability. This is a *policy* not a *statutory* defense. The P & I insurer is not claiming the owner's *statutory* right to a shipowner's limited liability, but merely the right to assert its *policy defense*. [9]

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[7] By the deposition of John Hawkes, director of Bilbrough, it is uncontradicted that London Steam-Ship, the "Club," is an association composed of a number of members, all of whom are shipowners, who "severally and individually, not jointly nor in partnership, nor the one for the other of them, but each only in his own name" agree to protect and indemnify *each other* in respect of the vessel entered for protection and indemnity risk in accordance with the Rules of the association.

[8] Rule 8(i) continues to cover the situation in which a vessel is entered for part, not full, tonnage:

> . . . or, if the ship is not entered for her full tonnage, such proportion of the said amount as the entered tonnage bears to the gross registered tonnage. . . .

[9] The closest the *Nebel Towing* P&I policy came to Rule 8(i) was in the clause quoted in

Since there can be no question that Rule 8(i) is one of the ". . . lawful conditions of the policy or contract," it brings us face to face with the critical provision of the Louisiana Direct Action Statute that "any action brought hereunder shall be subject to . . . the *defenses which could be urged by the insurer to a direct action brought by the insured. . . .*"

Direct Action

***The decisions of the Louisiana courts have been as unambiguous as the language of the Direct Action Statute itself: there must be a legal liability on part of the assured for the insurer to have a direct action liability.In *Burke v. Massachusetts Bonding & Insurance Co.*, 209 La. 495, 24 So. 2d 875 (1946), the question was whether under the law of Mississippi a wife had a right of action against her husband's Louisiana liability insurer for a tort that her husband committed against her in Mississippi. The Louisiana Supreme Court stated:

> The statute does not give plaintiff any more rights than she has under the law of Mississippi. It only furnishes her with a method to enforce in Louisiana whatever rights she has in Mississippi. Since she has no cause of action under the law of Mississippi, necessarily Act No. 55 of 1930 confers upon her no cause of action in Louisiana. The mere fact that under the statute plaintiff was able to obtain jurisdiction against her husband's liability insurer in a direct action in this State does not create, as against her husband, *or as against her insurer*, a substantive cause of action that does not exist under the law of the State where the wrongful act occurred.

24 So.2d at 877 (emphasis added).
See also Ruiz v. Clancy, 182 La. 935, 162 So. 734, 735-36 (1935):

> The statute does not purport to interfere with the right of an insurance

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that court's note 22 (*see* 419 F.2d at 236 and requoted note 17, dissenting opinion, 745 F.2d at 1004) which provided:

> It is expressly understood and agreed *if and when* the assured has *any interest other than as a shipowner* in the vessel named herein, in no event shall this Company be liable hereunder to any greater extent than *if the assured were the sole owner and entitled to petition for limitation of liability* in accordance with present and future law.

(Emphasis added)

This clause applied only to the suppositional situation of the assured having an interest other than as a shipowner in the vessel. This suppositious condition could have had no significance in *Nebel Towing* since it was uncontradicted that the insured vessel was under bareboat charter to the assured which the Court properly considered as an owner. *See* 419 F.2d 230, 231 n. 1.

> company to limit the so-called coverage, "in any policy against liability," to liabilities imposed upon him [the assured] by law," as this policy provides. *An insurance company therefore, may*--as the company did in this instance--*limit the coverage, or liability of the company, to pay only such sums as the insured shall become obligated to pay by reason of the liability imposed upon him by law*. The attorney for the insurance company contends that the statute would interfere with the freedom of parties to enter into contracts, and would be therefore unconstitutional, if it forbade insurers to limit their so-called coverage in liability insurance policies, so as to cover only the legal liability of the insured. The statute does not purport to do that, by merely giving an injured person a right of action against the insurer, and by compelling the insurer to respond--*within the limits of the policy*--to the obligation of the insured.

(Emphasis added).

In the face of these strong precedents, from both Louisiana and this Court, the contrary result reached in *Nebel Towing* cannot stand. The policy provision 8(i) (*see* note 8 and related text) is not couched as a claim to the shipowner's *statutory* right to limit liability. What--and all--it says is that we, the P&I underwriters, will pay up to but not beyond the assured's legal liability. Whatever the assured is liable for we will pay, 100% in full with no discount, but no more.

In the face of such a wholesome economic principle there is nothing in *Nebel Towing* that could lead this Court to say--as did the panel and concurring opinion, 745 F.2d 998,--that this is contrary to public policy or, in the words of § 655 "in violation of the laws of [the] state." *See* note 5 *supra*. From the standpoint of Louisiana's concern--reflected in § 655--about the injured victims of a tort, how could an insurance policy be more fair than to say: whatever your (the assured's) liability, we will pay 100% in full without reduction?

And what, from the standpoint of fairness and Louisiana's public policy could be unfair about the P&I policies expressing the insurer's maximum liability, not in terms of dollars, [13] but rather in words which are plain and readily ascertainable;

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[13] Both *Nebel Towing* and the District Court below applied as perfectly valid the dollar limitation prescribed in the P&I policies. For example, the liability of Cherokee, the prime P&I policy, was limited to its stated $1 million coverage (*see* item (b), Table I above). We have obtained and carefully considered all of the record and briefs in *Nebel Towing* including the P&I policy. The P&I policy expressly provided (line 9) that the "amount hereby insured [is] $175,000 as per schedule [of vessels by name as covered], [and] the underwriter . . . hereby undertakes to pay up to the amount hereby insured . . . such sums as the assured, as owner of the [vessel covered] shall become legally liable to pay and shall have paid on account of [enumerated liabilities]." *Nebel Towing* did not impose any liability in excess of the $175,000 policy limit.

not in terms of contentions or hopes, but in words of a realized permanent judicial decision?

Nor is there any support to the theory that applying Rule 8(i) is contrary to Louisiana public policy because *Nebel Towing* held the limitation of liability defense "personal" to the shipowner. Influenced greatly by Judge Ellis' lengthy opinion in *Alcoa Steamship Co. v. Charles Ferran & Co.*,[15] the *Nebel Towing* court seized upon the idea of "personal defense" based on Codal Art. 2098.[16] The *Ferran* opinion listed examples of defenses considered "personal" under Louisiana law which could not be asserted by the insurer in a direct action suit:

> These defenses included infancy, LSA-Rev.Stat. 9:571 and *Rouley v. State Farm Mutual Automobile Ins. Co.,* 235 F. Supp. 786, 793 (W.D.La. 1964); coverture, *Edwards v. Royal Indemnity Co.*, 182 La. 171, 161 So. 191 (1935) and *Dumas v. United States Fidelity & Guaranty Co.*, 241 La. 1096, 134 So. 2d 45, 50 (1961); charitable immunity, *Lusk v. United States Fidelity & Guaranty Co.,* La. App., 199 So. 666 (Orleans 1941); and governmental immunity, *Brooks v. Bass*, La. App. 184 So. 22 (Orleans 1938), certiorari denied, November 28, 1938. As succinctly stated in *Simmons v. Clark, La*. App. 64 So. 2d 520 (1 Cir. 1953), "personal defenses are such as infancy, interdiction, coverture, lunacy, bankruptcy and the like." 64 So.2d at 523.

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[15] 251 F. Supp. 823 (E.D. La. 1966), *aff'd*, 383 F.2d 46 (5th Cir. 1967), *cert. denied*, 393 U.S. 836, 89 S. Ct. 111, 21 L. Ed. 2d 107 (1968). This case did not involve the problem of the Louisiana Direct Action statute *and* the federal limitation of liability act. The question was the validity of the traditional "red letter" clause in the ship repairer contract. This Court affirmed the holding that the clause was valid and effective as a defense resulting from the "nature of the obligation." 383 F.2d 46, 56 (5th Cir. 1967). The District Court's opinion concerning the *Cushing* case, "personal defense" and limitation of shipowners liability was dicta.

[16] Article 2098, in effect when *Nebel Towing* was decided, stated:

> A codebtor *in solido*, being sued by the creditor, may plead all exceptions resulting from the nature of the obligation, and all such as are personal to himself, as well as such as are common to all the codebtors.
>
> He cannot plead such exceptions as are merely personal to some of the other codebtors.

LA. CIV. CODE ANN. art. 2098 (West 1977).

This was reenacted as article 1801, effective January 1, 1985.

> A solidary obligor may raise against the obligee defenses that arise from the nature of the obligation, or that are common to all solidary obligors. He may not raise a defense that is personal to another solidary obligor.

LA. CIV. CODE ANN. art. 1801 (West 1985).

251 F. Supp. at 831. *Nebel Towing* then quoted from that opinion:

> Amongst these apparently varied "personal" defenses, one common denominator is discernible--each person possessing a "personal" defense obtained that defense because the law granted it to all members of his class as a matter of public policy. The personal defense attaches to the status. Hence parents, children, husbands, wives, governmental units, charitable organizations, bankrupts, lunatics, interdicts, vessel owners, and the like possess a defense denied their respective insurers.

419 F.2d at 238.

Not mentioned, but still another common denominator, is that in each of these instances the defense is more than that. The nonliability is an absolute immunity, an immunity extended to each of the respective classes and to all of the members of each class. Seen in that light, it is immediately obvious that the class of "vessel owners" does not belong on Judge Ellis' list.[17] The federal right of limitation of liability has been granted to certain vessel owners under certain circumstances as a matter of federal policy, but it is not an immunity. Even for those who satisfy its requirements, the Limited Liability Act recognizes a liability. All the act does is put a ceiling on damages. More importantly, the privilege is not available for all owners or operators of all ships or vessels for all liabilities.[18]

Even for those owners-operators who can qualify for limitation of liability, the limitation provides them with neither an immunity nor an assured defense. To obtain the benefit of the Act the owners must establish a right to it. That involves the always difficult--and often times impossible--burden of establishing that the casualty occurred without the owner's privity and fault, including prevoyage unseaworthiness. The books are filled with hundreds of cases denying limitation of liability.

IV.

Related to the concept of personal defense which serves as an additional ground

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[17] We are unable to find a Louisiana case that has held the federal right to limitation of liability to be a personal defense. In a footnote in *Danzy v. United States Fidelity & Guaranty Co.,* 380 So. 2d 1356, 1359 n.5 (La. 1980), the Louisiana Supreme Court mentioned our result in *Nebel Towing* as part of a lengthy survey of personal defenses but did not express its approval or disapproval of that result.

[18] There are a number of liabilities not subject to limitation. *See* 3 Benedict on Admiralty §§ 31-32 (A. Jenner 7th ed. 1985); *see also id.* § 33 (excluding so-called personal contracts which can include warranties, express or implied, as to seaworthiness, charter parties, ship repairers and suppliers).

for our decision is the fact that Rule 8(i) is a defense that is personal to London Steam-Ship. The defense asserted by London Steam-Ship is not a defense of Ingram, its assured. Indeed, London Steam-Ship is not asserting any defense of Ingram, the owner.

As a policy clause, Rule 8(i) is a defense personal to London Steam-Ship, the underwriter is a solidary obligor. Article 2098 allows a debtor to raise all defenses that "are personal to himself," as this policy defense certainly is. *See supra* note 15. London Steam-Ship may raise this defense without regard to whether Ingram's right to limit liability is a defense personal to it.

> Insurers may assert defenses which result from the nature of the obligation -- contributory negligence, assumption of risk, confusion, collateral estoppel and res judicata, for example, as well as those common to all co-debtors. . . . Additionally, *insurers enjoy and frequently assert defenses personal to themselves, such as coverage, policy limits,* and procurement by misstatement of material facts in the application.

Alcoa Steamship Co. v. Charles Ferran, Inc., 251 F. Supp. 823, 831 (E.D. La. 1966), *aff'd*, 383 F.2d 46 (5th Cir. 1967), *cert. denied*, 393 U.S. 836, 89 S. Ct. 111, 21 L. Ed. 2d 107 (1968) (emphasis added).

This result makes it unnecessary for us to decide whether, in view of the Supreme Court's enigmatic 4-1-4 decision for that day and time only in *Cushing v. Maryland Casualty Co.*, 347 U.S. 409, 74 S. Ct. 608, 98 L. Ed. 806, 1954 A.M.C. 837 (1954), there is yet a final decision on the constitutionality of the Louisiana Direct Action Statute *vis-a-vis* the federal shipowner's limitation of liability statute, 46 U.S.C. § 183 *et seq.*

Conclusion

Nebel Towing is overruled and the District Court is reversed with respect to the liability of London Steam-Ship for amounts in excess of Ingram's limited liability. In all other respects the District Court is affirmed.***

Chapter 11: Principles for Hull Policies

Hooper v. Robinson, 98 U.S. 528 (1878)

Justice Swayne . . . delivered the opinion of the Court.***

A policy like the one here in question, in the name of a specified party, "on account of whom it may concern," or with other equivalent terms, will be applied to the interest of the persons for whom it was intended by the person who ordered it, provided the latter had the requisite authority from the former, or they subsequently adopted it. 1 Phillips, Ins., sect. 383.

This is the result, though those so intended are not known to the broker who procures the policy, or to the underwriters who are bound by it. Id., sect. 384.
One may become a party to an insurance effected in terms applicable to his interest, without previous authority from him, by adopting it either before or after the loss has taken place, though the loss may have happened before the insurance was made. *Id.*, sect. 388.

The adoption of the policy need not be in any particular form. Any thing which clearly evinces such purpose is sufficient.

"It is now clearly established that an insurable interest, subsisting during the risk and at the time of loss, is sufficient, and that the assured need not also allege or prove that he was interested at the time of effecting the policy; indeed, it is every day's practice to effect insurance in which the allegation could not be made with any degree of truth; as, for instance, where goods are insured on a return voyage long before they are bought." 1 Perkin's Arnould, 238.

This is consistent with reason and justice, and is supported by analogies of the law in other cases. We will name a few of them.

A deed voidable under certain circumstances may be made valid for all purposes by a sufficient after-consideration. A devise to a charitable use may be made to a grantee not in esse, and vest and take effect when the grantee shall exist. The doctrine of springing and shifting uses is familiar to every real-property lawyer. They always depend for their afficacy upon events occurring subsequently to the conveyance under which they arise.

Where the insurance is "lost or not lost," the thing insured may be irrecoverably lost when the contract is entered into, and yet the contract be valid. It is a stipulation for indemnity against past as well as future losses, and the law upholds it.

Where a vessel insured for a stated time was sold and transferred, and was repurchased and transferred back within that time, it has been held that the insurance was suspended while the title was out of the assured, "and was revived again on the reconveyance of the assured during the term specified in the policy." *Worthington v. Bearse and Others*, 12 Allen (Mass.), 382.

A right of property in a thing is not always indispensable to an insurable interest. Injury from its loss or benefit from its preservation to accrue to the assured may be sufficient, and a contingent interest thus arising may be made the subject of a policy. *Lucena v. Craufurd et al.*, 3 Bos. & Pul. 75; S.C. 5 *id.* 269; *Buck & Hedrick v. Chesapeake Insurance Co.*, 1 Pet. 151; *Hancock v. Fishing Insurance Company,* 3 Sumn. 132.

In the law of marine insurance, insurable interests are multiform and very numerous.

The agent, factor, bailee, carrier, trustee, consignee, mortgagee, and every other lien-holder, may insure to the extent of his own interest in that to which such interest relates; and by the clause, "on account of whom it may concern," for all others to the extent of their respective interests, where there is previous authority or subsequent ratification.

Numerous as are the parties of the classes named, they are but a small portion of those who have the right to insure.

Where money is advanced, as in this case, for repairs and supplies to enable a vessel to proceed on her voyage, the lender has a lien, not on the cargo, but upon the vessel, and the amount of the debt may be protected by insurance upon the latter. Insurance Company v. Barings, 20 Wall. 163, and the authorities there cited If the owner of a vessel, being also the owner of the cargo, or the owner of the cargo, not being the owner of the vessel, procures a third person to make such advances upon an agreement that he shall be repaid from the cargo, and a bill of lading is furnished to him, he has a lien on the cargo for the amount of his advances, and may insure accordingly. Clark v. Mauran and Others, 3 Paige (N.Y.), 373; *Dows v. Greene,* 24 N.Y. 638; *Holbrook v. Wight,* 24 Wend. (N.Y.) 169. The assignment of a bill of lading passes the legal title to the goods. *Chandler v. Belden,* 18 Johns. (N.Y.) 157. The assignment of a debt, ipso facto, carries with it a lien and all other securities held by the assignor for the discharge of such debt. The Hull of a New Ship, 2 Ware, 203; Pattison v. Hull, 9 Cow. (N.Y.) 747; *Langdon v. Buel,* 9 Wend. (N.Y.) 80.

Where a lien subsists either on the vessel or cargo, a third party may pay the debt, and, with the consent of the debtor and creditor, be substituted to all the rights of the latter. Dixon on Subrogation, 163; *Garrison et al. v. Memphis Insurance Co.,* 19 How. 312; The Cabot, 1 Abb. (U.S.) 150. Where there is neither an agreement nor an assignment, there can be no subrogation, unless there has been a compulsory payment by the party claiming to be substituted. Sanfard v. McLean, 3 Paige (N.Y.), 117.

Recurring to the facts, there are two points upon which we deem it proper particularly to remark: --

First, We find no ground for any imputation of bad faith upon Hooper. We think there was no indirection and no purpose of concealment on his part. Before the insurance was effected, the underwriters had a clear right, if they so desired, to know for whom they were asked to insure. Buck & Hedrick v. Chesapeake Insurance Co., supra. They made no inquiry. This excused Hooper from making any communication upon the subject. When the insurance money was paid, although the face of the policy and other facts, patent and notorious, which must have been known to the underwriters, showed clearly that the advances were made, and that the insurance was effected by Hooper, not for himself, but for others, the underwriters were again silent. The draft on Good Brothers & Co. had then been sold, and Hooper had received the money. Thereafter he had nothing at stake but the solvency of the drawees. When the adjuster, more than a month later, made the inquiry, which should have been made before, Hooper had paid over the money. He then made a frank and full disclosure. We see no reason to doubt that if the inquiry had been made earlier it would have been answered in the same way. In this respect the underwriters have themselves to blame rather than Hooper. The record discloses no ground upon which, ex equo et bono, he can be called upon to pay back the fund in controversy.

Second, it does not appear in the record to whom the vessel and cargo belonged. There is not a ray of light upon the subject. In that respect the case is left wholly in the dark.

The proof as to who were intended to be insured is that they were Good Brothers & Co., and no one else, though, according to the terms of the policy, payment in the event of loss was to be made to Hooper & Co. The former fact is established by the testimony of Hooper, and there is none other upon the subject. He is unimpeached, and his testimony is conclusive. The inquiry then arises, whether Good Brothers & Co. had any insurable interest in the cargo. It does not appear whether they had or had not. We have suggested several ways in which such an interest may have arisen, and have shown that under the policy in question it would have been sufficient if it had subsisted at any time before the loss was known to them. It may possibly have arisen in other modes. This brings us to the question of the burden of proof. Did it rest upon the plaintiffs or upon the defendant? In order to maintain the plaintiffs' case it was necessary to be made to appear that Good Brothers & Co., the assured, had no insurable interest in the cargo, the cargo being the thing insured.Upon both reason and authority, we think the onus probandi was upon the plaintiffs.

It was for them to make out their case. The premium had been paid, the loss had occurred, and the indemnity money had been received by the agents of the assured and paid over to their principals. The plaintiffs claim the right to go behind all this, and to reclaim from Hooper the fund thus received and parted with. It was incumbent upon them to establish every thing necessary to entitle them to recover, and they have no right to throw upon the defendant any part of the burden that belonged to themselves.For authorities upon this subject see 1 Greenl. Evid., sects. 34, 35, 80, 81, and the notes. Such is the legal result, notwithstanding the negative form of the averment, to be established.***

Seaman v. Enterprise F. & M. Insurance Co., 18 F. 250 (C.C. E.D. Mo. 1883).

McCrary, Circuit Judge**:**

This case is before the court upon a demurrer to the petition. The demurrer presents the question whether a stockholder in a private corporation has such an interest in the corporate property as will authorize him to take a policy of insurance for the protection of his interest; in other words, whether he has an insurable interest in the corporate property. The cases in which the question as to what is an insurable interest has been discussed are numerous, and I do not propose to cite or comment upon them here. It is sufficient to say that the tendency of the modern adjudications on the subject is in the direction of holding an insurance company responsible in every case where the insured has any such interest in the subject-matter of the insurance as would subject him to pecuniary damage or loss in the event of its destruction.

It is not necessary that the party who takes out the policy should have any title to the property insured; it is sufficient if he has such an interest in it as that by its destruction he would suffer pecuniary loss. There have been a great many attempts to define what is and what is not an insurable interest, and a great many cases, as I have said, in which that question has been discussed; but I think that what I have stated is perhaps the result of the great weight of the authority upon the subject; at all events, it is, in our opinion, the correct definition of an insurable interest.

It only remains, then, to determine whether [a stockholder in a corporation may have such an interest as I have indicated. We are very clearly of the opinion that he may. It is true that the title to the property is in the corporation; that the beneficial interest is in the stockholders of the corporation. The stock of a corporation represents its property, and is evidence of the right of the stockholder to receive the profits and increase of the corporate property. It is a very plain proposition, in our judgment, that the destruction of the corporate property may entail pecuniary loss upon the stockholder, and therefore that he has a right to insure his interest as such stockholder. In this case the property was a steam-boat, and the insured was the holder of a portion of the stock, which entitled him to three-sixteenths of the corporate property. He took a policy of insurance upon that interest, valued at $4,000. Some question has been raised as to the measure of damages. It has been insisted on the part of the defendant that the corporation may be insolvent; that there may be many debts which must be paid before a stockholder can receive any dividends; and that, therefore, his interest may be nothing. We reserve all questions of this character until the trial of the cause, simply saying now that the loss of the policy-holder must be shown upon the trial by competent evidence. It is also suggested that there may be a difficulty growing out of the fact that the insurance company would be entitled to be subrogated to the rights of the stockholder, in case they pay the loss. As to whether there is a right of subrogation it is not necessary now to determine; but, if there is such a right, we have no doubt that a court of chancery possesses ample power to enforce it. The adjudications referred to, in so far as they have dealt with this question, sustain the view of the court that stockholders in a corporation may have an insurable interest in the corporate property. There have not been many cases going directly to that point, but we think it is within the authorities, and well supported by the reason of the case.***

Saskatchewan Government Insurance Office v. Spot Pack, *Inc.*, 242 F.2d 385 (5th Cir. 1957)

John R. Brown, Circuit Judge:

Pressing successfully its claim under the quaint language, 'Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints, and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, & c., or any part thereof * * *,' for destruction of the fishing vessel M/V Spot Pack by fire at sea, the Owner Spot Pack, Inc., now resists the appeal by the Underwriters.***

The M/V Spot Pack, a converted Navy AMC minesweeper, had two diesel-driven generators, port and starboard. Installed originally to supply power for exploding magnetic mines, these generators supplied the power for all of the auxiliaries and the extensive refrigerated spaces needed and installed for the catch. She had, from September 1953 to March 1954, undergone extensive repairs at a Miami shipyard consequent upon a fire in her engine room. Extensive renewals, replacements and repairs to the electrical system were made. She left shipyard on March 17, 1954, bound for her first fishing voyage to Campeche Banks in a condition characterized, without dispute, by acknowledged experts as completely seaworthy. While going down the coast, the Engineer noticed that the magnetic coil of the starboard circuit breaker between the starboard generator and the panel was overheating badly. When the vessel put in at Key West, the Master reported this to the Owner's president by long distance. The Owner relayed this by telephone to the Electrical Contractor who had performed all of the electrical work in the shipyard. The contractor unequivocally informed the Owner that it would be all right and safe to operate with the circuit breaker out and bridged over and requested that it be removed, taken ashore and sent to them for overhaul, which was done. The Owner, by long distance, relayed to the Master the contractor's assurances that the vessel could be operated safely in the interim.

The vessel then proceeded to the Banks and after a poor catch, returned a few weeks later to Key West where, on receipt of information from the Owners that it, repaired and ready for installation, was then ashore, the circuit breaker was redelivered to the ship. The Master and Engineer, each licensed, experienced and of undisputed competence, after some consideration decided that, while reinstallation could easily be done within a few hours by the Engineer, it would be more convenient (and less arduous for them, no doubt) to wait until the vessel next returned to Miami where it would be done by an electrical contractor.

The vessel, with the repaired circuit breaker aboard, but uninstalled, then put to sea for a short fishing voyage during which both port and starboard generators, as on the Campeche trip, were alternately used without reported difficulty. On return, a few days later, to Key West, the Master, reporting by long distance to the Owners concerning the voyage, informed the Owner that some difficulty had been encountered with the refrigeration, but there is absolutely no evidence that the Owner was informed or knew then, or later, that the circuit breaker had not been reinstalled.

Within a few days she departed on her last voyage with the circuit breaker aboard, but uninstalled. In the darkness of April 28, 1954, with the starboard generator operating, but with no one in the engine room since she was wheelhouse controlled, the automatic bilge alarm rang, and immediately heavy smoke was seen pouring out of the engine room. Fire and smoke cut off access to the engine room and under deck spaces. Abandoned in a matter of hours, she burned to the water's edge and sank, carrying to her watery grave whatever evidence there might have been as to the source or cause of the fire, the place or location of its origin, and, if from electrical equipment, whether it was the generators, port or starboard, or anyone of the innumerable auxiliaries or their circuits.***

Assuming that prudent management required a circuit breaker in the line, it would be the sheerest guesswork to say that fire started in the starboard generator or in any part of the electrical system because of the absence of the circuit breaker. And had such a finding been made initially or on the requested rehearing, it would have foundered as clearly erroneous, *United Geophysical Co. v. Vela,* 5 Cir., 231 F.2d 816; *Galena Oaks Corporation v. Scofield,* 5 Cir., 218 F.2d 217.

This inexorable finding is decisive for, unlike *Continental Insurance Co. of City of New York v. Patton-Tully Transportation Co.,* 5 Cir., 212 F.2d 543, 1954 A.M.C. 889; *Ideal Cement Co. v. Home Insurance Co.,* 5 Cir., 210 F.2d 937, 1954 A.M.C.

663, and *Hanover Fire Insurance Co. v. Holcombe,* 5 Cir., 223 F.2d 844, 1955 A.M.C. 1531, certiorari denied 350 U.S. 895, 76 S.Ct. 154, 100 L.Ed. 787, where each policy contained an express warranty of continuing seaworthiness which was patently breached thus giving the double-bottomed defense of avoidance of the whole policy and a negation of damage from an insured peril, the insurance contract on the M/V Spot Pack, under an American Institute Time (Hulls) from for the period February 22, 1954 to February 22, 1955 was completely silent on warranties of seaworthiness. If seaworthiness was an ingredient of the contract, it has to be implied and, more important, the time the implied warranty attaches and its scope must be fixed.

The English Rule is clear that in a time Hull policy such as this one, there is no '* * * warranty that the vessel at any particular time shall have been seaworthy * * *' but 'If, however, through the personal misconduct of the owner, the ship be sent to sea in an unseaworthy state, he cannot recover for a loss brought about by such wilful act or default.' 2 Arnould, Marine Insurance (13th Ed. 1950), 697, pp. 637-638.

But the American Rule, in a rare departure from a determined course of parallel uniformity, *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.,* 263 U.S. 487, 44 S.Ct. 175, 68 L.Ed. 402, implies for a time policy, as does the English Rule as of the commencement of the voyage for voyage policies, 2 Arnould, op. cit. *supra,* 691, 695, a warranty of seaworthiness as of the very moment of attachment of the insurance. And, unlike the English Rule which limits the warranty to the commencement of the voyage, the American Rule takes it somewhat further to extend, in point of time, a sort of negative, modified warranty. It is not that the vessel shall continue absolutely to be kept in a seaworthy condition, or even that she be so at the inception of each voyage, or before departure from each port during the policy term. It is, rather, stated in the negative that the Owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition. And, unlike a breach of a warranty of continuing seaworthiness, express or implied, which voids the policy altogether, the consequence of a violation of this 'negative' burden is merely a denial of liability for loss or damage caused proximately by such unseaworthiness.

How this came to be the rule of general acceptance for all Time policies is obscure, for traced as it apparently is to expressions in *Union Insurance Co. of Philadelphia v. Smith,* 124 U.S. 405, 8 S.Ct. 534, 31 L.Ed. 497, there seems to have been slight critical awareness that the policy in Union contained not alone an express warranty of seaworthiness, but an express exclusion of losses caused by unseaworthiness or by incompetence of Master and Mariners, which might imply a contractual undertaking for a continuing obligation by Master and crew members acting generally as agents for the owners to take all prudent requisite steps to keep the ship seaworthy. But we need not determine whether, and to what extent, the rules should be different for a Time policy, as the one here, carrying, at most, an implied

warranty, for the Underwriter cannot meet the demands of the Union standard.
First, having the burden not only of proving unseaworthiness, Hanover Fire Insurance Co. v. Holcombe, supra; 21 Appleman, Insurance Law and Practice, § 12237, p. 120 (1947), but that such unseaworthiness (i.e., departing with circuit breaker uninstalled) was the cause of the loss, *New York & Porto Rico S.S. Co. v. Aetna Insurance Co., supra*; *Henjes v. Aetna Insurance Co., supra*, the Underwriter failed to sustain this burden.

Second, and of equal importance, assuming that departure with the circuit breaker uninstalled made the vessel unseaworthy, the proof shows nothing more than negligence on the part of the Master, Engineer and crew in failing to use the simple means at hand to make her seaworthy. *New York & Porto Rico S.S. Co. v. Aetna Ins. Co., supra*. When Union speaks in terms of 'bad faith or want of ordinary prudence or diligence on the part of the insured or his agents,' it refers to those acts in which the owner, if an individual, personally participates, or if a corporation or multiple ownership, in which there is personal participation by those having shoreside managerial responsibilities.

Consistent with the general pattern of legislative and judge-made admiralty law which, to encourage and foster shipping and maritime ventures, *Hartford Accident & Indemnity Co. of Hartford v. Southern Pacific Co.,* 273 U.S. 207, 47 S.Ct. 357, 71 L.Ed. 612, 1927 A.M.C. 402; *Just v. Chambers*, 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903, 1941 A.M.C. 430, distinguishes between acts of those in supervisory management and in normal operation, an insurance policy, as a contract made in that general atmosphere to meet the business needs of the shipping industry, should receive a parallel construction that neglect by agents or servants below the level of management will not be imputed on the usual notions of respondeat superior. In such a Time policy, it is only '* * * where, with the privity of the assured, the ship is sent to sea in an unseaworthy state (that), the insurer is not liable for any loss attributable to unseaworthiness,' *Compania Transatlantica Centroamericana, S.A. v. Alliance Assurance Co., D.C.S.D.N.Y.,* 50 F.Supp. 986, 991, 1943 A.M.C. 976, 983.

Of course, in this analysis, we disregard altogether the negligence of the Master and Engineer, for fire, being a definite peril and the incontestable cause of the loss, is not the less covered because brought about or caused by such negligence.***
How then was the Owner charged with this neglect? The evidence, both admitted and that tendered in the affidavits supporting the motion for new trial, is completely silent showing actual knowledge. And so it is of circumstances from which a Court might infer such knowledge. The Underwriter's answer to this is substantially that the Owner was guilty of an independent personal fault (i.e., with its privity) in not ascertaining whether the circuit breaker had been reinstalled. Of course, the implications of this are far-reaching for it reflects the temptation, which the marvels of science -- the telephone, radio, easy access by airplane -- make so alluring, to navigate and manage a vessel, not from her bridge through the eyes,

ears, and judgement of the Master and those in his command, but from the security of a swivel chair in some remote skyscraper office. A Master is not one in name alone. He is Master in fact and commander of his ship, *United Geophysical Co. v. Vela, supra*; *Ionion Steamship Co. of Athens v. United Distillers of America, Inc.,* 5 Cir., 236 F.2d 78, 83, 1956 A.M.C. 1750, and if Courts succumb to the beguiling paternalistic plea that someway, somehow, the Owner ought to have checked to see if a duty was fulfilled, responsibility, thus divided, is undermined.

Specifically, what reason was there why the Owner should have anticipated that the competent Master would not have required the competent Engineer to perform this simple task? None save the assumption that it was of such extraordinary importance to the safety of the vessel that the Owner should have taken special pains. But if this were important, then what about bunkers, galley stores, slop chest, navigation charts, radio equipment, and hiring the hands who go down to the sea in ships? And if the Master's performance was to be checked, who was to check the checker?

This plea, as here made, would reduce a Master of undoubted competence to an inferior, subordinate functionary. The record affords no basis for denying that the Owner was entitled to assume that he would do his duty.

Finally, the Underwriter, seeking to shore up its claim of a running, continuing obligation to use due diligence to keep the vessel seaworthy and unable to find words remotely suggesting 'due diligence' elsewhere in the policy, insists that the Inchmaree Clause[5] expressly states it. But this is to read that Clause as a restriction of coverage and to ignore its rich history which reveals it and its several expansive

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[5] 'This insurance also specially to cover (subject to the Average Warranty) loss of or damage to the subject matter insured directly caused by the following:--

> 'Accidents in loading, discharging or handling cargo, or in bunkering;
>
> 'Accidents in going on or off, or while on drydocks, graving docks, ways, gridirons or pontoons;
>
> 'Explosions on shipboard or elsewhere;
>
> 'Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, (excluding the cost and expense of replacing or repairing the defective part); ***
>
> 'Negligence of Master, Charterers other than an Assured, Mariners, Engineers or Pilots;
>
> 'Provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them. Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel.'

amendments as the underwriters' response to the practical business needs of the shipping world in the face of adverse court decisions. As such, its purpose is to broaden, not restrict, to expand, not withdraw, coverage.

Indeed, the Clause is aid and comfort, not to the Underwriter, but to the Owner. It supplies additional perils 'Touching the Adventures * * * which * * * the * * * Underwriters, are contented to bear and take upon' themselves. Here, specifically, if the fire was, in a legal sense, the proximate result of the imprudent failure to reinstall the circuit breaker, it was plainly 'Negligence of Master * * * Mariners, (or) Engineers * * *.' And if, as claimed, the fire was immediately caused by an overloaded circuit or generator, it comes within the precise terms of 'loss of or damage to the (vessel) * * * caused by * * * Breakdown of motor generator or other electrical machinery and electrical connections thereto * * *,' [7] a specific item of coverage purposely added within the past few years to expand protection of the policy. Neither of these sweeping covers, on this record, is shrunk by the Proviso, note 5, supra, 'Provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them * * *.' By its language, context, purpose and specific terms which exclude the Master and crew members from the status of 'owners' even though they, in fact, own interests in the vessel, this, as in the discussion of the Union rule above, refers only to acts of which the owner had privity and knowledge.

The Inchmaree Clause adds a further thing of significance: to the extent that there is an implied undertaking that the vessel is not knowingly being sent to sea in want of equipment or repairs, . . . it is further reduced in scope if such unseaworthiness arises from the 'Negligence of Master * * * Mariners, Engineers or Pilots.' For this and other causes set forth in the Clause, e.g., latent defects, qualifies the implied warranties. *Eggers v. National Union Fire Insurance Co.,* 5 Cir., 112 F.2d 541, 1940 A.M.C. 1106.

The finding of liability was fully supported and the matters urged on the motion for new trial were utterly immaterial. The judgment was right.***

***Tropical Marine Products*, Inc. v. *Birmingham Fire Insurance Co.*, 247 F.2d 116 (5th Cir. 1957)**

John R. Brown, Circuit Judge:

This appeal by the shipowner tests the correctness of the adverse judgment of the District Court after a trial without a jury denying recovery under an American

[7] Technically, the cost of replacing the offending part, i.e., the one causing the fire, would likely be excluded . . . . This might have been as inconsequential as a short piece of wire, a defective switch, electric motor driving a refrigerator compressor, defective fuse, insulation, or the like. Neither party sought to pinpoint this nor is any complaint made of it by the Underwriter on this appeal.

Institute Time Hull Policy for a sinking from unknown causes. So uncontradicted are the facts, as found or as controlling, that the District Judge's findings of fact were an almost verbatim adoption of those proposed by the plaintiff Shipowner, the losing party. The case turned finally in the Judge's analysis upon successive presumptions.***

The policy was for the period August 14, 1953 to August 14, 1954. The vessel was valued at $ 30,000. The Sea Pak was a wooden hull vessel originally built for the United States Coast Guard. She was 71'7' long, 13'6' wide was drew 4'6' of water. In the summer of 1953, she had been overhauled in Miami and in August 1953 was in good condition and seaworthy. She Left Miami in August 1953 and was operated from that time until her loss in and around Caicos Islands in the Bahamas. She had not been hauled out of the water subsequent to August 1953, although she had been placed in shallow water and her bottom scrubbed on several occasions while she remained afloat.

The Sea Pak left Cockburn Harbour, South Caicos Islands, on August 9, 1954. It proceeded to a fishing anchorage in the lee of Long Key.· This was a distance of about eight miles. The fishing anchorage was protected from the prevailing winds and from the sea and the water, and the anchorage remained calm all the time the Sea Pak was anchored there. The vessel remained at anchor in about 15 feet of water in this protected area until approximately 5:00 a.m. on August 13. During this time the vessel was collecting conch from small skiffs that were fishing in that area.

At about noon on August 12, the Master noticed that the Sea Pak was beginning to take on an unusual amount of water and that the automatic pump was working more than normally necessary. During that afternoon and night the leaking became progressively worse. An inspection of the vessel revealed that the water was coming from underneath a refrigerated space in the forward part of the ship. Because of the construction of the interior of the vessel, the bilge underneath this area was inaccessible. Shortly before daylight on August 13, the Master felt that the leak had developed to such an extent that he should attempt to return to Cockburn Harbour.

As soon as it was daylight, or about 5:00 a.m., on Friday the 13th, the anchor was raised and the boat proceeded around the south end of Long Key into the open waters of Turks Island Passage in an effort to return to Cockburn Harbour. At this time, the sea on the wind-ward side of Long Key was choppy and there was a moderate breeze. These conditions were not unusual for that area and were not such as would ordinarily have caused the vessel any difficulty.

After the vessel got underway, the leak continued to get progressively worse and before the ship could reach Cockburn Harbour, the leak had progressed to such an extent that the vessel's engine was drowned out. The vessel then drifted back along the shoreline of Long Key until the Master ordered the crew to abandon her. The four men on board then rowed ashore in a 14' rowboat which was being towed astern of the Sea Pak and the Sea Pak eventually sank outside the 100 fathom curve. Because of the depth of the water, no salvage attempt was made.

The Court concluded, as both plaintiff and defendant urged and as the physical loss which destroyed all evidence required, that 'there is no explanation as to what caused the leak which resulted in the loss of the vessel.'

Proceeding apparently then from an implied application which was not spelled out of a presumption of unseaworthiness because the vessel developed a leak in these calm waters in the lee of Long Key, the Court held as a legal conclusion that in the face of this presumption, there was not a counter presumption that the loss came within the perils covered by the policy. The Shipowner contended that even though the sinking of the vessel in calm protected waters might give rise to an inference of unseaworthiness, proof of seaworthiness, here admitted, as of the inception of the risk, was sufficient upon which the usual presumption would operate that, in the absence of a showing that it occurred from an excepted peril, the loss was caused by a peril insured against.

The Underwriter argues that, accepting these cases urged by the Shipowner, the counter presumption that the loss was from an insured peril, does not arise unless the owner proves that immediately before the loss the vessel was in a seaworthy condition. On this it emphasizes that the Court held as a fact that the Shipowner had not shown that the vessel was seaworthy immediately prior to the developing of the leak.

But we think that the difficulty with this decision stems from the fact that, like the underwriter, the Court assumed that the policy only insured '* * * the vessel against loss from extraordinary occurrences and does not insure her against those ordinary perils which vessels must encounter * * *.' In the quaint language which persists in this ancient policy form, the *Calmar Steamship Corp. v. Scott,* 345 U.S. 427, 73 S.Ct. 739, 97 L.Ed. 1125, 1953 A.M.C. 952, with its 'Pirates, Rovers, Assailing Thieves * * * and Detainments of * * * Princes * * *,' the Court's opinion makes it plain that all he thought involved was the initial insuring clause which he quoted:

> 'Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, & c. or any part thereof.'

This was to overlook a substantial insurance undertaking which, history shows, *The Spot Pack, Saskatchewan Government Insurance Office v. Spot Pack, Inc.,* 5 Cir., 242 F.2d 385, 1957 A.M.C. 655; *Ferrante v. Detroit Fire & Marine Insurance Co., D.C.Cal.,* 125 F.Supp. 621, 1954 A.M.C. 2026, was added voluntarily by underwriters, (with successive amendments to meet like conditions) to expand protection to shipowners and thereby overcome court decisions favorable to an underwriter but which, the underwriting fraternity thought unrealistic and a denial of coverage reasonably needed. Personified by the name of the vessel giving rise to the decision, The Inchmaree clause, with almost ritualistic uniformity provides generally, and here, specifically:

> 'This insurance also specially to cover * * * loss of or damage * * * directly caused by the following:--
>
> 'Breakdown of motor generators or other electrical machinery and and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, (excluding the cost and expense of replacing or repairing the defective part);
>
> 'Negligence of Master, Charterers other than an Assured, Mariners, Engineers or Pilots;
>
> 'Provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them. * * *'

This affords both an additional series of perils insured against and markedly affects the warranties of seaworthiness between Shipowner and Underwriter.

The Court here apparently labored, as did so many so long under some sort of notion that the owner owed the duty to keep and maintain the vessel in seaworthy condition and consequently, to recover, the owner must establish this as a fact. Indeed, the point of departure· between the plaintiff's proposed and the Court's findings adopted was over the seaworthiness of the vessel immediately prior to the loss.

But as we, *The Spot Pack, Saskatchewan Government Insurance Office v. Spot Pack, Inc., supra*, and the *Second Circuit, New York, New Haven and Hartford R. Co. v. Gray,* 2 Cir., 240 F.2d 460, 1957 A.M.C. 616, *certiorari denied,* 77 S.Ct. 1050, 1 L.Ed.2d 915, by almost simultaneous decisions have recently pointed out, the owner's obligation under a Time Policy, as was this one, is extremely limited: the vessel is seaworthy at the attachment of the insurance, but henceforth it is a sort of negative warranty, i.e., the owner or those in privity with him will not knowingly send the vessel to sea in a deficient condition.

Here the most that was determined as to unseaworthiness of the MV Sea Pak was the Court's negative finding that the owner had not sustained its burden of proving seaworthiness. This is far from the opposite holding that the vessel was unseaworthy. On that, the Court did not make such a finding and perhaps for the reason that, on the record before him, it was doubtful that there was sufficient proof. There was evidence that two fishermen skindivers (not ship repairmen) made an underwater inspection a month or so before and drove in a few wooden plugs, but whether in blanked off auxiliary openings or elsewhere was extremely vague. One diver, who asserted that the bottom 'was all right,' also said that 'there was no paint on it, no paint that you would call paint.' But except for the prior inconsistent statements of the two crew members, note 8, supra, the evidence was uncontradicted from the current master and his immediate predecessor (who had left the vessel two weeks before her sinking for a vacation) that there were only the usual leaks one expects in a wooden hull vessel. The equivocal· evidence of the underwater activity of the skindivers was a circumstance which, with other evidence, could be used in drawing the competing inference that, on the one hand, this showed careful, prudent diligence in the maintenance of the vessel or, on the other hand, the existence of an unseaworthy condition. But standing alone, it was insufficient to prove unseaworthiness and the remainder of the record would not overcome this deficiency.

The only thing of substance, pressed so hard and successfully by the Underwriter on the Court, was a presumption, note 3, supra, not evidence, that when a vessel sinks in a calm protected harbour the cause, unless otherwise satisfactorily explained, must have been unseaworthiness.

But even though it is assumed that this rule would apply when the leak develops while the vessel is at sea and after it has left port, the Court attributed unwarranted consequences to it. On the findings, the leak developed after the vessel had been out three and one-half days. If it is assumed arguendo that when the Sea Pak left Cockburn Harbour on August 9, she was in an unseaworthy condition there is absolutely none that the Shipowner or anyone in privity with it knew of that. There was thus no breach of the limited warranty of seaworthiness nor of the insurance and it was effective. The Spot Pack, Saskatchewan Government Insurance, office v. *Spot Pack, Inc., supra*. When, as the Court found, the unseaworthy condition (leak) developed, after the vessel was at sea and there were then no means by which to remedy it, what happens to the insurance? Does it terminate at the very moment it is needed most? *Cf. Henjes v. Aetna Insurance Co.,* 2 Cir., 132 F.2d 715, 1943 A.M.C. 27, *certiorari denied*, 319 U.S. 760, 63 S.Ct. 1316, 87 L.Ed. 1711.

Indeed, far from voiding the policy, it was as to just such unseaworthiness that the policy was meant to apply. The Inchmaree clause insures against damage or loss occasioned by latent defects in machinery or hull. Of course, a defect in machinery or a defect in a hull means that the vessel is thereby unseaworthy since, with such defect, the machinery or hull, cannot comply with the classic definition of 'reasonably suitable' for the purposes intended. *The Silvia,* 171 U.S. 462, 19 S.Ct. 7, 43 L.Ed. 241; *Companía de Navegacion, etc., v. Fireman's Fund Insurance Co.,* 277 U.S. 66, 48 S.Ct. 459, 72 L.Ed. 787. The only limitation on this is that the defect be latent and one not known or discoverable by the owner or one in privy with him. This is so because, as we held in *Spot Pack Saskatchewan Government Insurance Office v. Spot Pack, Inc., supra*, the phrase 'Provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners, or Managers of the Vessel' does not include acts of the master or crew members merely imputed on notions of respondeat superior.

Here, of course, the owner was in the United States and on this record all was left to the master. There is no evidence that the nonresident owner had personal knowledge of this condition, whatever existed, or the necessity for any detailed drydocking, bottom inspection, scraping or repainting. The policy, as is so often the case, did not prescribe any requirement for drydocking or a routine period for drydocking. That there might have been testimony that the bottom paint was gone, and one surveyor faintly suggested that he thought the vessel should have been hauled out every six months or so to avoid action by wood-destroying worms (an opinion expressed without knowledge of the practice following in the Caicos Islands where the evidence indicated an absence of such wood borers) was not of that caliber essential to a holding that the Shipowner personally failed to take prudent steps.

The defect was certainly latent in a practical sense. The Court found that that is 'no explanation as to what caused the leak.' And all are unanimous that it was and could not be determined. As the leak was increasing, the master and engineer determined that it had to be coming from that part of the hull in way of the freezer compartment. There was positively no means of checking the inside of the hull in this space and, of course, lying at anchor eight miles from port, there were no facilities established for a worthwhile inspection or repair over the side.

Since cases should be decided on practicalities and not theoreticals, the fact that this record stands uncontradicted that the hull did not leak in this way, at this place, or in this quantity prior to departure from port August 9, or on any one of the intervening days up to the afternoon of August 12, demonstrates also that if, as some theorize, a butt (the joinder of the ends of two of the hull planks) sprung to permit the leak, there is no· basis for concluding that the defect could then have been discovered.

And if the matter is approached from the viewpoint that the Shipowner, without the benefit of any presumptions, must affirmatively establish that the particular defect was latent within the classic meaning of the term, the result is the same. Since the Underwriter's assertion of unseaworthiness is a claim that the hull was defective, it was either latent or not latent. If it was not discoverable prior to departure for sea by all known and customary tests, it was latent and covered under the policy. If, on the other hand, it is claimed that the proof showed that it was discoverable by prudent inspections, or that the proof failed to show that prudent inspection could not have revealed it, the result is that the defect was one which in prudence ought to have been discovered. On this hypothesis, it was the Master who should have discovered it. If the Master knew of the leak or the conditions likely to give rise to leaks, or if the Master, not knowing that, knew enough that he ought to have discovered this condition, it was his clear duty to his Shipowner to do all that prudence required to ascertain and correct such conditions. The record is uncontradicted that the Master was responsible for the current upkeep, maintenance and repair of the vessel while she was in the Islands, and that the Shipowner had approved all of this maintenance requirements. The Master's failure in carrying out this duty to his Shipowner was negligence and, under the Inchmaree clause, this too was specifically covered.

If the defect could have been discovered the resulting unseaworthiness was due to the Master's negligence; if it was not discoverable by him or Shipowner, it was latent. Either way the Underwriter turns, the loss is within his expanded coverage. To be remembered also is the fact that this vessel did not sink in a calm sea or in the harbour-like protection of the lee of Long Key. A leak developed there, and the leak became increasingly worse. But the sinking of the ship was the direct action of substantial seas with wind abeam, while running off the exposed precipitous coast of Long Key in the effort to make the port of haven. It was undisputed that with the butt sprung, the action of the vessel being pushed ahead by her own power, working against the seas, would open up the planks even further. While it is true that these seas were not tempestuous, it is just as true that it was the cruel sea working on a troubled hull which changed a possible sinking in fifteen feet of water at the fishing anchorage into an inevitable total loss as she sunk to the watery grave outside the 100 fathom curve.

When the leak was discovered the vessel, as we said above, still had insurance. Likewise, there was no duty owed the Underwriter not to attempt to make a port of haven. Negligence of the assured or his agent is no defense to a marine policy . . . . And if it is assumed that to attempt the voyage in the exposed sea with the vessel in this weakened condition was a negligent act, it inevitably was negligence of the master then in sole command who alone determined whether to attempt the perilous run for sanctuary rather than risk sinking in fifteen feet of water, or pressing her bow onto the sand shoals. But there again, the more palpable was the master's negligent choice of these alternatives, the more categorical it makes the Inchmaree liability for 'negligence of master.'

We cannot emphasize too strongly that, as was the purpose of the underwriters in making the change, the Inchmaree clause is an expansion of coverage of considerable magnitude. Unlike so many cases, *Union Insurance Co. of Philadelphia v. Smith,* 124 U.S. 405, 8 S.Ct. 534, 31 L.Ed. 497; *Continental Insurance Co. of City of New York v. Patton-Tully Transportation Co.,* 5 Cir., 212 F.2d 543, 1954 A.M.C. 889; *Ideal Cement Co. v. Home Insurance Co.,* 5 Cir., 210 F.2d 937, 1954 A.M.C. 663; *Hanover Fire Insurance Co. v. Holcombe,* 5 Cir., 223

F.2d 844, 1955 A.M.C. 1531, *certiorari denied,* 350 U.S. 895, 76 S.Ct. 154, 100 L.Ed. 787, where each policy contained an express warranty of continuing seaworthiness and an exclusion of losses caused by unseaworthiness, a Time Hull Policy with no warranty of continuing seaworthiness but with an Inchmaree clause does in fact underwrite unseaworthiness of many types.

If a vessel has become unseaworthy due to the negligence of master or engineer in the maintenance of the vessel, in putting to sea without adequate equipment, fuel or stores, or without making required repairs at outports where the master is the sole principal representative of the owners, the 'cause' is negligence and this is expressly underwritten. If there is an undiscoverable defect in hull or machinery, the resulting unseaworthiness or the damage caused by it[12.] is nonetheless covered. Consequently, this is not the simple case in which a loss due to unseaworthiness affords a double-barreled reason for nonpayment -- a defense based upon the breach of the warranty, express or implied, or as automatic proof that the loss arose from this rather than a specified peril (perils of the sea) insured against. For if the vessel really sank because the hull was unseaworthy, or by reason of the action of the sea on that unseaworthy hull, as distinguished from the action of the sea alone, this no longer automatically denies recovery. Recovery is denied now only if that unseaworthiness is one not caused or brought about by the various elements of the Inchmaree clause.

The judgment denying recovery is therefore reversed and here rendered for the plaintiff Shipowner.***

Continental Insurance Co. v. Patton-Tully Transportation Co., 212 F.2d 543 (5th Cir. 1954)

Borah, Circuit Judge:

This is an appeal by the Continental Insurance Company of the City of New York, the defendant in the District Court, and a cross-appeal by Patton-Tully Transportation Company and The Girod Company, plaintiffs below, in a civil action at law based on a policy of marine insurance.

[12.] Add to this the endless possibilities for other specific Inchmaree coverages not quoted in the excerpt above: 'Accidents in loading, discharging or handling cargo, or in bunkering,' e.g., damage to hull from use of unseaworthy winch, booms or cargo gear; damage to vessel during loading or discharging operations resulting from the unseaworthiness brought about by such operations, e.g., listing, faulty trim, overloading. 'Explosions on shipboard or elsewhere,' e.g., from accumulations of gases from unseaworthy valves or tanks, malfunctioning of pressure relief valves on air tanks, manifold headers, etc. 'Breakdown of motor generators or other electrical machinery and electrical connections thereto.' e.g., collision damage from failure of unseaworthy electrical steering engine.

Plaintiff Patton-Tully Company as owner, and Girod Company as charterer of two barges upon which the defendant had issued its River Hull policy of insurance for their account instituted this action against insurer to recover for the total loss of each barge the sum of $ 10,000, its agreed valuation, or an aggregate amount of $ 20,000. In their complaint it was alleged that one of the barges sank while being towed in the Mississippi River between Natchez, Mississippi, and Jackson Point, Mississippi, and that the other barge which was secured to the bank of the Mississippi River at Natchez broke loose from its moorings and was lost beyond recovery. In its answer, and on the trial of the cause, the insurer set up by way of defense that the barges were at all times and more specifically at the time of loss inherently unseaworthy; that neither barge was lost as a result of a peril insured against; and that as to each barge there had been a breach of the watchman's warranty. After a trial was had before the Court without a jury judgment was entered awarding plaintiffs the sum of $ 10,000 for the loss of the barge which sank in tow and denying them any recovery for the loss of the other barge. This appeal and cross-appeal followed.

The provisions of the policy on which defendant relies are the warranty of seaworthiness, the 'perils' clause, and the watchman's warranty, which are as follows:

'Seaworthiness. Warranted by the assured that the vessel hereby insured shall be in a seaworthy condition at the time of attachment of this insurance and shall be maintained in a seaworthy condition at all times. * * *

'Perils. It is the intent of this Company by this policy, subject to all its terms and conditions, to indemnify the assured for this company's proportion of all General Average Charges, Salvage Expenses and loss, damage or hurt to the vessel hereby insured caused by fire and the adventures and perils of the rivers and other waters that may be named herein, excepting always the following matters and things (which are excluded both as losses and causes of loss) and all claims for damage, expense or liability arising therefrom or caused thereby, viz:
* * * * * *

'2. Rottenness, inherent defects, and other unseaworthiness;
* * * * * *

'Watchmen. Warranted by the assured that the vessel hereby insured shall at all times have a competent watchman on board, except that when the vessel is laid up or moored at a regular landing she shall be in charge of a competent watchman.'

The questions here, as in the District Court, are whether the evidence respecting the two lost barges shows that their loss was caused by unseaworthiness rather than a peril insured against and whether there was a breach of the watchman's warranty.

There was evidence to show that the barges-- 155 feet long, 34 foot beam-- were built in the year 1912. They were compartmented riveted steel transverse frame barges of a type not built since about 1920, and were of 180 net registered tons with a capacity of 500 short tons. These old vessels had been in charterer's possession for fifteen months and were in use as gravel barges at the time of their loss. They were not classified in the United States Army Engineers' publications as barges suitable for this work, but as barges for logging operations, and it appears that on several occasions prior to their loss a dragline bucket had knocked holes in the barges which had to be repaired to prevent the vessels from taking water. While the charterer's president, Girod, testified that such repairs were promptly made and that the barges were maintained in good condition, the witness also stated that he had never been inside the vessels; that it was customary for charterer's employees to check the barges for leaks at the unloading dock by merely observing whether or not they listed when loaded; and he conceded that it was very easy to make the barges leak. Phyfer, charterer's superintendent who was in charge of loading and unloading the barges and responsible for their mooring, testified that he had been inside the barges an unspecified number of times; had found numerous leaks where wasted rivets had pulled through the plating and from small holes that had been knocked in the barges.

There was further testimony on behalf of Phyfer that approximately three months prior to the loss of the barge which was being towed, barge No. 11, he discovered that this barge was leaking and required constant pumping. A visual inspection on his part which was restricted to one of the four main compartments revealed a hole in the bottom shell plating about the size of a quarter. It appears that an effort had been made at some prior and undetermined time to shut off this leak and the crude expedient adopted was the placement of a wooden board over the aperture which in turn was held in position by a perpendicular wooden upright which extended to the under side of the deck where it was wedged in place. When this inspection was made it was discovered that the wooden upright had completely rotted away and collapsed and as a consequence there was an influx of water equivalent to the flow from a one inch pipe. Despite the condition found charterers did not place the barge in dry dock but were content to repair the damage with a 'paper patch' which consisted of tar paper, asphalt, sealing compound, over which was placed a one inch board which was secured by an upright timber which was driven in place. This second patch was in the vessel at the time of its loss.

In the condition described, barge No. 11 carrying a deck load of about 350 tons of gravel was on the morning of August 4, 1951, at 3:55 a.m. taken in tow by the towboat Betty. There was no evidence to show that the bilges were sounded or that any other inspection was made of the barge by anyone to determine its condition at and immediately prior to the time when it was taken in tow and no watchman was on board. When the tug and tow got under way barge No. 11 was lashed to the starboard side of another barge which the Betty was shoving. The crew of the tug consisted of one Captain Smoot and a deckhand. So far as the record shows neither of the crew members boarded the barge before or after getting under way. Captain Smoot of the tug Betty was the only witness to testify as to the place, time, manner, and cause of the sinking of barge No. 11. According to his story which he related at the trial the tug and tow proceeded downstream without incident up until the time that they met an ascending tug and tow in a bend in the river approximately five miles below Carthange Point. The ascending flotilla was then in the bend favoring the right bank and the Betty and her tow were running the point and holding as close thereto as possible without encountering the sand bar which protruded therefrom. Captain Smoot stated that he made every effort to keep away from the other towboat, which was of a type similar to Federal Barge Line vessels, but because of the narrowness of the channel in this bend of the river he was obliged to pass close to her. But as to the width of the river in this bend and as to how close he was to the ascending flotilla he does not say. According to his version he encountered waves that were 'big' and 'rough' but we find nothing in his testimony that would indicate that the waves from the passing vessel were any different from those which were normally to be expected or foreseen. If his testimony, which we think is pure afterthought, is to be believed, the wave wash caused barge No. 11 to buckle and the cargo to shift and run over the side. Whereupon the barge took on a heavy list and as this endangered the balance of the flotilla it was cut loose and beached in a sinking condition on St. Catherine bar.

Thereafter, and over a period ranging between one week and two months after the sinking, representatives of the insurer made several visits to the beached barge. The results of their inspections revealed that the barge's side plates were extensively pitted throughout with the port side plate immediately aft of No. 2, transverse bulkhead approximately ten inches above the bilge knuckle wasted through in five places; that numerous scattered rivet points were wasted away, rivets were loose in the way of side plates where visible, and scattered numerous rivets throughout the visible portion of the deck were out and missing. There were also scattered deck plating tears, apparently dragline bucket damage, of 4 to 5 inches noted throughout. In the interior two additional temporary roofing tar paper patches with board and timber braces were discovered, one covering a hole in the port side plating approximately two feet forward of the after bulkhead in No. 1 compartment, and the other covering a hole in the starboard side plating in No. 2 compartment. In addition, the hatches were found open, with none of the hatch covers in place and dogged down with gaskets under them. Many of the hatch covers were missing although some were lying on the deck alongside the hatch openings, and no hatch had in undamaged condition all of the studs used to hold the covers in place. In no instances were covering securing nuts observed on deck and the threads of the existing studs were badly corroded with indications that no nuts had been screwed thereon for a long period of time.

The District Judge found that the barge was fit, suitable and seaworthy for the business being carried on at the time the policy was issued and took effect. But what is here important is that plaintiffs did not limit themselves to a warranty of seaworthiness at the inception of the risk, but chose to add a warranty that seaworthiness would continue as long as the policy was in force, and we must take them at their word. In this connection the Court found (1) that the barge was sufficiently strong to have made the usual and ordinary voyages under the usual and normal conditions; (2) that it was the positive testimony of Smoot that the hatch covers were on at the inception of the voyage; and (3) that the barge would have completed its voyage without incident had it not encountered unusual and extraordinary waves. In finding that the hatch covers were in fact properly secured the Court attributed to Smoot a statement which he did not make. As to the findings that the barge was seaworthy and that the loss was attributable to unusual and extraordinary wave wash we think that the issue of seaworthiness was improperly resolved by failing to take into account the evidence which related to the physical condition of the barge and that the Court was not warranted in inferring from Smoot's testimony that waves 'big' and 'rough' were unusual and extraordinary. A careful review of the entire evidence has left us with the definite and firm conviction that a mistake has been committed and we hold that these fact findings may not stand. Nor may these findings be supported as a matter of law.

It is a fundamental principle of marine insurance that the insured vessel is warranted to be seaworthy. This means that it should be able to withstand ordinary stress of weather, wind and wave to which it may be expected to be subjected and with which it will ordinarily be confronted. *Compania de Navegacion, Interior, S.A., v. Fireman's Fund Insurance Company,* 277 U.S. 66, 48 S.Ct. 459, 72 L.Ed 787; Arnould on Marine Insurance, Vol. II (19th English Ed.) Sec. 710. If it be assumed that the waves from a passing towboat did cause and not as we think merely accelerate the sinking, the further question arises: Was it an extraordinary, abnormal occurrence against which the insureds could not protect themselves with ordinary precaution? Or was it a normal, customary circumstance that may occur every day? The passing of towboats along the Mississippi at the points in question is a normal occurrence that may be expected at any time. It was not extraordinary or unusual and according to Smoot he met and passed big towboats every day. It does not seem to us that displacement waves from a passing towboat are a 'peril of the river' against which the barge was insured. *Western Assurance Company v. Shaw,* 3 Cir., 11 F.2d 495.

The trial court further found that there was a watchman on board barge No. 11. This finding was based on the theory that the barges and tug were lashed together as a unit and under the continuous observation of the master and deckhand. We need not labor the point since the warranty of seaworthiness was breached and 'one breach is sufficient.' We deem it sufficient to say that we agree with the insurer that a warranty to have a watchman 'on board' at all times while the vessel is not moored is to be strictly construed, and that the warranty has been breached where there was not a watchman actually on board, though it may appear that the master and crew were present. *Home Insurance Co. v. Ciconett,* 6 Cir., 179 F.2d 892; *cf. Buckwalter v. Aetna Ins. Co. (The Dauntless),* 143 A. 90, 6 N.J.Misc. 770, 1928

A.M.C. 1430. For all of the aforementioned reasons, we think the insurer must prevail as to barge No. 11.

We come now to consider the second lost barge, which broke from its moorings between the hours of midnight and 2:30 a.m. on the morning of August 5, 1951. There was no eyewitness to the occurrence. What caused the breaking of the one and one-half inch mooring lines is left entirely to inference as the lines were not produced at the trial in response to the call for their production. Nor is there any clear indication as to where or under what circumstances the vessel sank, for all that appears is that its stranded hulk was found bottom up on a sand bar 48 miles below Natchez several months thereafter. The record cannot however be taken as affording no indication of the cause of sinking since the vessel was in the deteriorated and leaking condition heretofore described. Furthermore, the evidence shows that the barge was listing at the time when it was moored to the landing, at which time it had about a foot and a half freeboard and was loaded with 280 yards of gravel. This being the situation, remedial action under the inspection rules of the charterer was demanded. However, it appears that nothing was done to correct this condition although on the night in question the barge was intermittently under the observation of the charterer's mechanic, Kilgore, who made his rounds about every two and a half hours and between visits repaired motors in a shed a quarter of a mile from the water's edge. The evidence shows that Kilgore did not go on board the barge or sound its bilges and while he testified that the vessel looked all right to him when he flashed his light on it around midnight, there is no showing that he had any knowledge of barges which would render him 'competent' in such matters as required by the policy. Indeed, Kilgore testified that he had been a motor mechanic and welder all his life.

On this record it is clear, and the Court so found, that the barge was not shown to be seaworthy and that the mechanic Kilgore was not a watchman within the terms of the policy. It is also apparent that plaintiff's contention that the barge sank from a peril insured against is without support in the evidence.

The burden of proof was upon plaintiffs to show that the loss occurred by perils of the river, and that they had in all respects complied with the terms and conditions of the policy. This they failed to do. *Swan v. Union Insurance Co.,* 3 Wheat. 168, 16 U.S. 168, 4 L.Ed. 361; *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.,* 136 U.S. 408, 10 S.Ct. 934, 34 L.Ed. 398.

The judgment of the District Court that plaintiffs have and recover from defendant the sum of $10,000.00 with interest and costs for the loss of barge No. 11 is reversed. As to that portion of the judgment which holds that plaintiffs shall recover nothing for the loss of steel barge No. 22 or 23 the judgment is affirmed.***

Gabarick v. Laurin Maritime (America), Inc., 2009 AMC 807 (E.D. La. 2009)

Africk, District Judge:

ORDER AND REASONS

Before the Court is a Rule 12(c) motion for judgment on the pleadings filed by American Commercial Lines LLC and American Commercial Lines, Inc. (collectively "ACL"), seeking to dismiss the complaint for interpleader and declaratory relief filed by Indemnity Insurance Company of North America ("IINA"). For the following reasons, ACL's motion is **GRANTED IN PART AND DENIED IN PART**.

BACKGROUND

On July 23, 2008, the M/V TINTOMARA and the Barge DM-932, which was being towed by the M/V MEL OLIVER, collided on the Mississippi River, causing oil to spill into the river. As a result, several lawsuits were filed against ACL, the owner of the barge, DRD Towing Company, Inc. ("DRD"), the operator of the towboat, and Whitefin Shipping Co., Ltd., Laurin Maritime (America), Inc., Laurin Maritime AB; and Anglo-Atlantic Steamship Limited (collectively "the TINTOMARA interests"), the owners of the M/V TINTOMARA. The parties have filed four limitation proceedings with respect to these vessels.

IINA issued an insurance policy to DRD, in effect at the time of the collision, which included Hull and Machinery coverage for damage to vessels identified in the policy's schedule/description of vessels. The policy also provided Protection and Indemnity (P&I) coverage for "costs, charges, and expenses reasonably incurred and paid by the Assured in defense against any liabilities insured against...in respect of the vessel named herein." ACL contends that it is an additional insured under the policy.

Following a demand from DRD for security, a demand from ACL for defense and indemnification, and demands from two law firms for defense costs, IINA initiated an interpleader action in this Court, pursuant to Rule 22 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1335, naming as defendants ACL, DRD, law firms retained by DRD and another entity on behalf of DRD, and several plaintiffs who had filed class actions against DRD and ACL for economic and compensatory damages. IINA seeks an order from the Court enjoining the defendants from instituting or prosecuting any proceeding affecting the IINA policy.

In its interpleader complaint, IINA alleges that its Hull and Machinery policy limits for the M/V MEL OLIVER are $850,000 and its P&I policy limits are $1 million per accident. In light of competing demands on its P&I policy by various parties and IINA's "doubt as to which, if any, of the claimants is entitled to be paid", IINA deposited $985,000, after deducting the $15,000 deductible, into the registry of the Court.

IINA's complaint also requests that the Court declare, pursuant to 28 U.S.C. §2201, whether it has a duty to defend or indemnify DRD and ACL.In particular, IINA requests that the Court declare (1) that the barge is not a covered vessel under the policy, (2) that any losses due to a breach of the warranty of seaworthiness or a want of due diligence by the insureds are not covered under the policy, (3) that claims against ACL or DRD for punitive or exemplary damages are not covered under the policy, and (4)that many claims against ACL and DRD are excluded from coverage under the American Institute Pollution Exclusion Clause and Buy Back Endorsement A of the Policy. In the event that the Court finds that the IINA policy covers claims by or against DRD or ACL, IINA requests that the Court declare that its liability cannot exceed the $ 985,000 P&I policy limits.

ACL filed this motion to dismiss IINA's interpleader action on the basis that IINA may not avoid its obligation to defend by initiating an interpleader action and depositing its policy limits. ACL also contends that IINA is not entitled to a declaratory judgment finding that the barge is not covered under the policy or that coverage is excluded for any losses due to unseaworthiness. ***

B. Action for Declaratory Relief

1. The Implied Warranty of Seaworthiness

As part of its complaint, IINA seeks a declaratory judgment that the policy excludes coverage for any loss sought by DRD and ACL that resulted from a breach of the warranty of seaworthiness. ACL, however, contends that such argument should be dismissed because P&I policies, unlike Hull & Machinery policies, do not imply a warranty of seaworthiness.

"A warranty of seaworthiness by the owner is implied in every hull insurance policy unless expressly waived." *Ins. Co. of N. America v. Bd. of Comm'rs of Port of New Orleans,* 733 F.2d 1161, 1165 (5th Cir. 1984). A breach of this warranty results in "denial of liability for loss or damage caused proximately by such unseaworthy-ness." *Id.* However, courts have found that this implied warranty does not extend to P&I policies. *See, e.g., Sorenson v. Boston Ins. Co.*, 20 F.2d 640, 643 (4th Cir. 1927); *Texaco, Inc. v. Universal Marine, Inc.,* 400 F. Supp. 311, 322-23 (E.D. La. 1975) (Gordon, J.). Another section of this Court has explained that implying a warranty of seaworthiness in a P&I policy would "negate coverage under a policy whose purpose is to protect for the insured's own negligence." *Texaco*, 400 F. Supp. at 322.

ACL's demands on the IINA policy are limited to the P&I section of the policy. Within the P&I section is a "Collision and Towers Liability Clause," which provides coverage for liability arising from the insured vessel's collision with any other vessel. IINA argues that despite the clause's location in the P&I section, an implied warranty of seaworthiness exists in this coverage because collision and towers liability coverage is effectively a form of hull insurance. In support of this argument, IINA cites *Insurance Company of North America v. Board of Commisioners of Port of New Orleans*, where the Fifth Circuit held that a P&I endorsement providing excess collision and tower's liability constituted "extra hull coverage," "subject to the same implied warranty of seaworthiness applicable to all hull policies." 733 F.2d at 1166. The Fifth Circuit explained that the fact that the clause was "in the form of an endorsement to the P&I policy did not automatically transform that coverage to an enumerated P&I risk." *Id.*

The collision liability coverage in this case, however, notably differs from the policy coverage reviewed by the Fifth Circuit as well as other policies. Traditionally, collision liability clauses cover liability for damages to third party vessels and are incorporated into Hull & Machinery policies, which typically cover damage to the insured's vessels. P&I policies cover additional risks "outside the scope of coverage under standard hull policies." *Employers Ins. Of Wassau v. Int'l Marine Towing,* 864 F.2d 1224, 1225 (5th Cir. 1989) (noting that there is a "traditional practice of assigning liabilities arising out of collision and towage to the Hull Policy."); *Navigators Ins. Co. v. Am. Home Assurance Co.*, No. 97-2650, 1999 U.S. Dist. LEXIS 13420, 1999 WL 681161, at *3 (S.D.N.Y. Sept. 1, 1999)("Often, in addition to covering damage to the insured vessel itself, a hull insurance policy will provide for collision liability.").

The policy considered by the Fifth Circuit in *Insurance Company of North America* conformed to the tradition of providing collision and tower's liability coverage in the hull section and a P&I endorsement merely provided *excess* collision coverage. 733 F.2d at 1166. IINA's policy, however, deviates from "the traditional practice" of covering collision liability in its Hull & Machinery policy by specifically deleting the collision liability clause from the Hull & Machinery section and inserting it in the P&I section. Because there is no collision coverage provided in IINA's Hull & Machinery section, which only covers damage to vessels listed in the policy's schedule, the collision and towers liability clause in IINA's P&I section does not provide excess hull coverage. Instead, the collision and towers liability clause is a provision wholly separate from the Hull & Machinery section, providing coverage for damage to third party vessels and property. Therefore, the Court does not run the risk of "transform[ing] that coverage to an enumerated P&I risk;" collision coverage is solely enumerated as a P&I risk. *See id.* Accordingly, the motion to dismiss the complaint for declaratory relief is **GRANTED** with respect to the implied warranty of seaworthiness.***

Hazard's Administrator v. New England Marine Insurance Co., 33 U.S. 557 (1834)

Justice McLean delivered the opinion of the Court.

The plaintiffs brought an action of assumpsit, in the circuit court from the district of Massachusetts, on a policy of insurance, dated the 29th of December 1827; whereby the defendants caused to be assured Josiah Bradlee & Co. for Thomas Hazard, Jun. of New York, fifteen thousand dollars on the ship Dawn and outfits, at and from New York to the Pacific ocean and elsewhere, on a whaling voyage, during her stay and fishing, and until her return to New York, or port of discharge in the United States.

The declaration contained various counts, stating a total loss of the vessel, and a partial loss of the cargo; and also a partial damage to the vessel by perils of the seas.

It appeared in evidence, that the vessel sailed the 29th of December 1827, and on her outward passage struck upon a rock at the Cape de Verd Islands, and knocked off a part of her false keel, but proceeded on her voyage and continued cruising, and encountered some heavy weather, until she was finally compelled to return to the Sandwich Islands, where she arrived in December 1829, in a leaky condition; and upon an examination by competent surveyors, she was found to be so entirely perforated by worms in her keel, stem and stern post, and some of her planks, as to be wholly innavigable; and being incapable of repair at that place, she was condemned and sold.***

The court, in their instruction, did not lay down the rule broadly, that a destruction by worms was not within the policy but the jury were told, that if, "in the Pacific ocean, worm ordinarily assail and enter the bottoms of vessels, then the loss of a vessel destroyed by worms, would not be a loss within the policy." In other words, if the vessel was lost by an ordinary occurrence in the Pacific ocean, it was a loss against which the underwriters did not insure. In an enlarged sense, all losses which occur from maritime adventures, may be said to arise from the perils of the sea; but the underwriters are not bound to this extent. They insure against losses from extraordinary occurrences only; such as stress of weather, winds and waves, lightning, tempests, rocks, &c. These are understood to be the "perils of the sea" referred to in the policy, and not those ordinary perils which every vessel must encounter.

If worms ordinarily perforate every vessel which sails in a certain sea; is not a risk of injury from them, as common to every vessel which sails on that sea, as the ordinary wear and decay of a vessel on otherseas? The progress of the injury may be far more rapid in the one case than in the other; but do they not both arise from causes peculiar to the different seas; and which affect, in the same way, all vessels that enter into them? In one sea, the aggregation of marine substances which attach to the bottom of the vessel may possibly produce a loss; in another, a loss may be more likely to occur through the agency of worms. Can either of these losses be said to have been produced by extraordinary occurrences? Does not the cause of the injury exist in each sea, though in different degrees: and against which it is as necessary to guard, as to prevent the submersion of a ship, by having its seams well closed.

In the form in which the instruction under consideration was given, this court think there is no error. If it be desirable to be insured against this active agent which infests southern seas, it may be specially named in the policy.***

Darien Bank v. Travelers Indemnity Co., 654 F.2d 1015 (5th Cir. 1981)

Per curiam:

Appellant, Travelers Indemnity Company, appeals the District Court's denial of its motions for a directed verdict and for a judgment notwithstanding the verdict in this consolidated action to recover under a marine insurance policy for the loss of the vessel STONEFIELD LADY. Finding that the appellee, as plaintiff, not only presented a prima facie case but also met his burden of proof, we affirm.

I.

This appeal arose out of the loss in the Gulf Stream of a 73 foot shrimp boat, the STONEFIELD LADY, which was owned by appellee Gore, mortgaged to appellee bank and insured by appellant. When discovered by the Coast Guard off Cape Hatteras, North Carolina, on June 27, 1978, the vessel was in a semi-submerged condition, bow vertically down, anchor out, with only three feet of stern above water. Since the Coast Guard suspected that the vessel contained contraband they airlifted a Navy Diving Team to the site and investigated the vessel. The team found no evidence of contraband in the vessel but they did note that the ship's wheel had been lashed in two places, that there were few personal belongings within, that the vessel's rigging was normal, that one portable pump was rigged on deck and the hatches open, that there were no openings through the hull valvefittings or in the hull itself which would allow ingress of sea water. Record, at 146-54. However, the diver also testified, in deposition, that it appeared that someone had unsuccessfully attempted to hole the hull in the forward compartment. Shortly after the vessel was taken in tow it completely sank in calm seas. The parties stipulated that the vessel "was lost by sinking". The whereabouts of the crew or their fate remains unknown.

Several weeks prior to the loss of the STONEFIELD LADY, police seized fifteen tons of marijuana from one of appellee's other shrimp boats, the LITTLE HORNET. Appellee received immunity from prosecution in consideration for testimony against his co-conspirators in that case as well as in regard to the STONEFIELD LADY. No prosecution was instituted in the latter instance, yet appellant maintains that the parallels between the two vessel's activities indicate that the STONEFIELD LADY was scuttled when this criminal scheme was foiled by the authorities.

In the spring of 1978, appellee a Georgia resident, owned four shrimp boats, the LITTLE WASP, LITTLE HORNET, WINYAH BAY and STONEFIELD LADY which were outfitted mainly in Fort Myers, Florida for fishing in the Gulf of Mexico. Testimony indicates that appellee approached a Georgia neighbor, Jack D'Antignac, with a plan for using appellee's pier for off-loading marijuana after importing it from Colombia in the LITTLE HORNET. They agreed to this scheme and shortly thereafter the boat was outfitted in Fort Myers with a long range single-side-band radio and a navigational aid, the Loran A, to supplement the LITTLE HORNET's existing navigational system. Although a soon to be phaseout model of radio navigation equipment, Loran A could be used to navigate at distances further from the United States than the newer system, Loran C, i.e. to Colombia. This was due to the dearth of Loran C stations throughout the Caribbean at that time. However, there are other aspects to such a purchase.

The Loran A was in some instances more accurate than Loran C, in areas of mutual coverage, due to problems in the new system. Further, appellee testified that differences in the placement of Loran lines on charts were significant to his fishing activities. Since shrimping involves fishing off small "table top" formations on the Gulf floor, precise navigation is essential and resort to two navigational aids, where possible, would be beneficial. Record at 15-20, 63-64.

The LITTLE HORNET, LITTLE WASP and WINYAH BAY all had Loran A's on them. The newly built STONEFIELD LADY only had the Loran C installed, but soon after the LITTLE HORNET received her second set of Loran A, the STONEFIELD LADY was also outfitted with a Loran A and a single-side-band radio. The other two shrimp boats did not receive such radios.

Appellee relieved the regular captain and crew of the LITTLE HORNET and turned that vessel over to D'Antignac for the smuggling run. Before leaving for Colombia the boat took on small quantities of ice and large quantities of fuel. Similarly, appellee relieved his son Tom as captain of the STONEFIELD LADY, as well as the crew, and put them on the WINYAH BAY. He testified that he did this to increase production on the WINYAH BAY and with the intent that he would captain the STONEFIELD LADY himself to increase its production. Record at 4-6. On cross, appellee admitted that the STONEFIELD LADY, under Tom Gore, had out produced all the other boats, but he also noted that he had made one trip on it himself that season. Record at 55-56.

The STONEFIELD LADY was also provisioned with a relatively large quantity of fuel and small quantity of ice prior to departing Fort Myers on May 26, 1978. Appellee attempted to explain these facts as relevant to the larger fuel and ice keeping capacity of the STONEFIELD LADY, compared to his other boats, and the need to prevent condensation rusting of fuel tanks by keeping the tanks topped off on long shrimping trips. Record at 84-89. The STONEFIELD LADY departed Fort Myers a week after the LITTLE HORNET and was discovered semi-submerged in the Gulf Stream seventeen days after the LITTLE HORNET was seized. During that time the appellee testified that he had no contact with the STONEFIELD LADY or its crew and that he did not know how it had come to be in that condition over 1,000 miles from its port of departure.

The vessel was covered by a specifically enumerated Marine Perils Policy for $ 160,000 with appellee bank as a loss payee. The quaint perils clause reads as follows:

> PERILS Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Masters and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, etc., or any part thereof; excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the Policy or by endorsement. And in case of any Loss or Misfortune, it shall be lawful and necessary for the Assured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of the said Vessel, etc., or any part thereof, without prejudice to this Insurance, to the Charges whereof the Underwriters will contribute their proportion as provided below. And it is expressly declared and agreed that no acts of the Underwriters or Assured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

When the insurer's agent learned of the discovery of the STONEFIELD LADY, he attempted to contact the appellee in regards to adjusting the claim and the possible salvage of the vessel. Appellee referred all inquiries, including those of the Coast Guard, to his attorney. No salvage attempt was made by any party to this litigation. All insurance loss claims were rejected by the appellant.

Also relevant to this action is whether a full crew was on board the STONEFIELD LADY when she departed Fort Myers. Appellee testified that he hired a Jim Gentile to captain the STONEFIELD LADY and instructed him to hire a crew of two and fish off the Louisiana and Alabama coasts. Appellee related that he had known this individual for several years as a result of fishing in the same vicinity and conversing on ship to ship radio but had never actually met him. However, appellee stated that Gentile came to him in search of a job while appellee was working on the STONEFIELD LADY and that appellee tested his knowledge of rigging and maneuvering prior to hiring him as captain. Appellee further testified that it was customary for the captain to hire his own crew and that appellee did not meet any member of the STONEFIELD LADY's crew before she sailed. Record at 8-12, 26-28.

Appellant, in response, put on evidence of discrepancies between appellee's description of Gentile and the description of others who apparently might have dealt with this captain. Further, various knowledgeable people in the area testified for appellant that they had never heard of a Jim Gentile as captain of a shrimpboat. Record at 70, 72, 94-96, 107-08. However, some of these witnesses had not heard of Tom Gore, appellee's son, as a shrimpboat captain either. Record at 96.

II.

We are principally concerned with whether the evidence presented was sufficient to state a prima facie case, to reach the jury and to support a verdict for the plaintiff. Under a specific perils insurance policy the burden of proving a loss by a peril insured against is on the insured. *S. Felicione & Sons Fish Co. v. Citizens Casualty Co. of N.Y.,* 430 F.2d 136, 138 (5th Cir. 1970), *cert. denied*, 401 U.S. 939, 91 S. Ct. 936, 28 L. Ed. 2d 219 (1971). However, the standard for review of motions for directed verdict and for judgment notwithstanding the verdict prevents us from reaching determinations regarding the credibility of testimony. As stated in this Court's leading opinion, *Boeing Company v. Shipman,* 411 F.2d 365 (5th Cir. 1969) (en banc);

> (t)he Court should consider all of the evidence not just that evidence which supports the non-mover's case but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Id. at 374-75.

Although not entirely clear, it appears that the arguments at trial centered upon whether the evidence adduced was sufficient to prove loss by a peril of the sea, barratry or scuttling. Barratry of the master is defined "as an act committed by the master or mariners of a ship for some unlawful or fraudulent purpose, contrary to their duty to the owners, whereby the latter sustain an injury." *Fishing Fleet, Inc. v. Trident Ins. Co., Ltd.,* 598 F.2d 925, 927 (5th Cir. 1979) (quoting *Marcardier v. Chesapeake Ins. Co.,* 12 U.S. (8 Cranch) 39, 49, 3 L. Ed. 481 (1814)). Scuttling, of course, requires the sinking of a vessel with the complicity, knowledge, consent or participation of the owner. *See Northwestern Mutual Life Ins. Co. v. Linard,* 498 F.2d 556, 560-62 (2nd Cir. 1979). *See also Fishing Fleet, Inc. v. Trident Ins. Co., Ltd.,* 598 F.2d at 929.

Loss by peril of the sea certainly contemplates, as appellant contends, "... perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistable force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence." *Reisman v. New Hampshire Fire Ins. Co.,* 312 F.2d 17, 19 (5th Cir. 1963) (quoting *R. T. Jones Lumber Co., Inc. v. Roen Steamship Co.,* 270 F.2d 456, 458 (2nd Cir. 1959)). However, as stated by Judge Garza, it also embraces:

> ... all kinds of marine casualties which are of the sea as distinguished from merely being on the sea, and which are of a fortuitous nature and not the inevitable result of the action of the elements on the fabric of the vessel or its cargo.
>
> The coverage is against casualties which may occur, not consequences which must occur; the peril must result from the violent action of the elements, as distinguished from their natural, silent influence on the fabric of the vessel; loss or damage resulting from the ordinary and inevitable action of the winds and waves, such as natural decay and wear and tear, is excluded. Moreover it is not necessary that there should be the action of the sea, wind, or waves, violent or otherwise, to cause a peril of the sea, but an accidental occurrence, peculiar to the sea, not happening through design, is sufficient.
>
> "The rule has been laid down that a policy insuring against "perils of the sea' covers only extraordinary risks or occurrences, but other cases hold that it is not limited to extraordinary perils, and covers all instances of marine casualties due to the fortuitous action of the seas. In any event the peril need not be extraordinary in the sense of being catastrophic or arising from causes which are uncommon and could not be reasonably anticipated. Furthermore, whether or not an occurrence constitutes an extraordinary risk so as to be a peril of the sea is not of itself an absolute and unvarying thing, but is dependent on the circumstances of the case and the character of the vessel insured. In considering what is and what is not a peril of the sea, the

> question is whether the loss arose from injury from without or from weakness within. To make insurer liable the injury must have been occasioned by a storm or accident that would injure a seaworthy vessel."

United States Nat. Bank of Galveston v. Maryland Nat. Ins. Co., 218 F. Supp. 247, 249 (S.D. Tex. 1963) (quoting 45 C.J.S. Insurance § 854). For example, mere swells may or may not be enough based upon the circumstances of the case.

Taking the alleged loss by peril of the sea first, we note that there is little evidence presented. It is stipulated that the vessel sank at sea, but without more this does not appear to be a fatal admission. *See By's Chartering Service, Inc. v. Interstate Ins. Co.,* 524 F.2d 1045, 1047 (1st Cir. 1975*)*. There is no evidence of a storm ravaged superstructure, see *Continental Insurance Co. v. Hersent Offshore, Inc.,* 567 F.2d 533, 534-35 (2nd Cir. 1977), or of "the cruel sea working on a troubled hull" resulting in the loss. See *Tropical Marine Products, Inc. v. Birmingham Fire Ins. Co. of Pa.,* 247 F.2d 116, 122 (5th Cir.), *cert. denied*, 355 U.S. 903, 78 S. Ct. *331,* 2 L. Ed. 2d 260 (1957). Nor was there evidence adduced of natural decay or of a leak occasioned by wear and tear on this relatively new shrimpboat. See *Reisman v. New Hampshire Fire Ins. Co.,* 312 F.2d 17, 18-19 (5th Cir. 1963); *Sipowicz v. Wimble,* 370 F. Supp. 442, 448 (S.D.N.Y. 1974). Indeed there was no evidence of any unusual and extraordinary accident peculiar to the sea which could have sunk this vessel. See *United States National Bank of Galveston v. Maryland National Ins. Co.,* 218 F. Supp. 247 (S.D. Tex. 1963). Therefore, the loss appears to have been a mere fortuity with the presumption being that its cause was by a peril of the sea. *See e.g*., *New York, New Haven and Hartford Railroad Co. v. Gray,* 240 F.2d 460, 464 (2nd Cir.), *cert. denied*, 353 U.S. 966, 77 S. Ct. 1050, 1 L. Ed. 2d 915 (1957); *Boston Insurance Co. v. Dehydrating Process Co.,* 204 F.2d 441, 443 (1st Cir. 1953).

To counter this appellant argues that since the drifting hulk was discovered semi-submerged in calm seas, and sank in same, that a presumption arose that the vessel was unseaworthy and that this condition caused the sinking. *Tropical Marine Products v. Birmingham Fire Ins. Co. of Pa.,* 247 F.2d 116, 120 (5th Cir.), *cert. denied*, 355 U.S. 903, 78 S. Ct. 331, 2 L. Ed. 2d 260 (1957). However, the raising of this presumption is not appropriate here. The STONEFIELD LADY was found drifting over a thousand miles from its departure port in the Gulf Stream, an ocean current which flows at speeds of three to five knots out of the Gulf of Mexico south around the Florida Keys then north along the east coast of the United States. Thus, the vessel could have gone down at some distance from the position where discovered by the Coast Guard. No evidence was put forward by either party as to the state of winds and seas at the most relevant points to this inquiry i.e. at the point the vessel started taking on water or, more importantly, where it became semi-submerged. *See id.* at 122. In the absence of evidence of the existence of calm seas and weather, this presumption cannot be asserted by the appellant.

However, assuming arguendo that the STONEFIELD LADY did sink in calm seas the presumption cited by appellant is unavailing. It may be rebutted by a showing of seaworthiness. If so rebutted, a "counter presumption arises that the unexplained sinking and consequent loss was caused by some extraordinary, although unknown and unascertainable, peril of the sea." *Boston Insurance Co. v. Dehydrating Process Co.,* 204 F.2d 441, 443 (1st Cir. 1953). *See Reisman v. New Hampshire Fire Insurance Co.,* 312 F.2d 17, 20 (5th Cir. 1963); *Tropical Marine Products v. Birmingham Fire Insurance Co. of Pa.,* 247 F.2d 116, 118 (5th Cir.), *cert. denied*, 355 U.S. 903, 78 S. Ct. 331, 2 L. Ed. 2d 260 (1957).

On the issue of seaworthiness the only question raised as to the vessel was whether it was manned by a competent captain and crew. Appellee testified that he hired a competent captain whom he had known for some time and had tested in maneuvering and rigging the vessel, albeit in a cursory manner. He also testified that he directed the captain, as per custom in the trade, to hire a crew of two for the vessel. Without determining credibility, this would appear to be sufficient evidence to rebut the presumption of unseaworthiness as a cause of a vessel's sinking in calm seas. Ultimately the insurer bears the burden of proving unseaworthiness, see *Saskatchewan Government Insurance Office v. Spot Pack,* 242 F.2d 385 (5th Cir. 1957), and appellant's bare insinuation that Gentile did not exist does not meet this burden. *See, e.g. Aguirre v. Citizens Casualty Co. of New York,* 441 F.2d 141, 144 (5th Cir.), *cert. denied*, 404 U.S. 829, 92 S. Ct. 65, 30 L. Ed. 2d 58 (1971); *Lemar Towing, Inc. v. Fireman's Fund Insurance Co.,* 352 F. Supp. 652, 659-665 (E.D.La.1972) *aff'd* 471 F.2d 609 (5th Cir. 1972), *cert. denied*, 414 U.S. 976, 94 S. Ct. 292, 38 L. Ed. 2d 219 (1973). Therefore, we conclude that on all lines of argument, in regard to loss by peril of the sea, that the District Court was correct in denying appellant's motions for a directed verdict or for judgment notwithstanding the verdict.

Turning to the issue of scuttling or barratry we find the appellant's position even weaker. All of the evidence presented from which an inference of scuttling could be made, also permits the inference that the loss was occasioned by the barratry of the master. The attempted holing of the hull, the portable pump being rigged on deck, the absence of personal effects and the wheel being lashed in two places, all are indicative of a planned sinking. But who's plan?

There is a basic lack of evidence of appellee's complicity in an intentional sinking of the boat. Appellant points to the drug smuggling scheme and the seizing of the LITTLE HORNET seventeen days prior to the discovery of the STONEFIELD LADY as providing a motive for covering up that vessel's involvement in the conspiracy. *See S. Felicione & Sons Fish Co. v. Citizens Casualty Co. of New York,* 430 F.2d 136, 139 (5th Cir. 1970), *cert. denied*, 401 U.S. 939, 91 S. Ct. 936, 28 L. Ed. 2d 219 (1971). However, such reasoning is also consistent with providing the master with a motive for sinking her without the owner's permission. Since appellee received immunity from prosecution and the value of the vessel exceeded its insurance coverage, *see Northwestern Mutual Life Insurance Co. v. Linard,* 498 F.2d 556, 559 (2nd Cir. 1974), there was credible evidence upon which reasonable men could conclude that it was not in appellee's interest for the vessel to be scuttled. *See Fishing Fleet, Inc. v. Trident Insurance Company, Ltd.,* 598 F.2d 925, 928-29 (5th Cir. 1979).

Taking appellants' best arguments, the loss of an insured vessel in seaworthy condition in good weather and in calm seas from unknown causes, where the vessel might be engaged in an abortive illegal scheme may arouse suspicion. "But suspicion, even strong suspicion, is not an acceptable substitute for proof by a preponderance of the evidence." *Wenhold v. Royal Insurance Co.,* 197 F. Supp. 75, 79-80 (D.Mass.1961). Appellee was extensively examined and cross-examined before the jury and his credibility is not a question before this Court.

In sum, sufficient conflicting evidence was adduced to justify submission of the case to the trier of fact and for support of their verdict for appellee. *Boeing Co. v. Shipman,* 411 F.2d at 375. Therefore, the judgment of the District Court, in all regards, is AFFIRMED.

Goodman v. Fireman's Fund Insurance Co., 600 F.2d 1040 (4th Cir. 1979)

Winter, Circuit Judge:

Plaintiff, the owner of a 55' yacht, sued to enforce a marine insurance policy issued by defendant with respect to damages to the yacht when it sank. The district court granted judgment for defendant ruling that the policy did not cover the particular loss which plaintiff sustained. While we disagree with the principal reasons assigned by the district court, we do agree that judgment for defendant was proper because we conclude that plaintiff breached a warranty contained in the policy and therefore was precluded from recovery thereunder. We affirm.

I.

As found by the district court, the pertinent facts are that plaintiff owned a 55' Chris Craft twin-diesel motor yacht which he used for private pleasure purposes. He purchased from defendant a policy of "hull insurance," the pertinent provisions of which are:

> Coverage
>
> The insurance provided by this Section covers, subject to the conditions of this policy, against ALL RISKS of physical loss or damage from any external cause. Also, provided the loss or damage has not resulted from want of due diligence by the assured, the owners or managers of the vessel, and subject to the conditions of this policy, this insurance covers loss of or damage to the vessel

> directly caused by: explosions; breakdown of motor generators or other electrical machinery and electrical connections thereto, breakage of shafts, or any latent defect in the machinery or hull (excluding the cost and expense of replacing or repairing the defective part); negligence of masters (including owner when acting in capacity of master), mariners, engineers, pilots, or repairers provided the repairers are not an assured hereunder.
>
> In addition to Exclusions elsewhere herein this policy does not insure against:
>
> (a) Loss or damage through wear and tear, gradual deterioration, marine borers, vermin, ice and/or freezing, inherent vice, mysterious disappearance, loss of use and delay.

A special condition, typed on the front page of the policy, reads as follows:

> LAYUP WARRANTY. Warranted that the said vessel shall be laid up and out of commission from October 1st, at noon, until May 1st, at noon.

In 1975, plaintiff employed professional help to lay up his yacht for the winter, but in September 1976 he undertook to do the work himself. Unfortunately, he omitted to drain the sea water cooling system, the function of which is to aid in cooling the engine, and, more importantly, he did not close the port and starboard sea valves which permitted sea water to enter the cooling system. The cooling system included two filters which were encased in plastic cylindrical jackets, and because the sea valves remained open and the sea water lines were not drained, water remained in those filters.

The plastic filter jackets broke during the course of the winter due to the freezing of water in the filters, and the breaking of the filter jackets permitted water in the cooling system to flow into the hull through the broken jackets. Indeed, water continued to enter the system through the open valves and to flow through the broken jackets in such volume that the yacht sank as far as the mooring lines would permit it to sink.

The district court found as a fact, and its finding is amply supported, that it is the custom of the Chesapeake Bay region in laying up a vessel for the winter season at least to close the port and starboard sea valves. The district court held that the sinking of the yacht was not covered by the policy because: (1) insofar as the loss was caused by the freezing of the water in the cooling system, the loss was excluded from coverage; (2) the loss was not covered by the "all risks" clause of the policy; and (3) the provision insuring against the negligence of masters the so-called Inchmaree clause did not apply.

II.

With one exception, we do not agree with the reasons assigned by the district court for denying recovery. Since British & Foreign Marine Co. v. Gaunt (1921) 2 A.C. 41, all risks policies have been construed as covering all losses that are "fortuitous." A loss is not considered fortuitous if it results from an inherent defect in the object damaged, from ordinary wear and tear, or from the intentional misconduct of the insured. However, loss due to the negligence of the insured or his agents has generally been held to be fortuitous and, absent express exclusion, is covered by an all risks policy. *See Avis v. Hartford Fire Insurance Co.,* 283 N.C. 142, 195 S.E.2d 545, 547-49 (1973).

The addition of the phrase "external cause" to the "all risks" clause constitutes no real limitation on the scope of the latter. If the loss did not result from inherent defect, ordinary wear and tear, or intentional misconduct, its cause was necessarily external. Nor does the Inchmaree clause limit liability. Its purpose is to broaden, rather than to restrict, coverage under marine insurance policies. *See, e.g., Northwestern Mutual Life Insurance Co. v. Linard,* 498 F.2d 556, 563 (2 Cir. 1974). Significantly, the policy in suit describes the Inchmaree clause as an addition to, and not an exclusion from, the coverage of the policy.

While the policy excluded loss or damage through ice or freezing, we do not think that liability is excluded under this provision. The district court reasoned that as the freezing of the water in the cooling system was a cause of the sinking, the loss was excluded from coverage. This reasoning overlooks the fact that it was plaintiff's negligence which caused the freezing and which, coupled with his negligence in failing to close the intake valves, caused the sinking. When two or more causes combine to cause a loss, one of which is insured against while the other is not, the loss is not insured unless the covered cause is the predominant efficient cause of the loss. *See, e.g., Phenix Insurance Co. v. Charleston Bridge Co.,* 65 F. 628, 632 (4 Cir. 1895). We think plaintiff's negligence was the predominant efficient cause of the sinking. While freezing was an intervening cause of the series of events, it was not unforeseeable.

We do agree with the district court that the Inchmaree clause does not extend coverage to plaintiff, but since we would find coverage under the all risks provision if it were considered alone, we turn to the reasons why we do not think that plaintiff can prevail when all of the pertinent language of the policy is considered.

III.

By the terms of the policy, it was warranted that the yacht would be "laid up" and out of commission from October 1 to May 1. Whether a vessel is laid up during the time warranted in a marine insurance policy depends upon local custom. *Wigle v. Aetna Casualty & Surety Co.,* 177 F. Supp. 932, 934 (E.D.Mich.1959); *Providence Washington Ins. Co. v. Lovett,* 119 F. Supp. 371, 374 (D.R.I.1953). The district court found, and its finding is not clearly erroneous, that it is the custom in the Chesapeake Bay region at least to close the sea valves as part of the winterizing program. Since plaintiff failed to perform these steps, the vessel was not laid up as warranted in the policy. It is a familiar rule that the breach of an express warranty in a contract for marine insurance releases the insurer from any liability due to the breach. See, e.g., *Capital Coastal Corp. v. Hartford Fire Ins. Co.,* 378 F. Supp. 163, 172 (E.D.Va.1974).***

Ferrante v. Detroit Fire & Marine Insurance Co., 125 F. Supp. 621 (S.D. Cal. 1954)

Carter, District Judge:

This case presents a question of marine insurance and concerns the 'Inchmaree' clause[1] usually appearing in American and English Marine insurance policies.

On June 1, 1951, Salvatore Ferrante was the owner and Master of a purseseiner, the 'Rosanna'. The 'Rosanna' was covered by a policy of marine insurance issued by the defendant for the period from August 22, 1950, to August 22, 1951, insuring the hull and machinery of the 'Rosanna' against loss and damage from certain specified perils and causes in the amount of $ 52,500. Prior to the filing of the action, all of Ferrante's rights under the policy were assigned to the co-plaintiffs herein, Herbert W. Elander, Einar Jall and William R. Bird, doing business under the fictitious firm name of Western Engine Service Co. This company made the repairs on the 'Rosanna' following the happenings hereinafter related.

The facts of the accident are related by Salvatore Ferrante, the owner and Master and W. D. Newby, Chief Engineer, contained in a surveyor's report.

> 'June 1, 1951. 12:00 noon. We were trolling along looking for fish when the exhaust stack gave out a heavy cloud of white smoke. I then checked my pyrometer for fire in exhaust boxes. The engine was slowly turning and I noticed vibration in the front end, so I immediately shut it off. As the motor stopped I heard a distinct thud and then started looking to see what the trouble was. I pulled side inspection plates on the engine and found the crankshaft broken through the back main bearing'***

The 'Rosanna' was towed to San Pedro and the expense of the towing, $502.64 is conceded by the pretrial stipulation to be a proper claim for the plaintiff. Repairs were made by the Western Engine Service Company, commencing June 6, 1951

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[1] The clause was first inserted in Marine policies after a decision by the House of Lords, reversing the court of appeal in *Thames & Mersey Marine Insurance Co. v. Hamilton Fraser & Co.,* 12 App.Cas. 484 (1887). The vessel involved was the S.S. 'Inchmaree', hence the name appended to the clause.

and were completed July 27, 1951. The parties have agreed that the total cost of repairs amounted to $11,682.05. The evidence established that the cost of repairing the consequential damages done to the engine when the shaft broke amounted to $1,080.10 and that the balance of $ 10,601.95 represents the cost of replacing the broken shaft.

The surveyor's report also states: 'It was found that a new crankshaft was not immediately available from the factory. A second-hand used shaft of the same type and model as original was located. It was accordingly checked between centers and found true * * *'

The second-hand shaft and its testing and preparation for installation in the 'Rosanna' amounted to $ 2,578.40; the new crankshaft would have cost $ 3,887, a difference or saving of $ 1,309.

Plaintiff sues for the following:

1. Towing charge, $ 502.64;
2. The cost of repairs on the engine, $ 11,682.05; and
3. The difference in value between the used crankshaft and the new crankshaft, $ 1,309.

There is a deductible provision in the policy of $ 600, the amount being deductible from the total claimed in (2) and (3) above, but not from the towing.

The policy provides that it is warranted free from particular average under 3%, which in this instance

The marine insurance policy sued upon, is like woman, 'fearfully and wondrously wrought.' It consists of nine additions or endorsements fastened to the top of a one-page marine policy. This policy is written in the archaic language of marine policies, similar to that referred to by the Supreme Court in the case of *Calmar S. S. Co. v. Scott,* 1953, 345 U.S. 427, at page 432, 73 S.Ct. 739, at page 742, 97 L.Ed. 1125, where the court said, 'Construing such conglomerate provisions requires a skill not unlike that called for in the decipherment of obscure palimpsest texts. * * * nor have we any Elder Brethren of Trinity House to help us.'

To the first policy sheet is attached an endorsement entitled, 'American Hulls (Pacific) 1938, Rev. Nov. 1945,' consisting of some twenty-four numbered paragraphs, plus additional matter listed as (a), (b) and (c) at the bottom thereof. Next is attached another endorsement entitled, 'California Fishing Vessels, Endorsement No. 2 (Rev.) Nov. 1945-K.' It provides that clauses 10, 11, 14, 15, 23, 24 and C are deemed to be deleted from the prior endorsement, 'American Hulls.' On top of these are attached seven additional endorsements not pertinent here.

In this hodge-podge we find certain provisions clearly and definitely stated. The policy sheet states: 'This insurance is understood and agreed to be subject to English Law and Usage as to liability for and settlement of any and all claims.'

Endorsement No. 1 states in (c): 'Warranted to be subject to English Law and Usage as to liability for and settlement of any and all claims.' However, endorsement No. 2 expressly deletes (c) above, from endorsement No. 1, but no reference is made to the policy sheet. It is assumed therefore that the foregoing warranty in the policy sheet remains untouched and that this case is governed by English Law and usage. This point need not be labored in that it does not appear that a different result would follow under American Law and usage.

Endorsement No. 1 in paragraph 10, contains what is generally termed the 'Inchmaree' clause, but paragraph 10 is deleted from endorsement No. 1 by endorsement No. 2.

However, endorsement No. 2 terminates our frustration in that it contains in paragraph 9, the 'Inchmaree' clause with which we are here concerned.

> '9. This insurance also specially to cover (subject to the average and deductible average warranties) loss of or damage to hull or machinery directly caused by the following:--
>
> 'Accidents in loading, discharging or handling cargo, or in bunkering or in taking in fuel;
>
> 'Explosions on shipboard or elsewhere;
>
> 'Bursting of boilers, breakage of shafts or any latent defect in the machinery or hull *(excluding, however, the cost and expense of repairing or renewing the defective part);*
> 'Contact with aircraft;
>
> 'Negligence of Master, Charterers, Mariners, Engineers or Pilots;
>
> 'Provided such loss or damage has not resulted from want of due diligence by the Owners of the vessel, or any of them, or by the Managers. Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the vessel.' (Exclusion phrase underlined.)

The breaking of shafts in vessels has been a fertile field for litigation. At the threshold we are met with a question of fact, and different results flow from different factual determinations. For example, the shaft may break from (1) 'negligence of Master, Charterers, Mariners, Engineers or Pilots' insured against in the 'Inchmaree' clause, or from (2) 'any latent defect in the machinery or hull' insured against in the clause. Obviously 'machinery' includes the shaft. Or from (3) obsolescence, old age and wear and tear, or (4) other causes or combinations of causes.

If the shaft breaks through negligence as specified in the clause, then it is clear that since negligence was a peril insured against, the cost of replacing the shaft and all resulting damage caused by the breakage, including the expense of removing and replacing the shaft are properly recoverable.

If the shaft breaks because of a latent defect,[5] the latent defect is a peril insured against. The liability of the insurer is for 'damage to hull or machinery directly caused by' this latent defect. The question of liability for the cost of renewing the shaft itself, and for the cost of removing and replacing the shaft, raise serious questions which we discuss hereafter.

If the shaft breaks from obsolescence, old age or ordinary wear and tear, such a peril is insured against. The liability of the insurer is for 'loss or damage to hull or machinery directly caused by * * * breakage of shafts * * *' The same question arises as to liability for the cost of renewing the shaft itself and for the cost of removing and replacing the shaft.

At the trial, pictures of portions of the broken shaft were before the court. Tests were made and there was conflicting expert testimony as to the cause of the break. There was evidence of other conditions and circumstances, such as the fact that the pistons and walls of the cylinders were scored, indicating over-heating and freezing from expansion. The usual cause of such a condition is ineffective lubrication bringing about the over-heating and expansion and consequent binding or freezing. This would so increase the stress on the engine that, unless given attention it would result in stalling or breakage. This could have been averted by proper attention by the engineer, whose duty it was to give such attention. There was also expert testimony based on the happenings in question and the appearance of the shaft as to what an engineer would have seen and observed had he been using due care in the operation of the engine.

On examination of the evidence, we found no latent defect existed. Defendants' expert testimony on the subject of latent defects was unsatisfactory and the manufacturer's report contradicted this testimony. From the evidence we found that the shaft failure and entire engine damage was proximately caused by negligence of the engineer in failing properly to lubricate the engine, and in failing to observe the symptoms of inadequate or improper lubrication which were or should have been apparent to a competent engineer. If, as suggested by defendant, the engineer was not in the engine room, he was nonetheless negligent by his absence.

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[5] A latent defect is a hidden defect and generally involves the material out of which the thing is constructed as distinguished from the results of wear and tear.***

Since the shaft failure was occasioned by the negligence of the vessel's engineer, the plaintiffs are entitled to recover the cost of repairs, $11,682.05 less the policy deductible of $600. The particular average warranty of 3% does not become pertinent.

The court also found that the used crankshaft installed by the insured was an adequate replacement and was installed by the plaintiffs for their convenience. Plaintiffs therefore are not entitled to recover the saving thus effected in their costs of $1,309.

The Original 'Inchmaree' Clause.

If we are in error in our finding of negligence, then detailed analysis of the 'Inchmaree' clause becomes pertinent. In order to place this case in a position where an appellate court could dispose of it on appeal and have the views of the trial court, for what they are worth, we proceed to analyze the 'Inchmaree' clause. The specific query is whether the clause provides restitution of the cost of replacing a broken shaft without regard to the cause of that failure.

It appears from a review of the earlier decisions that the words in parentheses reading: '(*excluding*, however, the cost and expense of repairing or renewing the defective part)' were not written into the original form of the 'Inchmaree' clause. In determining the meaning of the 'Inchmaree' clause as previously written, the English courts and at least one American court have reached the conclusion that the clause did not insure against the breakage of a shaft in the absence of the operation of some other peril specified in the policy. The words 'breakage of shafts' appearing in the mid portion of this clause were construed to spell out a marine peril. The breakage of a shaft establishes the peril but it does not simultaneously constitute damage to 'hull or machinery' within the first portion of the clause.

The 'Inchmaree' Clause as amended.

There do not appear to be any recorded decisions construing the clause containing the exclusion above set forth. We now consider it.

Plaintiffs contend for a construction that the cost of replacement of the shaft itself is covered under the terms of the 'Inchmaree' clause because it was not a 'defective part.' It is clear that the phrase '(excluding however the cost and expense of repairing or renewing the defective part)' refers only to the part shown to have a latent defect. Plaintiffs argue, first, that the addition of the excluding clause has had the legal effect of excluding from coverage only the cost of repairs or renewal of parts having a latent defect and by necessary implication including cost of replacement of broken shafts, when such shafts are themselves free from latent defects. The argument, in effect, is that the 'Inchmaree' clause, as it formerly existed and was interpreted by the English Law, has been broadened on the principle of 'expressio unius exclusio alterius.' Plaintiffs also contend that the exclusion clause, added in an effort to clarify coverage, has actually succeeded in causing an ambiguity; that such ambiguity in an insurance policy should be resolved against him who chose the ambiguous words, i.e., the insurer. *Aschenbrenner v. United States Fidelity & Guaranty Co.,* 1934, 292 U.S. 80, 54 S.Ct. 590, 78 L.Ed. 1137.

We believe that the effect of the exclusion, reasonably construed, is to delete rather than to add coverage. It resolves any doubt whether the cost of repairing or renewing parts containing latent defects is covered. Reading the 'Inchmaree' clause we find 'This insurance * * * to cover * * * loss of or damage to * * * machinery directly caused by * * * breakage of shafts * * *'. It seems clear that coverage of resultant or consequential damage only is intended. Thus a broken shaft is not a '*cause of damage' until it has broken and the policy covers only whatever is caused thereafter and thereby*. The phrase 'excluding the cost of repairing or renewing the part containing the latent defect' is understandable because the latent defect usually causes breakage of the part itself in addition to other consequential damage. It was therefore inserted to make doubly clear the meaning of the 'Inchmaree' provision where latent defects were involved.

We conclude therefore that the 'Inchmaree' clause with the additional exclusion phrase contained within the parentheses does not change the interpretation heretofore given to the 'Inchmaree' clause by courts here and in England. Broken shafts, per se, are not covered by the policy and are not covered unless the break was caused by some peril insured against in the policy. Thus, neither the cost of renewing the broken shaft or of removing it and replacing it with a new or repaired shaft are covered per se, under the 'Inchmaree' clause amended by the excluding words, but only the resulting damage to 'hull or machinery.' In this case the shaft breakage was proximately caused by negligence of the engineer, a described peril, hence the cost of the replacement shaft is recoverable and also the cost of removing the shaft and putting in the replacement shaft as well as the resulting damage caused by the break.

Insurance policies such as the one at hand, are widely purchased by owners of fishing vessels on the Pacific coast and elsewhere. The breaking of shafts is a common occurrence. Seamen are ordinarily not men of great scholastic training, and should be able to understand, in purchasing a policy, the extent of their rights.

Policies should therefore clearly inform the insured in what instance the breaking of a shaft is covered by insurance, and in what instances he must bear the loss himself. The record here shows that both the underwriters and lawyers engaged in the practice of admiralty law have vigorously disagreed as to the meaning of this policy. Certainly if these men, skilled in matters of marine insurance have trouble with the policy, it follows a fortiori, that the average ship owner or master probably has more difficulty.

It would be well if the policy were rewritten so that it could be readily understood by laymen and no longer constituted in the words of Chief Justice Rugg of Massachusetts, a 'snare to the insured and a barren hope to the injured.'***

***Columbian Insurance Co. v. Catlett*, 25 U.S. 383 (1827)**

Justice Story delivered the opinion of the Court.

This is a writ of error to the Circuit Court of the District of Columbia, sitting at Alexandria.

The original action was upon a policy of insurance, dated the 6th of February, 1822, whereby the Columbian Insurance Company insured the plaintiff ten thousand dollars, lost or not lost, at and from Alexandria to St. Thomas, and two other ports in the West Indies, and back to her port of discharge in the United States, upon all kinds of lawful goods and merchandise, laden or to be laden on board the ship called the Commerce, &c.; beginning the adventure upon the said goods and merchandise from the loading at Alexandria, and continuing the same until the said goods and merchandise shall be safely landed at St. Thomas, &c. and the United States. The goods and merchandise to be valued, as interest may appear. The policy contained the usual risks; and the premium agreed on was three and three quarters per cent., to return half per cent for each port not used or attempted, and no loss happens. There are other provisions in the policy, which will be hereafter commented on. The breach alleged in the declaration is a total loss by perils of the seas, with the usual averments of notice and nonpayment.

The trial was had upon the general issue, and a verdict found by consent for the plaintiff, for 10,000 dollars, subject to the opinion of the Court upon the demurrer to evidence filed in the case.***

From the demurrer to evidence, it appeared, that the ship sailed from Alexandria on her voyage about the 14th of February, 1822, having on board a cargo of 2,297 1/2 barrels of flour of the invoice price of $16,887 32 cents, both ship and cargo being owned by the plaintiff. On the 21st of March she arrived in safety with her cargo at St. Thomas, having met with no accident; and she continued at that port until the 30th of May following, for the purpose of selling her cargo, and for no other cause. During this period the master, who was also consignee, sold by retail 509 1/2 barrels; being limited, by his instructions, to eight dollars per barrel, and not being able to procure that price for the residue of the cargo, he sailed on the 31st of May for Cape Haytien with it, and had also on board some doubloons, amounting to $480, part of the proceeds of the former sales. He might have sold his whole cargo at from $7,50, to $7,75 at St. Thomas. The 509 1/2 barrels of Flour sold at St. Thomas, according to the invoice price, amounted to $3,512 99, leaving the value of the cargo on board, exclusive of the doubloons, at the time of sailing from that port, according to the invoice, at $12,328 25 cents.

On the 6th of June the ship, with her cargo, arrive off Cape Haytien, and the captain having gone on shore, the ship stretching too far in, took the ground and was wrecked. In consequence of this disaster, 155 barrels of flour were totally lost, 1,633 were got on shore, part without injury, but the greater part damaged, and the whole was sold. The gross amount of the sales at Cape Haytien was $9,391 34 cents, the expenses of salvage, including commissions on sales, $4,124 72 cents; the proportion of the captain's expenses attaching on the cargo, $285 78 cents.***

The next question is, whether the delay at St. Thomas for seventy days was not so unreasonable as to constitute a deviation. Without question, any unreasonable delay in the ordinary progress of the voyage avoid the policy on this account. But what delay will constitute such a deviation, depends upon the nature of the voyage, and the usage of the trade. It may be a very justifiable delay, to wait in port, and sell by retail, if that be the course of business, when such delay would be inexcusable in a voyage requiring or authorizing no such delay. The parties, in entering into the contract of insurance, are always supposed to be governed in the premium by the ordinary length of the voyage, and the course of the trade. That delay, therefore, which is necessary to accomplish the objects of the voyage according to the course of the trade, if bona fide made, cannot be admitted to avoid the insurance. In the present case, it is proved, that the stay at St. Thomas was solely for the purpose of selling the cargo, and for no other cause. But, it is said, that a sale might have taken place at St. Thomas of the whole cargo, if the orders of the owner had not contained a direction to the master limiting the sale at St. Thomas to the price of eight dollars, and that this limitation was the sole cause of the delay, and was unreasonable; that the master ought, under the circumstances, to have sold at a lower price, or have immediately elected to go to another port. We are of a different opinion. In almost every voyage undertaken of this nature, where different ports are to be visited for the purposes of trade, and to seek markets, it is almost universal for the owner to prescribe limits of price to the sales. Such limitations have never hitherto been supposed to vary the insurance, or the rights of the party under it. It cannot be, that the master, if entitled to go to a single port only, is bound to sell at whatever sacrifice, as soon as he arrives at that port, and within the period at which he may unload, and sell, and reload a return cargo. He must, from the very nature of the case, have a discretion on this subject. If he arrives at a bad market, he must have a right to wait a reasonable time for a rise of the market, to make suitable inquiries, and to try the effect of partial and limited sales. He is not bound to sell the whole cargo at once, whatever be the sacrifice, and thus frustrate the projected adventure. In short, he must exercise in this, as in all other cases, a sound discretion for the interest of all concerned; and if it be fairly and reasonably exercised; it ought not to be deemed injurious to rights secured by the policy. It is as much the true interest of the owner to sell in a reasonable time, and with all proper despatch, as it is for the underwriters. To be sure, if the owner should limit the price to an extravagant sun, or the master should delay after all reasonable expectations of a change of market were extinguished, such circumstances might properly be left to a jury to infer a delay amounting to a deviation. And here, again, as on the former point, it may be remarked, that every underwriter is presumed to know the ordinary course of the trade, and to regulate his proceedings accordingly.

But, it is said, that there is no sufficient evidence of the usage of trade in the present case. It is to be remembered that this is a case which comes before this Court upon a demurrer to evidence. The plaintiff was not bound to have joined in the demurrer without the defendant's having distinctly admitted, upon the record, every fact which the evidence introduced on his behalf conduced to prove; and that when the joinder was made, without insisting on this preliminary, the Court is at liberty to draw the same inferences in favour of the plaintiff, which the jury might have drawn from the facts stated. The evidence is taken most strongly against the party demurring to the evidence. This is the settled doctrine in this Court, as recognised in *Pawling v. The United States*, (4 Cranch's Rep. 219.) and *Fowle v. The Common Council of Alexandria*, (11 Wheat. Rep. 320.) The testimony in the present case, does not, in direct terms, (as has been justly stated at the bar,) establish the general usage of the West India trade. The witnesses do not, generally, speak to a usage, eo nomine. But it cannot be denied, that its scope and object are to establish the usage by an enumeration of facts, and voyages, by persons experienced in the trade, and referring to their own knowledge and general information. It thus conduces, indirectly, to prove the usage; and as it is altogether one ways, it is certainly such that a jury might infer a usage from it. And if so, this Court may infer it. We consider it, then, as a fair deduction from this testimony, that considerable delays in port in the West India trade are not uncommon, for the purpose of taking the advantages of the market, and that sales by retail are within the usage. There are no facts from which this Court can infer, that the delay in the present case was unreasonable or unusual; and, consequently, we cannot admit, that the delay amounted to a deviation. The case of Oliver v. The Maryland Insurance Company, (7 Cranch's Rep. 487.) is in no respect inconsistent with this doctrine. One question in that case was, whether the delay at Barcelona, for the purpose of taking in a return cargo, was a deviation. The Court below instructed the jury, that it was not, if the vessel did not remain longer in that port than the usage and custom of trade at that place rendered necessary to complete her cargo. This Court was of opinion that the instruction was, in substance, correct. The only difficulty which arose was from the terms of the instruction, which seemed to limit the right, not to the time necessary to take in the cargo, but to a particular period, regulated by the usage of trade. The Chief Justice there said, "There is some doubt spread over the opinion in this case, in consequence of the terms in which it is expressed. The vessel might certainly remain as long as was necessary to complete her cargo, but it is scarcely to be supposed this was regulated by usage and custom. The usages and customs of a port, or of a trade, are peculiar to a port or trade. But the necessity of waiting, where a cargo is to be taken on board, until it can be obtained, is common to all ports, and all trades. The length of time frequently employed in selling one cargo and procuring another, may assist in proving, that a particular vessel has, or has not, practised unnecessary delays in port, but can establish no usage by which the time of remaining in port in fixed. The substantial part of the opinion, however, appears to have been, and seems so to have been understood, that the plaintiff could not recover, unless the jury should be of opinion, that the vessel did not remain longer at Barcelona than was necessary to complete her cargo, of which necessity the time usually employed for that purpose might be evidence." This case, therefore, recognises the right to wait in port for the purpose of selling one cargo and procuring another; and the reasoning is employed solely to avoid a criticism founded upon some ambiguity of phrase peculiar to that case. On the other hand, the cases cited at the bar abundantly prove, that the usage and course of trade are very material to determine whether the delay be unreasonable or not.***

Pacific Fisheries Corp. v. H.I.H. Casualty & General Insurance Co. 239 F.3d 1000 (9th Cir. 2001)

Rawlinson, Circuit Judge:

The Pacific Fisheries Corp. ("Fisheries") appeals the district court's judgment following bench trial and denial of Fisheries' motion for a new trial in its diversity action against HIH Casualty & General Insurance and HIH Marine Insurance Companies ("The Insurers"). Fisheries alleges that the court erred in denying its untimely demand for a jury trial. Fisheries also contends that because the breach of the trading warranty contained in the marine insurance policies did not itself cause the loss, its losses should have been covered.

Because the district court properly denied the untimely jury demand and correctly found that the insurance policies were voided by breach of the trading warranty, we affirm.

BACKGROUND

The Appellant, Fisheries, operates a fishing vessel called the Icy Point. The Icy Point embarked on a fishing excursion in the Pacific Ocean from San Francisco on February 17, 1997. On March 11, 1997, Fisheries purchased insurance coverage from The Insurers under two policies: a Protection and Indemnity Policy ("P&I") and a Hull and Machinery Policy ("Hull"). Each of these policies contained an identical trading warranty which provided that Fisheries' insured vessel was confined to the Pacific Ocean and was not to travel beyond certain points of that ocean.[1]

On March 31, 1997, the Icy Point began traveling to Guam in the normal course of business. The travel to Guam constituted a breach of the trading warranty. While

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[1] The vessel was "confined to the waters and tributaries of the Pacific Ocean not west of 165 degree E. longitude, not south of 30 degrees S. latitude, and not north of 55 degrees N. latitude." This area does not include Guam.

in Guam, an employee of the ship filed a lawsuit against Fisheries on the ground that the malfunction of the boat's freshwater system caused him to suffer dehydration. When Fisheries informed The Insurers of these events, The Insurers advised Fisheries that they needed to determine the reason for the ship's breach of the trading warranty before agreeing to defend against the employee's claim. Further, The Insurers told Fisheries that they would not extend the trading warranty in general, even if they ultimately extended the warranty for the limited purpose of defending against the employee's claim.

The vessel departed Guam on May 10, 1997 and proceeded north, remaining outside the trading warranty area. Approximately one week later, the Icy Point experienced an engine breakdown. When Fisheries informed The Insurers of the breakdown, The Insurers refused coverage on the ground that the vessel once again was in breach of the trading warranty.

Fisheries filed suit for breach of insurance contract in California Superior Court on October 22, 1997. The Insurers removed the action to the district court for the Northern District of California, based on diversity, on November 14, 1997.***

Following a bench trial, the district court ruled in favor of The Insurers and entered judgment on April 1, 1999. The court found that the trading warranty provision was material to the insurance policy and that Fisheries had deliberately breached the warranty in complete disregard of the terms of the insurance contract.***

*Breach of Trading Warranty****

Fisheries also argues that the district court erred in holding that the insurance policies were void due to Fisheries' breach of the trading warranty. Fisheries contends that because the breach of the trading warranty itself did not cause the loss claimed, the policies are still effective. However, under California law, "breach of even an immaterial warranty will void a policy 'where the policy expressly declares that it shall avoid it.'" *Certain Underwriters at Lloyd's v. Montford,* 52 F.3d 219, 223 (9th Cir. 1995) (citations omitted). Causation between the breach of warranty and any loss claimed is not required. In the present case, Fisheries received notice that any breach of the trading warranty would render coverage under the policy void. Accordingly, the district court did not err in finding the policies void.***

***Home Insurance Co. v. Ciconett*, 179 F.2d 892 (6th Cir. 1950)**

Miller, Circuit Judge:

These two appeals involve two separate sinkings of the Diesel Towboat 'Judge Ross,' owned by C V. Ciconett and covered by an insurance policy issued by The Home Insurance Company.

The policy of insurance was originally issued October 10, 1942, for a period of one year in the amount of $8,500. It was renewed by annual certificates extending the insurance through the periods covered by the two sinkings. The first sinking occurred on September 7, 1944 while the vessel 'Judge Ross' was docked at Mount Vernon, Indiana. It was raised and repaired at a cost of $ 3,083.54, for the recovery of which amount Ciconett filed a libel in personam in Admiralty against the Insurance Company. This action was dismissed by the District Judge, from which ruling the appeal in action No. 10,896 has been prosecuted.

On November 28, 1944, following the renewal of the policy on October 10, 1944, the 'Judge Ross,' while navigating the Kentucky River, struck a submerged snag or stump which caused the second sinking. There was expended the sum of $4,677.78 in an unsuccessful attempt to raise the vessel. The boat was thereafter abandoned by the Insurance Company. Ciconett was paid $5,000 by the Insurance Company as a partial payment on the final adjusted liability without waiver of rights by either party under the policy of insurance. To recover the loss resulting from this sinking, Ciconett filed his libel in Admiralty against the Insurance Company for the sum of $8,500, plus the expenditure of $4,677.78, subject to the credit of $5,000 paid by the Insurance Company. The Insurance Company denied liability for the expenditure of the $4,677.78. The District Judge overruled this defense and entered judgment in favor of the libellant in the net amount of $8,177.78, from which judgment the Insurance Company has prosecuted the appeal in action No. 10,895. The appeals are before us on a single record.

The first sinking arose out of the following facts as found by the District Judge and fully supported by the evidence: Captain Martin Wood was in charge of the vessel 'Judge Ross' on September 6, 1944. It was moored to the bank at Mount Vernon, Indiana, at which time its crew was Captain Wood, Engineer Breeck and Melvin Johnson, a deckhand. Captain Wood discovered when he went on watch about midnight that water was entering the hull. He discovered a leak in the stern starboard rake. He started the pumps and attempted to caulk the seams and stop the leak. This was unsuccessful and the boat finally sank about six or seven o'clock a.m., September 7, 1944.

The policy contained the following provision: 'IT IS WARRANTED BY THE INSURED that the said vessel . . . shall at all times have a competent watchman on board, awake and on duty.' The Insurance Company claimed among other defenses that this warranty was breached by the insured and that such breach discharged it from any liability under the policy. The libellant claimed that the warranty was not breached and that, in any event, such breach of warranty did not cause the sinking and so did not discharge the Insurance Company from liability. The District Judge found on this disputed issue of fact as follows: 'There was no watchman on board and awake on September 6, 1944, when the leak began, which resulted in the sinking.' The contention of counsel for libellant that the warranty was not broken is supported by very slight evidence. In our opinion, the finding is fully supported by the evidence, is not clearly erroneous, and is conclusive of the appeal in action No. 10,896. The further contention that the presence of a watchman would not have prevented the sinking of the boat under counsel's theory of how the leak started is not established by the evidence, and in any event is immaterial as a matter of law.

It is settled that a warranty in a contract of insurance must be literally complied with; that the only question in such cases is whether the thing warranted to be performed was or was not performed; and that a breach of the warranty releases the company from liability regardless of the fact that a compliance with the warranty would not have avoided the loss. *Shamrock Towing Co. v. American Insurance Co.,* 2 Cir., 9 F.2d 57, 60; *Fidelity-Phenix Ins. Co. v. Chicago Title & Trust Co.,* 7 Cir., 12 F.2d 573; *Whealton Packing Co. v. Aetna Insurance Co.,* 4 Cir., 185 F. 108; *Aetna Insurance Co. v. Houston Oil and Transport Co.,* 5 Cir., 49 F.2d 121, 123-124. *See also Norwich Union Indemnity Co. v. H. Kobacker and Sons Co.,* 6 Cir., 31 F.2d 411, 414; *Imperial Fire Ins. Co. v. Coos County,* 151 U.S. 452, 14 S.Ct. 379, 38 L.Ed. 231. The general Admiralty Law, as shown by the foregoing cases, is applicable. *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 243-245, 63 S.Ct. 246, 87 L.Ed. 239.

Libellant's contention that the failure of the Insurance Company to return the premium barred such a defense is not well taken. No effort was being made to cancel the policy in its entirety for fraudulent procurement thereof, or for some similar reason. The policy was in full force and effect. The Insurance Company was entitled to the premium, and also to stand upon the express provisions of the policy. *U.S. Life Ins. Co. v. Smith,* 6 Cir., 92 F. 503, 508-509; *Home Ins. Co. v. Scott,* 6 Cir., 46 F.2d 10, 12.

Nor is libellant entitled to urge at this time that breach of the warranty was waived. No such issue was raised by the pleadings. On the contrary, the libel alleged 'That all of the terms and conditions of the said policy of insurance have been fulfilled.' The facts urged upon us as constituting waiver may or may not be what the evidence on such an issue would have established. The question was not ruled on by the District Judge and is not before us on this appeal.

The second sinking on November 28, 1944, involves the following provision of the policy, contained in a rider attached thereto, referred to as the 'Sue and Labor Clause'- 'And In Case of Any Loss or Misfortune, it shall be lawful and necessary to and for the Assured or their agents, factors, servants and assigns, to give this Company prompt notice of the disaster, * * *; to sue, labor or travel for, and to make all reasonable exertions in and about the defense, safeguard and recovery of the said vessel, or any part thereof, without prejudice to this insurance; and after recovery, two competent surveyors shall be appointed, * * * whose duty it shall be to make specifications in writing, clearly stating both the amount of work and the manner in which it shall be done to make said vessel good for any damage caused by the disaster; * * * and the Assured shall contract with the party making the lowest estimate to make said repairs, to the expenditures and amount whereof, after any and all deductions provided for in this Policy have been made, the said Company will contribute according to the proportion the sum insured bears to the valuation aforesaid. * * * It is further agreed * * * in case the assured or their agents refuse to appoint a surveyor * * * , or refuse to adopt prompt and efficient plans for the safeguard and recovery of said vessel, or to repair said vessel when recovered, then the said Insurers are hereby authorized to interpose and have said vessel repaired, if she has been recovered, or to recover said vessel and cause the same to be repaired for account of assured, to the cost of which, after any and all deductions provided for in this policy have been made, this Company will contribute according to the proportion the sum insured bears to the valuation aforesaid; * * *.' The vessel was valued at $8,500 by the policy. It is under this clause that the libellant claims reimbursement for the expenditure of $4,677.78 incurred in the unsuccessful attempt to raise the vessel. In the beginning the libellant made the attempt to float the vessel free of the stump and was apparently making satisfactory progress. But shortly thereafter the Insurance Company employed a diver, Vernon Parker who took charge of the work and thereafter directed the efforts to float the vessel. Considerable expense was incurred by Parker, which, however, was found by the District Judge to be reasonable and to constitute expense as was contemplated by the terms and coverage of the 'Sue and Labor Clause.' The District Judge made the following conclusion of law: 'The 'Sue and Labor Clause' constitutes separate coverage in the insurance policy and is supplementary to the contract of the insurance company to pay the damage to the 'Judge Ross' and authorizes libellant to recover the 'Sue and Labor' expenses incurred by him, in addition to $8,500.00, the amount provided in the policy as the total insurance.'

The legal effect of the standard sue and labor clause in a policy of marine insurance is discussed and explained in *American Merchant Marine Ins. Co. of New York v. Liberty Sand & Gravel Co.,* 3 Cir., 282 F. 514, and *White Star S.S. Co. v. North British and Mercantile Ins. Co., D.C.,* 48 F. Supp. 808, 812, the two cases relied upon by the District Judge. The rule is well stated as follows in the White Star S.S. Co. case: 'The law is well settled that the sue and labor clause is a separate insurance and is supplementary to the contract of the underwriter to pay a particular sum in respect to damage sustained by the subject matter of the insurance. Its purpose is to encourage and bind the assured to take steps to prevent a threatened loss for which the underwriter would be liable if it occurred, and when a loss does occur to take steps to diminish the amount of the loss. Under this clause the assured recovers the whole of the sue and labor expense which he has incurred, subject to the expense having been proper and reasonable in amount under all the circumstances, and without regard to the amount of the loss or whether there has been a loss or whether there is salvage, and even though the underwriter may have been paid a total loss under the main policy.'

The Insurance Company agrees with the foregoing statement of the law generally applicable in cases where the policy contains the so-called standard sue and labor clause, but contends in the present case that the sue and labor clause here involved varies from the usual standard one in that the paragraph containing the clause closes with the following provision not usually present in such clauses: 'No particular average claim adjusted in accordance with the terms of this Policy, shall go beyond the cost of the actual repairs made necessary in consequence of any disaster insured against, nor shall the cost of raising or recovering the vessel or of taking her to the dock or any other general average expenses be included in the partial loss claim; and this Company will be liable for all claims or losses only in proportion as the sum herein insured bears to the agreed value of the vessel as shown in the Policy, not to exceed in the aggregate in the event of claim for total loss, constructive total loss, general average, salvage charges or any expenses whatsoever, the sum hereby insured.' It is the Insurance Company's contention that by reason of this concluding clause its total liability, including the expenses incurred in attempting to float the boat, is limited to $8,500.

Under the facts in this case, we agree with the ruling of the District Judge. As pointed out above, the Sue and Labor Clause is a separate paragraph in the policy independent of the insurance coverage, and is supplementary to the contract of the underwriter to pay the damage or loss insured against. Such expenditures are for the benefit of the underwriter. In our opinion, the limitation of liability refers to the loss claims under the policy itself, and does not exclude recovery under the ancillary contract under the conditions existing in this case.***

***Reliance Insurance Co. v. The Escapade*, 280 F.2d 482 (5th Cir. 1960)**

John R. Brown, Circuit Judge:

We here test whether the District Court was correct in determining that by conduct of the underwriter subsequent to a loss it either waived or was estopped from asserting an acknowledged breach of the warranty of private pleasure use of a yacht hull policy. The significance of the Sue and Labor Clause in solving that problem may be at the heart of the case.

While ostensibly in the form of two separate proceedings,[1] this is in reality a single case which grows out of the substantial damage sustained by the Yacht Escapade

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[1] The admiralty cause (No. 18017) was brought in rem against the Yacht by the salvors, Dunn's boat yard, and intervenor Allied Marine Corporation, for the recovery of $ 2700 for salvage and $ 1288.17 due the shipyard for cleaning up and preventive work done on the Yacht preliminary to survey after delivery by salvors. Bond, the yacht owner, impleaded Reliance Insurance Company, the Insurer, on the ground that the salvage, admittedly due, was payable ultimately by the Insurer under the policy. The Court granted recovery to the Owner for the amount paid by him to the salvors ($2967.90). The shipyard bill was taken care of in the civil action.

as a result of stranding near Cat Cay in the Bahamas on February 8, 1958. The M/Y Escapade was insured under an apparently standard yacht hull policy at an agreed valuation of $30,000. It contained variations of the hoary language generally found, *Saskatchewan Government Ins. Co. v. Spot Pack,* 5 Cir., 1957, 242 F.2d 385, 386; *Tropical Marine Products, Inc. v. Birmingham Fire Ins. Co. of Pa.,* 5 Cir., 1957, 247 F.2d 116, 118, so that along with rovers, pirates and assailing thieves, it expressly covered losses due to perils of the seas. Of course, a strand, followed by severe pounding of the vessel for several days while salvors awaited abatement of the fury of the weather, was a classic case of a sea peril. Consequently, liability could not have been denied for want of an insured peril. Denial of liability, when it belatedly came, was on the ground that since the vessel had been chartered for a week's voyage, there was a breach of the private use warranty[2] and this voided the policy.

After a trial in which the Judge saw and heard all of the witnesses in the flesh, the Court held that notwithstanding the breach of this warranty, the Insurer had either waived the defense or was estopped to assert forfeiture from the breach. Recovery for all losses and additionally for all expenses incurred under the Sue and Labor Clause,[4] was therefore decreed.

We need but briefly discuss the facts and then we shall do so in terms of those either expressly or impliedly found by the trial court. The Yacht was actually stranded February 8, but Bond, the owner and Assured, did not receive word from

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The civil action (18018) was brought by Bond, the owner, against Reliance, the Insurer, to recover his full loss for damage to the yacht. The District Court granted recovery for the loss in value (estimated cost of repairs in the sum of $ 19,890.05), the value of fitting stripped and pilferred ($ 3500) and the cleanup work preparatory to survey (approximately $ 1095.99) plus Florida statutory attorneys' fees.

[2] Under the heading 'General Conditions' the policy provided:

> 'Private pleasure warranty: Warranted by the Assured that the vessel shall be used solely for private pleasure purposes and shall not be hired or chartered unless approved by the Assurers, and permission endorsed hereon.'

[4] Under the heading 'Section 'A' -- Hull Insurance,' the policy provided (brackets are inserted to identify the later waiver clause (2)):

> 'Sue and labor: (1) In case of any loss or misfortune, it shall be lawful and necessary for the Assured, their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the said vessel, or any part thereof, without prejudice to this insurance; the charges whereof we, the Assurers, will contribute according to the rate and quantity of the sum herein insured. (2) And it is especially declared and agreed that no acts of the Assurer or Assured in recovering, saving or preserving the property insured, shall be considered as a waiver or acceptance of abandonment.

the Yacht until February 11. He immediately reported the casualty to the office of Hansen, the Insurance Agent who had executed and delivered the policy for the Insurer and who soon took over local direction of the handling of the loss under continuous reporting to the home office. Hansen's office, during his personal absence, dispatched McClaskey, a marine surveyor who thereafter acted as the representative of the Insurer, to Cat Cay to examine the stranded vessel. Before leaving for Cat Cay, McClaskey called Dunn, the salvors, to inquire whether they could undertake salvage if it proved feasible. McClaskey returned to Miami on February 12. On the morning of February 12, Hansen talked to Bond and learned from bond that the vessel had been chartered. Meyers, an assistant of Hansen, immediately obtained a copy of the charter. That afternoon Hansen and Meyers called on Bond at his office where salvage of the M/Y Escapade was discussed. Although they did not tell Bond about it, hansen had already talked to the home office of the Insurer, had informed them of the existence of the charter-party, a copy of which he then had, and on instructions from the home office had called in counsel then and still acting for the Insurer because of the known breach of the private pleasure warranty, note 2, *supra*.

Hansen and Meyers went to Bond's office that afternoon because Bond was contending that the Yacht was a total loss and was therefore being abandoned to the Insurer. Hansen was adamant that the Insurer would not accept an abandonment and was equally emphatic that it was Bond's responsibility to protect his property and to salvage the vessel if feasible. Although McClaskey, pursuant to Hansen's earlier directions, had made preliminary arrangements with the salvors, Hansen made it plain to Bond that if Bond did not personally authorize the salvage, Hansen and McClaskey, for the Insurer, would call the salvors back. In other words the Insurer, though having a right to take action pursuant to the Sue and Labor Clause, see note 4 supra, declined to do so and put the full responsibility on the Assured. There was no dispute that probable salvage cost, estimated in the neighborhood of $ 2,000, was discussed. At any rate Hansen made plain to Bond that he had to arrange for salvage, and the implication was equally positive that if Bond failed to do so, both the salvage program then underway would be stopped, and the Insurer would disclaim any further liability. Following such demands Bond prepared a letter of authority along these lines addressed to the salvors. McClaskey picked it up later on the afternoon of February 12, then flew to Cat Cay and delivered the letter to the salvors who had arrived with the salvage equipment but had not yet begun the salvage operations.

But direction by Hansen through McClaskey for the Insurer was not yet at an end. Whether present all the time or not, McClaskey kept in constant touch with the salvage operations. The vessel was returned by the salvors to Miami on February 19 where she was taken to the shipyard of Allied Marine Corporation. McClaskey outlined certain work to be done but the shipyard, apparently wary of instructions from surveyors, declined to perform any work. McClaskey, still acting for the Insurer, told Bond that Bond would have to authorize the shipyard to do the work.

Bond asserts with no real contradiction that his compliance with McClaskey's demand was that he advised the shipyard that they were authorized to do whatever work Hansen or McClaskey instructed them to do. Whatever the terms of the authorization, Hansen or McClaskey were the ones to give directions, and since they were not then acting as friends of the vessel owner, their interest and activity was related solely to the interests of the Insurer.

Though all of this from February 12 up through the early days of March had gone on under the active, direct, personal participation of McClaskey, the Insurer's representative and with full detailed reports ports to the home office, the Insurer was silent about the claim. To Bond's persistent inquiries, Hansen, handling the loss on the ground for the Insurer, merely told Bond to be patient. It was not until March 7 that Bond received from the Insurer the first and only communication (except for pleadings filed in court). On that date Hansen wrote Bond 'I have a message from (Reliance) to the effect that they are not accepting liability in connection with your accident on (M/Y Escapade).' Oddly enough this even requested cooperation in the further investigation of the claim -- an act wholly inconsistent with denial of liability.

These circumstances led the District Court to find estoppel. In the brief memoranda opinion touching the highlights the Court emphasized the inconsistency in the action of the Insurer (through Hansen) asserting that Bond would have to look after and protect his own property as the Insurer would not accept abandonment. The Court pointed out 'Neither of these statements can have any rational significance in the face of a denial of liability by insurer. They can become meaningful only in a context predicated upon continuing liability, for insurer is not concerned with abandonment if it denies all liability, and the only compulsion upon the insured to care for his damaged property is his desire to do all required by the 'sue and labor clause'; thus to keep the policy in force and so become entitled to a recovery.'***

By this appeal the Insurer attacks generally the holding of estoppel and urges specifically that it cannot be applied here for two special reasons. The first is that estoppel cannot be applied to extend coverage. The second is that even if the Insurer under principles applicable generally to insurance companies was estopped from asserting the breach of the private pleasure use warranty against the claim for sue and labor expenses since this was a marine policy having the unique sue and labor provision, there could be no estoppel as to the named peril claim for the damage to the Yacht itself.

The first of these objections may be quickly answered. We are aware that this Court, as have many others, see *Home Ins. Co. v. Campbell Motor Co.,* 1933, 227 Ala. 499, 150 So. 486; 16 Appleman, Insurance Law and Practice, § 9090, at 628-629 (1944), has declared that estoppel or waiver cannot supply a contract where none existed, it cannot supply coverage where the contract did not. 'It is well settled that conditions going to the coverage or scope of a policy of insurance, as distinguished from those furnishing a ground for forfeiture, may not be waived by implication from conduct or action. The rule is that while an insurer may be estopped by its conduct or its knowledge from insisting upon a forfeiture of a policy, the coverage or restrictions on the coverage cannot be extended by the doctrine of waiver or estoppel.' *C.E. Carnes & Co. v. Employers' Liability Assurance Corp.,* 5 Cir., 1939, 101 F.2d 739, at 742.

But the estoppel here found as a fact by the District Court does not create a new liability or grant a coverage not already in the policy. As we pointed out this hull policy by traditional language reflecting the even more ancient traditions of marine underwriters intends to, and does, cover expressly damage from perils of the seas. Stranding is a peril of the sea. So is pounding from the angry waves. Liability under the policy will be absent not because the peril is not covered, but because action of the Assured in chartering the Yacht has ostensibly 'forfeited' the policy coverage otherwise existing. But these promissory warranties do not really forfeit the contract as that awesome term is normally understood. Consistent with the law's abhorrence of the harsh consequence of forfeiture, violations of such policy provisions are looked upon as bringing about a temporary 'forfeiture' which is more accurately described by the term now generally used--coverage of the policy is suspended. 'Consequently coverage is not permanently destroyed. It is suspended so long as, but only so long as the violations of the specified basic policy requirements continue. Equally clear, coverage is revived the moment the breaches or conditions cease.' *Lineas Aereas Colombianas Expresas v. Travelers Fire Ins. Co.,* 5 Cir., 1958, 257 F.2d 150, 155, and see especially note 9.

Of course, at the moment the Yacht fetched up and the loss commenced, the breach had not yet been cured, and the suspension, unlike *Henjes v. Aetna Ins. Co.,* 2 Cir., 1943, 132 F.2d 715, 1943 AMC 27, was still operative. But the point is that the private pleasure warranty merely provided a defense to an occurrence and loss otherwise covered under the policy.[9] As in the case of any other defense to contract coverage, it may be waived or the underwriter may be estopped to assert it, and doing so is not expanding or creating a new coverage.

We do not think that the second specific reason is any more availing. Moreover, a discussion of it will also serve to dispose of the general attack on the holding of estoppel under the broad grounds that the action of the Insurer could not properly be regarded as inconsistent nor as inducing conduct detrimental to the Assured. The nub of the second objection seems to be this. Granted that action of an insurance company comparable to that taken here by the Insurer from February

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[9] This is especially true of a warranty as qualified as the private pleasure warranty, note 2, supra. By its own terms, it is operative unless the charter is approved by the insurer and permission endorsed. What the underwriter has reserved unto itself to approve by special permission in advance, it can waive or assent to after the event

12 to March 7 was inconsistent with denial of liability and induced action detrimental to the Assured so that a court would hold that the Insurer was estopped from asserting the known and available defense thereby reviving the whole of the forfeited contract, a different result is required here. This, the argument goes, is so because the inconsistent action by the Insurer, on the one hand, and the detrimental injury to the Assured, on the other, all relate to the efforts to salvage and protect the vessel from further harm. These, by nature, are sue and labor expenditures covered separately under the unique provision of the Sue and Labor Clause of marine policies. This clause, therefore, takes the case out of the operation of the usual rule, and the estoppel may run only as to such sue and labor expenditures, not the loss from the named insured peril.

The argument is initially beguiling. It seems to say that since sue and labor is treated as added supplemental coverage, the policy may be approached as though it were two contracts, not just one as in the ordinary insurance policy. Consequently, the inconsistent-detriment-inducing-conduct should be confined to that separable (if not separate) undertaking. The trouble with this is that it ignores the history, function and purpose of the Sue and Labor Clause. In a capsule, that may be briefly stated. Since an assured has the duty toward his underwriter to exercise the care of a prudent uninsured owner to protect insured property in order to minimize or prevent the loss from the occurrence for which the underwriter would be liable under the policy, the clause undertakes to reimburse the assured for these expenditures which are made primarily for the benefit of the underwriter either to reduce or eliminate a covered loss altogether. Also it affirmatively protects the position of each as to abandonment.[11]

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[11] The clause is an ancient one. 'It is not known when the words were first inserted in policies, but a clause of similar import appears in the 'Tiger' policy, dated 1613. The later part of the clause, the 'waiver,' is of later origin and may have been introduced, in part at least, to make clear the privilege of the underwriter himself to step in and protect the insured property.' Winter, Marine Insurance, page 195 (3rd ed. 1952). At the bottom is the assured's legal duty toward the underwriter to take action after an occurrence to prevent or minimize loss. 'The existence of such a duty has been judicially recognized both in this country and in the United States (footnote 26 cites *Columbian Ins. Co. v. Ashby,* 1830, 4 Pet. 139, 29 U.S. 139, 143, 7 L.Ed. 809); and Arnould, writing in 1848, stated that it had long been settled that it was the clear duty of the assured to labour for the recovery and restitution of detained or damaged property.' 2 Arnould, Marine Insurance § 799a at 721-722 (1950). The clause is inserted 'primarily for this purpose * * * thus converting into an express obligation under the policy that which existed as a duty implied by law and requiring that the assured use due diligence in taking measures for saving and preserving the damaged property.' Winter, supra, at 393. Compliance by the assured with this contractual duty is not optional either under the original language or the modification that 'it shall be lawful and necessary,' see (1) note 4, supra. 'Courts have held that the insertion of the word 'necessary' does not essentially alter the operation of the clause. It imposes no additional duty on the master. He was already bound to labor diligently for the recovery of the property and to alleviate the burden of the insurer.' *American*

Taking the analysis through the next step, it is obvious that since the clause is to reimburse the assured for expenses incurred in satisfying the assured's duty to the underwriter, there is no such duty where the policy, for one reason or another--either basic lack of coverage or an unwaived defense, forfeiture, etc.--does not apply. The underwriter has no right to demand that the assured take the sue and labor steps unless the policy is applicable. An assertion of any such demand is therefore consistent only with continued existence of the coverage. This is made all the clearer by the very nature of sue and labor as a supplementary coverage. While it is true that it is often spoken of in such terms, and certainly when applicable does obligate the underwriter over and above the specified dollar limits of the policy, this expression must be used with caution. The obligation comes into being only when the action taken is to minimize or prevent a loss for which the underwriter would be liable. If the underwriter would not be liable at all--here because of breach of the personal use warranty--there would be no contractual obligation to repay sue and labor. The sue and labor 'coverage' is therefore tied irrevocably to the insured perils coverage. By the same token, where such demand reflecting continued coverage is made by the underwriter, action taken pursuant to it by the assured works to his detriment when liability is thereafter declined.

Consequently, the actions of the Insurer had a significance which far transcended potential sue and labor liability. In assaying this conduct, we do not, as the Insurer

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Merchant Marine Ins. Co. v. Liberty Sand & Gravel Co., 3 Cir., 1922, 282 F. 514, 522. *Republic of China v. National Union Fire Ins. Co.*, D.C.Md., 1957, 151 F.Supp. 211, at page 238, *1957 AMC 915.*

Against the background of this duty, the purpose of the clause is at least twofold. It 'is to (a) encourage and (b) bind the assured to take steps to prevent a threatened loss for which the underwriter would be liable if it occurred, and when a loss does occur to take steps to diminish the amount of the loss.' *White Star S.S. Co. v. North British & Mercantile Ins. Co.,* D.C.E.D.Mich.1943, 48 F.Supp. 808, 813, 1943 AMC 399, quoted with approval in *Home Ins. Co. v. Ciconett,* 6 Cir., 1950, 179 F.2d 892, 895. Its principal ultimate aim is clear. 'Prevention of loss is the very object in view. It contemplates the benefit of the insurers only * * *.' 2 Arnould, supra, § 871 at 795. While it is frequently said that 'the sue and labor clause is a separate insurance and is supplementary to the contract of the underwriter to pay a particular sum in respect to damage sustained * * *,' *White Star S.S. Co. v. North British & Merc. Ins. Co., supra,* 48 F.Supp, 808, 812-813, 1943 AMC 399, the obligation under it is keyed to the existence of liability on the underwriter as to the loss from the named peril. 'The * * * expenses must have been incurred with a view to averting or minimizing a loss for which the underwriter would have been liable under the policy.' Templeman & Greenacre, Marine Insurance at 115 (4th ed. 1934). It is 'separate,' of course, in the sense that the reimbursement to the assured is in addition to, and over and beyond, the amount payable under or the dollar limits of, the named perils coverage. 'Under this clause the assured recovers the whole of the sue and labor expense which he has incurred * * * and without regard to the amount of the loss or whether there has been a loss or whether there is salvage, and even though the underwriter may have paid a total loss under the main policy.' *White Star S.S. Co. v. North British & Merc. Ins. Co., supra,* 48 F. Supp. 808, 813, 1943 AMC 399.***

seems to think the District Judge either did or had to do, confine it to February 12. The salvage at sea activities went on from February 12 to at least February 19 when the Yacht was brought to the shipyard in Miami. Whatever uncertainty there might have been about the position the Insurer should ultimately take as decisions were being made under considerable pressure on February 12, none prevailed during the following six days. Continued acquiescence by the Insurer in the salvage operations ostensibly pursuant to the letter order exacted by it from the Assured accompanied as it was with continued silence about denial or acceptance of liability were equally significant circumstances. Moreover, the action taken at the shipyard requiring that the Assured authorize the expenditure of nearly $1,000 to remove, clean and preserve valuable machinery from further salt water deterioration, and, more important, to clean up the ship to permit survey were likewise acts wholly inconsistent with nonliability. The former was to prevent further damage, and the latter related to survey wholly unnecessary if the Insurer considered that the contract had been forfeited for breach of warranty. And, of course, all of this was done in comparative leisure from February 19 up through early March, and in the light of detailed information being furnished the home office, see note 7, supra, it was the action of the Insurer, not merely its agents.

The presence of the Sue and Labor Clause made the necessity for prompt announcement of the Insurer's position more, not less, emphatic. With full knowledge from February 12 on of the exact facts concerning the charter which was alone the basis for a tardy denial of liability three weeks later, the Insurer stood silent while at the same time asserting the imperative demands that the Assured take these costly actions or run the risk that he would have no insurance. The District Judge on what is essentially a question of fact was entitled to reach the conclusion, which withstands the clearly erroneous concept of F.R.Civ.P. 52(a), 28 U.S.C.A., that for such conduct this marine underwriter would fare no better than would an insurer on traditional land risks. As to them, the law is clear that whether regarded as waiver, or more properly as estoppel, inconsistent action to the detriment of the assured has the effect of reviving the contract obligation theretofore 'forfeited' for breach of warranty or other policy provision.

The District Court on ample evidence, F.R.Civ.P. 52(a), determined that these actions of the Insurer were inconsistent with nonliability from a known breach of warranty, and that the Assured had been induced by this conduct to take action to his detriment. This is the essence of estoppel, and on this conclusion the District Court was correct in allowing recovery thereon in both of the actions for sue and labor expenses and for loss due to the named peril.

Affirmed.

Hutcheson, Circuit Judge, concurring in part and dissenting in part:

While I concur in the opinion and the result in No. 18017, the admiralty case, I dissent from both opinion and result in No. 18018.

The policy issued by Reliance was a yacht policy, containing a private pleasure warranty as follows:

'Warranted by the Assured that the vessel shall be used solely for private pleasure purposes and shall not be hired or chartered unless approved by the Assurers, and permission endorsed hereon.'

The evidence was undisputed, indeed it was admitted, that this express warranty was deliberately breached by the insured by chartering the yacht for charter hire of $ 125.00 per day. The charterer, a young lady, and two friends, with a captain employed for the charter, took the vessel to the Bahama Islands, where the vessel was run aground near Cat Cay. The result of the decision of the court is, in my opinion, to make the theory of estoppel operate to extend the coverage to a risk not only not provided for in, but prohibited by, the policy of insurance. In my view, there is no basis whatever in the record for the result reached in this case.

I was a member of the court which decided *Lineas, etc. v. Travelers,* 5 Cir., 257 F.2d 150, cited by the court here as authority for its conclusion, and I must vigorously dissent from the idea that that case deals with a similar situation to that existing here or furnishes any authority for the result reached here. What and all that is involved in this case is that an express warranty was flagrantly breached, and for the loss to the insured, against which it did not contract, the insurer is being made to pay. Convinced as I am that the opinion, by supporting the theory of estoppel in this case, runs a good principal into the ground, I Dissent.

***Diesel Tanker A.C. Dodge*, *Inc. v. Stewart*, 262 F. Supp. 6 (S.D.N.Y. 1966), *aff'd*, 376 F.2d 850 (2d Cir. 1967)**

Cannella, District Judge:

The libel seeking recovery under the insurance policies involved in this case, is dismissed.

Since the action is founded on marine insurance, the court finds that it is within the admiralty jurisdiction of this court. 28 U.S.C. § 1333.

This case was tried before this court, without a jury in January, 1966. Suit was brought against the respondents as underwriters and as representatives of other subscribers to policies of insurance issued by Lloyds, London insuring the libellants against loss by reason of liabilities arising from certain cases enumerated in the policies.

On May 25, 1952 the Diesel Tanker A.C. Dodge collided with the S. S. Michael (and thereafter fire occurred) with resultant loss of life to persons aboard both vessels, personal injuries aboard both craft, loss of cargo on the Dodge, damage to the Michael and total loss to the Dodge.

Following the collision libellant Dodge filed a petition for limitation of liability and after trial and appeal it was held that the collision resulted from the joint fault of the Dodge and the Michael. It was also held that libellant Dodge was entitled to a limitation of liability. Petition of Diesel Tanker A.C. Dodge, Inc., 133 F. Supp. 510 (E.D.N.Y.1955), *aff'd*, 234 F.2d 374 (2d Cir. 1956). The Dodge was required to deposit in its limitation of liability fund $60.00 per ton of the vessel's gross tonnage for the benefit of personal injury and death claims, pursuant to 46 U.S.C. § 183. Out of this fund the libellant paid $64,531.50 to Frances Elliott, Administratrix of the Estate of John Elliott, Master of the Dodge, who died in the collision.

Before the above-mentioned litigation terminated, the owner of the Michael had settled the majority of the personal injury and death claims and the claim of the owner of the cargo on the Dodge. The Michael owner also paid to Frances Elliott the sum of $59,000.00 for a covenant not to sue the Michael.

The Dodge owner was insured under the policies of Hull and Disbursements Insurance in the amount of $400,000.00 which policies contained an American Hull Syndicate standard form of Running Down clause. Those insurers paid libellant the full face amount of the policy on the loss of the Dodge. The Dodge was also insured against fire in the amount of $150,000.00, in excess of the Hull Insurance coverage. The underwriters of that policy paid libellant $75,000.00 on account of the total loss of the Dodge.

There were four additional policies of insurance[2] in full force and effect at the time of the collision. The respondents freely admit the existence of such policies.

All the policies are in writing. The breach claimed by the libellant is the failure of the respondents to pay the amount of the loss which libellant claims was sustained. The respondents assert that the loss which the libellants claim to have sustained is

[2] a) Policy No. 614 B 440943, issued by respondent, A.B. Stewart and others, referred to as a Protection and Indemnity Policy (otherwise known as P&I) insuring in the amount of $25,000.00 subject to a deductibility average of $500.00.

b) Policy No. 614 B 440944, issued by respondent Guy Janson, and others, referred to as excess Protection and Indemnity, in the amount of $175,000.00, excess of the first $25,000.00 of ultimate net loss.

c) Policy No. 614 B 446491, issued by respondent, K.G. Poland, and others referred to as a legal and/or contractual liability policy, insuring libellant in the amount of $750,000.00.

d) Policy No. 446492, issued by respondent, G. B. Brookes, and others, referred to as an excess legal and/or contractual liability policy, insuring libellant in the amount of $250,000.00, but only to pay the excess of $750,000.00 for losses covered by policy "c)" hereinabove.

not payable under the terms and conditions of any of the policies which are involved in this case.

The clauses of the policies upon which the libellant relies are alleged in the libel and the respondents do not contest the correctness of such clauses.

It is well settled that in a "both to blame" collision, if one of the colliding vessels pays third-party claims, such claims become part of the collision damage of the vessel paying the claim. *See The Albert Dumois,* 177 U.S. 240, 20 S. Ct. 595, 44 L. Ed. 751 (1900); *New York & Cuba Mail S/S Co. v. American S. S. Owners Mutual Protection and Indemnity Assn., Inc.,* 72 F.2d 694 (2d Cir.), *cert. denied,* 293 U.S. 622, 55 S. Ct. 218, 79 L. Ed. 709 (1934). Under the maritime law of collision, the Michael was able to offset one-half of her payments on account of these claims against one-half of the damages allowed to the Dodge for loss of the Dodge and incidental expenses.

It is the libellant's contention that were it not for such third death, personal injury and cargo damage claims, the libellant would have recovered from the Michael $170,515.94. This figure is arrived at by using general rule in a "both to blame" collision, viz, the vessel that is damaged least pays the other vessel an amount equal to one-half the difference of the sum of the losses sustained. *See The North Star,* 106 U.S. 17, 20, 27 L. Ed. 91, 1 S. Ct. 41 (1882); *Petition of the Diesel Tanker A. C. Dodge, Inc., supra*. The sum of $170,515.94 is one-half the difference between the hull claim of the Michael, $462,618.69, and the total loss value of the Dodge, $800,000.00, plus stand-by wreck and salvage expenses, a total of $803,650.57.
It is libellant's contention that the alleged loss that he suffered is covered under the insurance policies involved herein. Insofar as the Protection and Indemnity (P & I) policies are concerned, the libellant asserts that the loss falls within clauses 4 and 4(a) of the Stewart policy, which is incorporated by reference into the Janson excess policy.

The P&I policies, as stated in the general provisions of such policies, undertake to insure the assured only for what he has become liable to pay and has actually paid, i.e., strict indemnity. However, clause 4(a) provides that if a claim arises under clause 4, it should be settled on the principle of cross-liabilities. The cross-liabilities principle states, in effect, that adjustment for losses in a "both to blame" collision should be made as if the owners of each vessel had been compelled to pay the owner of the other vessel some portion of the latter's damages that may properly be allowed in ascertaining the sum payable to the assured because of the collision. In other words, if cross-liabilities is applied, an insured owner will be deemed to have paid a portion of the damages even though, in fact, he has not actually expended any of his own money.

It is the libellant's position that even though he has been fully reimbursed for out-of-pocket costs or expenses, since he is demanding recovery for a loss under clause

4, strict liability does not apply; but rather, by applying cross-liabilities he could recover for the alleged loss.

It is well settled that if there is any ambiguity in a policy it should be resolved in favor of the assured. *Trinidad Corp. v. American S/S Owners Mutual Protection & Indemnity Ass'n,* 229 F.2d 57 (2d Cir. 1956). However, this court finds no ambiguity at all in clauses 4 and 4(a). Although 4(a) provides for the use of cross-liabilities, it is clear that it can be used to the same extent only as provided in the American Marine Insurance Syndicate Running Down Clause. This is explicitly set forth in clause 4(a).

Therefore, the use of the cross-liabilities principle would be governed by whatever limitations and conditions are established in the running down clause. The running down clause provides for the settling of claims, in a "both to blame" collision, on the principle of cross-liabilities *unless* the liability of the owners or charterers of one or both of the vessels is limited by law. Since the liability of the owner of the Dodge has been limited, it follows that the cross-liabilities *theory* principle mentioned in clause 4(a) of the P & I policy could not be used even if the libellant had incurred a liability for loss under clause 4. [4] Therefore, the libellant could only recover under the P & I policies on the principle of strict indemnity and since libellant has already been reimbursed for what it has actually paid out, it is entitled to no further recovery under the P & I policies.

In *New York & Cuba Mail S/S Co. v. American S. S. Owners Mutual Protection and Indemnity Assn., Inc. supra*, the court was faced with facts substantially similar to those present in this case. A shipowner made a claim against his P & I insurer for a third party loss offset by the other shipowners in a "both to blame" collision. The P & I policy contained a clause worded similar to clause 4 of the Stewart policy. The court denied recovery under the P & I policy. The New York & Cuba Mail S/S Co. case is distinguishable from the instant case. The policy in that case made no provision for the application of cross-liabilities and therefore, of course, contained no limitation on the extent to which cross-liabilities could be used to settle claims. Although the court recognizes the importance of the New York & Cuba Mail S/S Co. case, it is not dispositive of issue in this case, insofar as the P&I policies are concerned.

If no recovery can be made under the P&I policies, it is libellant's position that full recovery could be made under the Poland policy. This policy does not provide for strict indemnity and therefore no question would arise as to whether the policy

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[4] Even apart from the contract involved in this case, it seems to be the general opinion of text writers that in a case where the liability of one or both owners has been limited by law, the cross-liabilities principle cannot be used as a basis of settlement in a "both to blame" collision, since it would not be practical. *See* Hurd, The Law and Practice of Marine Insurance 123(2d ed. 1952); Templeman on Marine Insurance 309 (1950).

required the application of the cross-liabilities principle. All that the Poland policy requires, as set forth in clause 3 of that policy, is that the assured incur a legal liability. Clause 3 provides that it is: "To cover the legal * * * liability of the Assured for all loss or expense resulting from the legal * * * liability of the Assured and/or their employees and/or agents and/or vessels owned, chartered or operated by the Assured for loss, damage and/or expense to others and/or to the property of others of whatever kind whether afloat or ashore and for loss of life and personal injury, death or illness of any person or persons arising out of or resulting from the ownership, use or operation of vessels owned, * * *".

Clause 8 of the same policy provides that recovery can be made under it only if such losses are not collectible under Hull and Machinery or P&I policies. Since the libellant's alleged losses could be collected neither under the Hull policy, from which the libellant has received the full face amount, nor under the P&I policies for the reasons mentioned above, the libellant can recover, if at all, only under the Poland policy which is referred to by the libellant as the "umbrella" policy.

While it may be true that the libellant suffered a loss as a result of the setoff against it by the Michael, this court finds that the libellant did not incur the requisite legal liability as a result thereof. As stated in the *New York & Cuba Mail S.S. Co.* case, *supra*, 72 F.2d at 697: "This diminution [loss] was not due, however, to any liability of the Mexico to its own cargo or to the Hamilton, but simply because the Hamilton might offset its own damage in the division and such damage included its liability to the Mexico's cargo." Similarly in this case, the diminution of the Dodge's claim was not due to any legal liability for personal injury, death and cargo damage. The libellant has already been reimbursed for any legal liabilities incurred as a result of the collision.

In any event, the Poland policy only covers the assured's liability for loss *to others* or the property of others. It does not cover any loss sustained by the assured by reason of the loss of its own property. The claim for $170,515.94 was, in effect, asserted to recover at least a part of the value (over and above that already received from various policies) of the Dodge which was a total loss.

It is this court's finding that the libellant is not entitled to recover either under the Janson or Poland policies or a combination of both. Therefore, the libel is dismissed.

Avondale Shipyards, Inc. v. Insured Lloyd's, 786 F.2d 1265 (5th Cir. 1986)

Garwood, Circuit Judge:

Avondale Shipyards, Inc. (Avondale) brought this diversity suit against Universal Systems, Inc. (Universal) and its insurer, Insured Lloyd's (Lloyds), seeking contractual indemnity from Universal for sums Avondale had paid in settlement of a prior personal injury action brought against it by Frank King (King), a Universal employee who was injured while working on a ship then under construction at Avondale's shipyard. Avondale likewise sought recovery against Lloyds on this theory by reason of the contractual indemnity portion of the liability insurance policy Lloyds had issued to Universal. Additionally, Avondale requested a declaratory judgment that it was covered respecting the King claim as an additional insured under the comprehensive general liability portion of the same Lloyds insurance policy. On motions for summary judgment filed by all parties, the district court ruled that Avondale was covered by the comprehensive general liability portion of the Lloyds policy, but was not entitled to contractual indemnity from Universal or to recovery on that theory from Lloyds. On this appeal by Lloyds and cross-appeal by Avondale, we affirm the district court's determination as to the comprehensive general liability coverage, but reverse its ruling denying Avondale contractual indemnity recovery.

Facts and Proceedings Below

On December 12, 1980, King, a Universal employee, was injured while working as a shipfitter on the S/S OGDEN DYNACHEM, a vessel being constructed by Avondale for Ogden Shamrock Transport, Inc. at the Avondale shipyard. King's injury arose when he fell down a stairway on the ship allegedly as a result of stepping in a greasy substance on the deck. The OGDEN DYNACHEM had been removed from its shoreside ways and was positioned on a dry -dock afloat in the Mississippi River. At the time of King's accident, the vessel was approximately 74 percent complete; it was not capable of self-propulsion, but was able to float without assistance.

King's work as a Universal employee at the Avondale shipyard was pursuant to a contract in which Universal agreed to provide shipfitters to Avondale. The contract obligated Universal to indemnify Avondale against any claim for personal injury arising out of or connected with the work performed by Universal on or about Avondale's premises. In addition, Universal was required to obtain a comprehensive general liability policy naming Avondale as an additional insured and providing insurance to cover Universal's indemnity obligation. Pursuant to this agreement, Universal obtained a comprehensive general liability policy from Lloyds designating Universal as the named insured and Avondale as an additional insured. The policy also covered Universal's indemnity obligation. Avondale used Universal employees, including King, in building the OGDEN DYNACHEM for Ogden Shamrock Transport, Inc., the actual owner of the vessel and apparently a sister corporation of Avondale.

King filed suit in December 1981 against Avondale in the United States District Court for the Southern District of Mississippi to recover damages of $300,000 for his December 12, 1980 injuries. In that action, King asserted that Avondale was negligent and liable for negligence as a "vessel" pursuant to 33 U.S.C. § 905(b).[1] Avondale demanded defense and indemnity from Lloyds and Universal; Lloyds denied coverage to Avondale, but provided a defense. In the King litigation, the district court, in July 1982, entered an order granting a partial, interlocutory summary judgment on the issues of ownership and status of the OGDEN DYNACHEM. In this order, the court ruled that the OGDEN DYNACHEM was a vessel for purposes of section 905(b) and that the vessel was under Avondale's care and control at the time of the accident, making Avondale the vessel's owner *pro hac vice* for purposes of section 905(b). Almost two years after the partial summary judgment order was entered, a settlement was reached with King for $120,000, which was jointly funded by Avondale and Lloyds. In June 1984, the district court signed a final judgment approving the settlement.

In August 1983, during the course of the King litigation, Avondale filed the present suit against Lloyds and Universal in the United States District Court for the Eastern District of Louisiana, seeking to establish insurance coverage by Lloyds for Avondale's liability to King and to recover full contractual indemnity from Universal plus all costs, expenses, and attorneys' fees incurred by Avondale in both the King litigation and this action. Lloyds denied coverage to Avondale based on a "watercraft exclusion" contained in the comprehensive general liability policy, which excluded coverage for liabilities arising from vessel ownership.[2] Lloyds

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[1] Longshoreman's and Harbor Workers' Compensation Act (LHWCA), section 5(b), 33 U.S.C. § 905(b), provides in part:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void."

For purposes of section 905(b), section 902(21) defines "vessel" as "any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, *owner pro hac vice*, agent, operator, charter or bare boat charterer, master, officer, or crew member." (Emphasis added.) ***

[2] The watercraft exclusion in the Lloyds comprehensive general liability policy provides:

contends that the district court's determination in the King litigation that Avondale was *pro hac vice* owner of the OGDEN DYNACHEM brings it within the scope of this exclusion. Similarly, Universal bases its denial of indemnity on Avondale's status as *pro hac vice* owner because section 905(b) bars claims for contractual indemnity by such owners against employers of persons injured on such vessels.

As part of the settlement of the King litigation, Avondale and Lloyds agreed that the outcome of the present declaratory judgment action would determine the responsibility for the settlement payment made to King. In the instant litigation, the parties agreed at a pretrial conference that the insurance coverage issue between Avondale and Lloyds as well as Avondale's contractual indemnity claim against Universal could be resolved by motions for summary judgment. In December 1984, the district court in the case at bar, acting on cross-motions for summary judgment, ruled that Avondale had insurance coverage as an additional named insured under the comprehensive general liability policy issued by Lloyds to Universal. The court reasoned that, although in its view Avondale was collaterally estopped by the determination in the King litigation that Avondale was *pro hac vice* owner of the vessel for purposes of section 905(b), this status under section 905(b) was not coextensive with the meaning of "owner" under the watercraft exclusion. The court determined that Avondale was not an owner of the vessel for purposes of the exclusion and hence was covered by the policy. The district court, however, ruled that Avondale could not recover for contractual indemnity against Universal or Lloyds, because under section 905(b) an indemnification agreement between the employer of an injured worker and the *pro hac vice* owner of a vessel is invalid.

Lloyds appeals the district court's determination that Avondale is covered by its comprehensive general liability policy. Avondale cross-appeals the district court's denial of recovery for contractual indemnity.

Discussion

Comprehensive General Liability Policy

> "This insurance does not apply:
>
> ". . . .
>
> "to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of
>
> "(1) any watercraft owned or operated by or rented or loaned to any insured, or
>
> "(2) any other watercraft operated by any person in the course of his employment by any insured;
>
> "but this exclusion does not apply to watercraft while ashore on premises owned by, rented to or controlled by the named insured; . . . ."

Lloyds challenges the district court's finding that *pro hac vice* ownership status under section 905(b) is not coextensive with the meaning of ownership as used in the watercraft exclusion of its comprehensive general liability policy. We do not reach that issue. Avondale argues that it was not collaterally estopped from relitigating *pro hac vice* ownership because the previous King litigation was resolved by a monetary settlement approved in a consent judgment. Moreover, Avondale asserts that the previous determination was incorrect because Avondale lacked the necessary relationship to the vessel to establish *pro hac vice* ownership. Finding that Avondale was not collaterally estopped by the King litigation and was not the *pro hac vice* owner of the OGDEN DYNACHEM, we affirm the district court's conclusion that the watercraft exclusion was inapplicable and that Avondale was covered by the comprehensive general liability policy. ***

(b) The merits

Because the King litigation does not preclude Avondale from contending in this suit that it was not the owner *pro hac vice* of the OGDEN DYNACHEM, we turn to the merits of that issue. Lloyds contends that vessel ownership, for purposes of its policy's watercraft exclusion (*see* note 2, *supra*), is to be determined under the same standards as vessel ownership for purposes of the LHWCA and its section 905(b). while the district court disagreed with this contention, we need not reach that issue, as we hold that, contrary to the premise of Lloyds' claim, Avondale was not the *pro hac vice* owner of the OGDEN DYNACHEM for purposes of section 905(b) or otherwise.

In *Trussel v. Litton Systems, Inc.,* 753 F.2d 366 (5th Cir. 1984), we held that a shipyard having no more than custody and control of a vessel for purposes of effecting its construction cannot be deemed an owner *pro hac vice* of the vessel or to otherwise stand in such relation to it as to be deemed a vessel under section 902(21) for purposes of section 905(b). In *Trussell*, an employee of a subcontractor was injured while working on a vessel being constructed by Litton for the United States, which held title to the incomplete vessel. In addressing the employee's section 905(b) claim against Litton, we considered whether Litton was the *pro hac vice* owner of the vessel at the time of the injury. We examined previous decisions holding that a bare boat or demise charterer is an owner *pro hac vice* of the vessel, and cases holding that a ship repairer does not have the requisite degree of control over a vessel to its *pro hac vice* owner. *See Bossard v. Port Allen Marine Service, Inc.,* 624 F.2d 671 (5th Cir. 1980). We concluded in *Trussell* that "[a] shipbuilder -- like a ship repairer -- does not have the unrestricted use of a vessel required of an owner pro hac vice." 753 F.2d at 368. And, we held that accordingly Litton was "not subject to liability to plaintiff under section 905(b)." *Id.* Avondale, like Litton, did not hold title to the incomplete vessel and had no right to use the vessel other than for purposes of effecting its construction. Therefore, we find that when King was injured Avondale was not the *pro hac vice* owner of the OGDEN DYNACHEM, and did not otherwise stand in such relation to it as to be deemed a vessel under section 902(21) for purposes of section 905(b).

Lloyds argues that the watercraft exclusion exempts from coverage liability that arises out of the incidents of ownership of the vessel. It relies upon *Tidex, Inc. v. A.L. Commercial Blasting Corp.*, 567 F. Supp. 918, 922 (E.D. La. 1983), and *Offshore Logistics Services, Inc. v. Mutual Marine Office, Inc.,* 462 F. Supp. 485, 491-92 (E.D. La. 1978), in which vessel demise charterers, as owners *pro hac vice*, were precluded from coverage by similar watercraft exclusions. those cases, however, rest on the "long . . . established" rule of admiralty that "a demise charterer is considered the owner of the vessel *pro hac vice*. " *Id.* at 491. *See also e.g.*, Gilmore & Black, *Admiralty* § 4-1 at 194 (2d ed.); 46 U.S.C. § 186. In *Trussell*, we held that a shipbuilder was *not* the equivalent of a demise charterer, and was not an owner *pro hac vice*. In light of *Trussell*, the cited cases relied on by Lloyds do not support the application of the watercraft exclusion to a shipbuilder. Based on *Trussell*, we hold that Avondale lacked the incidents of ownership necessary to bring it within the watercraft exclusion. Therefore, Avondale, as an additional insured, was covered by the comprehensive general liability policy.

Contractual Indemnity

Avondale cross-appeals against Universal and Lloyds seeking indemnity for its settlement payments to King. The district court denied such relief, reasoning that because Avondale was found to be a *pro hac vice* owner in the King litigation, its indemnity agreement with Universal is void under section 905(b).

Section 905(b) clearly provides that in an employee's negligence action under this section against a vessel as third party, the employer will not be liable to the vessel and any agreements to the contrary are void. *See* note 1, *supra*. The indemnity agreement between Avondale and Universal, however, is void only if Avondale is a "vessel" for purposes of section 905(b). *See Pippen v. Shell Oil Co.*, 661 F.2d 378, 386-88 (5th Cir. 1981); *Tran v. Manitowoc Engineering Co.,* 767 F.2d 223, 229 (5th Cir. 1985). We have already determined that the King litigation does not bar Avondale's contention in the present suit that it is not a *section* 905(b) vessel. When King was injured, Avondale did not own or hold title to the OGDEN DYNACHEM. *Cf. Hall v. Hvide Hull No. 3,* 746 F.2d 294, 304 (5th Cir. 1984) (shipbuilder with contractual ownership interest in vessel may be vessel owner under section 905(b)), *cert. denied*, 474 U.S. 820, 106 S. Ct. 69, 88 L. Ed. 2d 56 (1985). We held in *Trussell* that the shipbuilder, which did not own or hold title to the vessel but merely "contracted to construct the vessel" and had "no right to use it for any other purpose," was not a "vessel" for purposes of section 905). Therefore, we find that shipbuilder Avondale is not a vessel for purposes of section 905(b), and that the indemnity agreement between Avondale and Universal is valid.

Conclusion

For the foregoing reasons, we affirm the district court's holding that Avondale may recover under the Lloyds comprehensive general liability policy issued to Universal. We reverse the district court's determination that the indemnity agreement between Avondale and Universal is void, and hold that Avondale may also recover in contractual indemnity. ***

***Terra Resources, Inc. v. Lake Charles Dredging & Towing*, Inc., 695 F.2d 828 (5th Cir. 1983)**

John R. Brown, Circuit Judge:

***Our voyage's purpose is to determine whether the district court erred in requiring Aetna Casualty & Surety to indemnify Lake Charles Dredging & Towing, Inc. and Fidelity & Casualty Insurance Co. for money paid in settlement to Terra Resources, Inc., and other plaintiffs (Terra) for damages caused when three drifting barges crashed into an oil production facility and pipeline. Finding no error, we affirm.

On the night of January 25, 1978, the unmanned barges, two owned by Parker Brothers Co. and one by Lake Charles Dredging,[2] were moored to an anchoring device[3] in East Cote Blanche Bay, in Louisiana. A storm set in over the bay. Driven by the waves and the gale-force winds, the barges scudded south through the water, dragging the anchoring device behind, until they collided with the production facilities.

Terra filed suit against both Lake Charles Dredging and Fidelity & Casualty, its P & I insurer. Parker Brothers was later added by an amended complaint.[4] Both Parker Brothers and Lake Charles Dredging advised Aetna, their general comprehensive liability insurer, of the claim. Aetna denied liability, pointing to a watercraft exclusion in the insurance policies.[5]

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[2] Lake Charles Dredging is a wholly-owned subsidiary of Parker Brothers.

[3] The mooring device consisted of a concrete block sunk into the floor of the bay, connected by a cable to a buoy on the surface. It was owned by Lake Charles Dredging.

[4] Fidelity & Casualty also afforded P & I insurance for Parker Brothers. Each policy contained an escape clause, which excluded Fidelity & Casualty from liability if any other insurance covered a particular loss. The Aetna policies had no such escape clause.

[5] The text of the watercraft exclusion follows:

This insurance does not apply:

> (e) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of
>
> > (1) any watercraft owned or operated by or rented or loaned to any insured, or
> >
> > (2) any watercraft operated by any person in the course of his employment by any insured;

but this exclusion does not apply to watercraft while ashore on premises owned by, rented to or controlled by the named insured. . . .

Terra's claim was settled for $140,000. Of this sum, $10,000 was paid by Parker Brothers, $10,000 by Lake Charles Dredging, and $120,000 by Fidelity & Casualty as their insurer.[6] Prior to final settlement, Aetna was brought in as a third party defendant. The settlement agreement expressly did not dispose of any claims against Aetna. It expressly subrogated Fidelity & Casualty, Lake Charles Dredging, and Parker Brothers to Terra's rights. It did not specify how much of Fidelity & Casualty's $120,000 contribution was being paid on behalf of Lake Charles Dredging and how much on behalf of Parker Brothers.

With Terra now out of the case, trial was had on the stipulations and depositions. The trial judge found that Aetna was liable to Lake Charles Dredging despite the watercraft exclusion. Since Lake Charles Dredging owned the peripatetic anchoring device, it was subject to liability independently of its ownership and use of the watercraft. ***Thus Aetna owed Lake Charles Dredging $10,000. The trial judge also held that Parker Brothers had no source of liability other than its use of watercraft. Consequently, the exclusion applied and Aetna owed Parker Brothers nothing. Finally, the judge required Aetna to indemnify Fidelity & Casualty for its $120,000 contribution on the grounds that the entire payment had ultimately been made on behalf of Lake Charles Dredging, whose selection and ownership of the inadequate anchoring device had been the sole proximate cause of the incident. *Terra Resources, Inc. v. Lake Charles Dredging & Towing, Inc.*, 555 F. Supp. 406 (W.D.La. 1981).

Aetna appeals. It claims that the only source for Lake Charles Dredging's liability to Terra was its use and operation of watercraft. Because of the exclusion, therefore, Aetna owes nothing to Lake Charles Dredging, however, it owes nothing to Fidelity & Casualty. To be indemnified, Fidelity & Casualty must show actual liability on its part, which it cannot do, since no ruling on the merits of Terra's claim was ever made. Moreover, says Aetna, even if potential liability is all it must show in order to receive indemnification, Fidelity & Casualty had no potential liability to Terra. Finally, Aetna contends it owes Fidelity & Casualty nothing because no proof was offered as to how much of the $120,000 was contributed on behalf of Lake Charles Dredging.

With these factual and procedural victuals, we now embark.

We first reach Aetna's contention that the watercraft exclusion bars any claim by Lake Charles Dredging against it. If the sole source of Lake Charles Dredging's liability were its ownership and use of the barges, we would wholeheartedly support that position. ***We agree with the trial court that Lake Charles Dredging's ownership of the mooring device was such a separate and independent source of potential liability, not encompassed by the watercraft exclusion.

[6] Each P & I policy had a $10,000 deductible.

Lake Charles Dredging's mooring device indisputably was inadequate to secure the barges under the prevailing and reasonably contemplated weather conditions. Aetna argues that this fact is irrelevant. If no watercraft had been used, it argues, no mooring would have been necessary, and no accident would have occurred. We find this argument unconvincing. Under the insurance policy, for the exclusion to apply, the watercraft must be owned, used, loaded, unloaded or operated by an insured party or someone in its employ. To be sure, Parker Brothers and Lake Charles Dredging did own the runaway barges, but this need not have been the case. The ownership of the mooring device was completely independent of Parker Brothers' and Lake Charles Dredging's ownership and use of the barges. The damage would still have occurred if the barges had not been owned by Parker Brothers, Lake Charles Dredging, or anyone else employed by either insured. The failure of that device was a totally independent basis for Lake Charles Dredging's liability to Terra. Under Louisiana law, Aetna is accountable to Lake Charles Dredging under its insurance contract.

At the least, then, Aetna must indemnify Lake Charles Dredging for the $10,000 paid from the pocket of Lake Charles Dredging. What, if any, is its liability to Fidelity & Casualty?

As a general rule, an indemnitee must establish actual liability on his part to recover payment from an indemnitor. *Wisconsin Barge Line, Inc. v. Barge Chem 300*, 546 F.2d 1125 (5th Cir. 1977). This Court has recognized that this rule is not absolute, however. In *Wisconsin Barge* the Court adopted the holding of *Tankrederiet Gefion A/S v. Hyman-Michaels Co.,* 406 F.2d 1039 (6th Cir. 1969), to hold that

> defendants need only show potential (rather than actual) liability to recover indemnity where either (1) defendants tender the defense of the action to the indemnitor, (2) the claim for indemnity is founded upon a judgment, or (3) the defendant's claim is based on a written contract of insurance or indemnification.

546 F.2d at 1127.

Aetna claims that Fidelity & Casualty comes within none of the three exceptions and must therefore prove it was actually liable to Terra. We disagree. Because Fidelity & Casualty is legally subrogated to Lake Charles Dredging's rights, its claim is firmly based upon Lake Charles Dredging's written contracts of insurance with both Fidelity & Casualty and Aetna. ***

Upon Aetna's denial of coverage, under the terms of the P & I policy, Fidelity & Casualty became contractually bound for the payment of Lake Charles Dredging's debt (liability). Having paid, it is subrogated in that amount to Lake Charles Dredging's rights, including the right to seek indemnification under the disputed Aetna general comprehensive liability insurance policy. ***

Under *Wisconsin Barge*, Fidelity & Casualty need only show its potential liability in order to recover from Aetna.

Aetna contends that if it is in fact liable to Lake Charles Dredging, then Lake Charles Dredging had insurance other than Fidelity & Casualty's policy. Under those circumstances, by its terms, the Fidelity & Casualty policy does not apply. Therefore Fidelity & Casualty had no potential for liability and Aetna owes it no indemnification under *Wisconsin Barge*. This perfectly circular reasoning ignores the fact that Aetna denied liability and left Fidelity & Casualty holding the bag. Aetna cannot refuse to indemnify Fidelity & Casualty simply because Fidelity & Casualty instead paid in Aetna's rightful place.

Aetna thus is liable for payments made on Lake Charles Dredging's behalf. It owes nothing, however, for any payments made on Parker Brothers' behalf. Here our smooth sailing is interrupted, for the settlement agreement neither states nor implies how much of Fidelity & Casualty's $120,000 contribution was made on behalf of which party. Upon analysis and review of the facts of the case, we are convinced that the district court correctly solved this problem. The court held:

> Parker Brothers was potentially liable as the owner of two of the barges but the record is undisputed that Parker Brothers merely turned possession of unmanned barges over to Lake Charles. Lake Charles was the party in control of the entire operation and was the party principally at fault in selecting the mooring device and in failing to have the barges moved to a safe location. Although liability could have been visited on Parker Brothers due to its ownership of the barges, it seems beyond question that Parker Brothers could have demanded indemnification from Lake Charles. For this reason, it is reasonable to conclude that the entire contribution of Fidelity & Casualty was on behalf of Lake Charles and should therefore be recoverable from Aetna.***

In the present case, the trial court was clearly correct in finding that Lake Charles Dredging was the party primarily responsible for the act causing the damage to Terra's property. Though it owned the barges, Parker Brothers was only constructively at fault, and could have demanded indemnification from Lake Charles Dredging.

Aetna characterizes the trial judge's holding as sheer speculation and conjecture. The facts of the case, however, lead us to support the conclusion reached by the district judge. Parker Brothers was not operationally negligent. Though it owned two of the barges, and the barges posed a real potential *in rem* liability, the failure of the inadequate mooring device, rather than any flaw in the barges themselves, was the proximate cause of the accident. Moreover, as Aetna admits, Lake Charles Dredging was fully in charge of the entire dredging project. The barges were under

Lake Charles Dredging's complete control and were moored under its direction. The device itself was owned and placed by Lake Charles Dredging. The district judge could correctly decide that Fidelity & Casualty's payment ultimately was made on behalf of Lake Charles Dredging. Under the general comprehensive liability policy, as Lake Charles Dredging's insurer, Aetna must indemnify Fidelity & Casualty for its entire $120,000 contribution.***

***Blanton v. Continental Insurance Co.*, 565 F. App'x 330 (5th Cir. 2014)**

Per curiam:

Misty and Robert Blanton, doing business as Field Service Industries, appeal the judgment of the district court in favor of Continental Insurance Company in this insurance dispute. The district court held that Continental Insurance Company had no duty to defend Field Service Industries in a lawsuit arising out of its installation of and subsequent repairs to engines in a marine vessel because the underlying claims fell within the contractual liability exclusions to the insurance policy. We affirm the judgment of the district court on alternative grounds.

I. Factual and Procedural Background

On June 16, 2006, Plaintiffs-Appellants Misty and Robert Blanton, doing business as Field Service Industries (collectively "FSI"), installed two diesel engines into the *Betty L*, a motor vessel owned by J.A.M. Marine Services, L.L.C. ("J.A.M."). J.A.M. uses the *Betty L* to supply offshore drilling, shipping, and ocean vessels with lubricants and fuel via barge or tug deliveries. At the time of the installation, FSI was an authorized engine dealer for Alaska Diesel. Less than a year after installation of the engines on the *Betty L*, the engines experienced mechanical problems. In May and June 2007, FSI performed diagnostic and repair work on both engines. According to J.A.M., FSI performed the initial diagnostic work and repairs in a substandard manner, necessitating additional repairs. One of the engines ultimately had to be replaced, rendering the *Betty L* out of service for over a month.

J.A.M. brought suit in state court alleging negligence and breach of contract claims against Alaska Diesel, FSI, and FSI's owners, the Blantons and Robert R. Eisele, Jr. and Robert Peter Eisele ("Eiseles").

FSI had a Marine Services Liability Policy with Continental Insurance Company ("Continental") that included Commercial General Liability ("CGL") coverage and Ship Repairer's Liability ("SRL") coverage. The policy period was from August 15, 2006, to August 15, 2007, which is after the installation of the engines on the *Betty L,* but includes FSI's later repair work. After being served with J.A.M.'s lawsuit, FSI sought a defense from Continental under the Policy, but Continental denied coverage. FSI responded by filing this breach of insurance contract action in state court, seeking a judgment that Continental owed a duty to defend FSI. Continental removed this action to federal court and joined the Eiseles.

The underlying lawsuit between J.A.M. and FSI settled, leaving only the issue of whether Continental had a duty to defend FSI. The parties filed cross motions for summary judgment, and the district court granted summary judgment in favor of Continental. The district court held Continental had no duty to defend FSI in the underlying action due to the presence of "contractual liability" exclusions contained in both the CGL and SRL portions of the Policy. FSI appealed, arguing that the district court erred by holding that the contractual liability exclusions precluded coverage. Continental asserted that the district court did not err, and, even if it had, other exclusions contained in the Policy apply to FSI's claims. Additionally, Continental contends that if it owes a duty to defend the Blantons that duty does not extend to the Eiseles.

After FSI filed its appeal, we certified a similar question of Texas insurance law regarding contractual liability exclusions to the Supreme Court of Texas. *See Ewing Constr. Co. v. Amerisure Ins. Co.*, 690 F.3d 628, 633 (5th Cir. 2012). We placed this case in abeyance pending the Texas Supreme Court's answer. On January 17, 2014, the Texas Supreme Court held that an insured's express agreement to perform construction in a good and workmanlike manner did not enlarge its obligations and was not an "'assumption of liability' within the meaning of the policy's contractual liability exclusion." *Ewing Const. Co., Inc. v. Amerisure Ins. Co. ("Ewing II")*, 420 S.W. 3d 30, 36 (Tex. 2014). Following the decision in *Ewing II,* Continental, in a letter brief to the court, conceded that the contractual liability provisions in the CGL and SRL do not apply to FSI's claims. However, Continental maintains that several other exclusions contained in both the CGL and SRL portions of the Policy preclude coverage. ***

III. Duty to Defend

On appeal, FSI alleges that it is entitled to a defense under the CGL and the SRL Policy provisions for the following allegations in J.A.M.'s underlying petition: (1) loss of use of the *Betty L* resulting from FSI's negligent installation of the engines; (2) loss of use of the *Betty L* resulting from FSI's negligence in performing diagnostic work and/or repairs on the engines; (3) damage to J.A.M.'s property resulting from FSI's negligent installation of the engines; and (4) damage to J.A.M.'s property resulting from FSI's negligence in performing diagnostic work and repairs on the engines. Continental counters that CGL and SRL coverage pertains only to situations in which FSI's work causes damage to property not produced by or worked on by FSI, and since J.A.M.'s underlying petition is based on damage to engines installed and repaired by FSI, there is no CGL or SRL coverage. Continental points to several exclusions to CGL and SRL coverage in support of its assertion that it owes no duty to defend. We consider each of the four claims in turn and explain how each falls within an exclusion to both the CGL and SRL portions of the Policy. Because we agree that the Policy does not cover these claims, we need not reach the parties' arguments concerning the application of the Policy to the Eiseles.

A. Relevant Law

In this diversity action, Texas substantive law applies as interpreted by Texas state courts. *Gilbane Bldg. Co. v. Admiral Ins. Co.*, 664 F.3d 589, 593 (5th Cir. 2011). Under Texas law, whether an insurance carrier owes a duty to defend under an insurance policy is a purely legal question. *Koenig v. First Am. Title Ins. Co. of Tex.*, 209 S.W.3d 870, 873 (Tex. App.—Houston [14th Dist.] 2006, no pet.). "In determining a duty to defend, we follow the eight-corners rule, also known as the complaint-allegation rule: 'an insurer's duty to defend is determined by the third-party plaintiff's pleadings, considered in light of the policy provisions, without regard to the truth or falsity of those allegations.'" *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491 (Tex. 2008) (quoting *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006)). All doubts regarding the duty to defend are resolved in favor of the duty. *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002).

"Initially, the insured has the burden of establishing coverage under the terms of the policy." *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010). If the insured proves that the claim is covered, the insurer must prove the loss is within an exclusion in order to avoid liability. *Id.* If the insurer establishes the applicability of an exclusion, the burden shifts back to the insured to prove coverage under an exception to the exclusion. *Id.* However, "[o]nce coverage has been found for any portion of a suit, an insurer must defend the entire suit." *St. Paul Ins. Co. v. Tex. Dep't of Transp.*, 999 S.W.2d 881, 884 (Tex. App.—Austin 1999, pet. denied).

In assessing the scope of coverage provided by an insurance policy, we interpret the policy as a written contract, according to settled rules of contract construction. *See Nat'l Union Fire Ins. Co. v. Crocker,* 246 S.W.3d 603, 606 (Tex. 2008). This includes giving the policy's terms their plain meaning. *Id.* A term of the policy is considered ambiguous when it is "susceptible to two or more reasonable interpretations." *Lincoln Gen. Ins. Co. v. Aisha's Learning Ctr.*, 468 F.3d 857, 859 (5th Cir. 2006) (citations omitted). However, "an ambiguity does not exist simply because the parties interpret a policy differently. If a contract as written can be given a clear and definite legal meaning, then it is not ambiguous as a matter of law." *Gilbert,* 327 S.W.3d at 133 (citations omitted). When a term is subject to more than one reasonable construction, we interpret the term in favor of coverage. *Id.*

B. Claims and Exclusions

1. Loss of use of the *Betty L* resulting from FSI's negligent installation of the engines.

Claim One is based on J.A.M.'s allegations that it lost the use of the *Betty L* from May 14 to 17, 2007, due to the failure of the port engine, which had been installed and placed into service by FSI ten months prior to its failure. J.A.M. also claimed that it lost the use of the vessel due to the failure of the starboard engine shortly thereafter. FSI alleges that this claim is covered by the CGL portion of the Policy. However, Continental denies that there is coverage under Exclusion "m."

The CGL portion of the Policy states that Continental has "no duty to defend the insured against any 'suit' seeking damages for . . . 'property damage' to which this insurance does not apply." Exclusion "m" specifically precludes coverage for:

> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> > (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
> >
> > (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
>
> This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

The Policy provides relevant definitions that clarify the meaning of this exclusion. "Property damage" includes:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or,
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

"Impaired property" means "tangible property, other than 'your product' or 'your work', that cannot be used or is less useful because . . . [i]t incorporates 'your product' or 'your work' that is known or thought to be defective, deficient, inadequate or dangerous[.]" Further, the Policy defines "your work" as "[w]ork or operations performed by you or on your behalf; and . . . [m]aterials, parts or equipment furnished in connection with such work or operations." "Your product" pertains to "[a]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by . . . You[.]"

Thus, in light of these definitions, Exclusion "m" to the CGL portion of the Policy precludes coverage for the loss of use to tangible property that cannot be used because it incorporates FSI's defective product or work. However, this exclusion does not apply if the loss of use arises out of a sudden or accidental injury to FSI's product or work. Here, Claim One appears to fall within Exclusion "m" since J.A.M.

alleged that the loss of use of the *Betty L* was due to FSI's substandard installation of the engines. However, FSI challenges the application of this exclusion, invoking the exception for sudden and accidental damage. Continental counters that nothing in J.A.M.'s pleadings indicate that the loss of use of the *Betty L* was the result of sudden or accidental damage to the engines. Under the eight-corners rule, we turn to J.A.M.'s allegations in its state court petitions to resolve this matter. *Zurich*, 268 S.W.3d at 491.

J.A.M. filed four petitions alleging claims against FSI in state court. Continental argues that none of the language in the four petitions supports FSI's position that the loss of use to the *Betty L* was the result of sudden or accidental damage to the engines. In J.A.M.'s first petition, it states that in 2006 it purchased the two engines and that on June 16, 2006, FSI, as an authorized dealer of those engines, installed both of them in the *Betty L.* Approximately ten months later, the port engine began to "push water used to cool the engine out of the day tank." J.A.M. contacted FSI and scheduled repair work three days later. FSI technicians performed diagnostic testing on the engine, but they only discovered an oil leak and replaced two different gaskets. After the technicians left, a separate injector "O" ring began leaking. The vessel was returned to operation, but engine water continued to "push out of the day tank."

Less than a week later, the starboard engine developed a similar problem whereby it "began to push its engine cooling water out of the day tank." An FSI technician responded the next day and determined that the starboard engine's head gasket needed to be replaced. Service was scheduled for June 7, 2007, and FSI expected that the replacement would take four hours. However, the repair lasted four days "due to substandard work performed by [FSI's] technicians[,] which created additional problems requiring repair."

The narratives contained in the Second, Third, and Fourth Amended Petitions are substantially similar. Even when reading the pleadings liberally, *see King,* 85 S.W.3d at 187, it is clear that the engines did not suddenly cease to function. Rather, J.A.M. alleged that the loss of use of the *Betty L* was the culmination of several problems beginning with the negligent installation of the engines in June 2006, and continuing with a series of repairs made to the engines for various problems in May and June 2007. Thus, Exclusion "m" to the CGL coverage applies to this claim.

2. Loss of use of the *Betty L* resulting from FSI's negligence in performing diagnostic work and repairs of the engines.

J.A.M.'s petition made the following allegations which form the basis of FSI's second claim: (1) loss of use of the *Betty L* due to the failure of the starboard engine less than one week after the port engine had been diagnosed, repaired, and put back to use during May 2007; (2) loss of use of the vessel during the repair period that was extended from four hours to four days in June 2007 due to FSI's negligence and substandard work; and (3) loss of use of the vessel beginning on June 26, 2007, when the starboard engine failed after having been reinstalled and placed into operation the day before. FSI seeks coverage under both the CGL and the SRL portions of the Policy for (1) and (3), and only under the SRL for (2). Continental argues that Exclusion "m" precludes CGL coverage and Exclusion "e" precludes SRL coverage.[5]

As previously explained, Exclusion "m" to the CGL coverage precludes coverage for the loss of use to physical property that cannot be used because it incorporates FSI's defective product or work. Subsections (1) and (3) clearly encompass the loss of use of the vessel due to the failure of the engines following repairs and faulty diagnostic work by FSI on those engines. For the same reasons explained for Claim One, Exclusion "m" applies to Claim Two.

Turning to the SRL coverage, Exclusion "e" applies. Exclusion "e" to the SRL portion of the Policy states that the Policy does not apply to "demurrage, loss of time, loss of freight, loss of charter and/or similar and/or substituted expenses." FSI asserts that Exclusion "e" does not apply because it does not specifically list "loss of use damages" or "property damages" as items to exclude. It interprets J.A.M.'s petition as alleging the loss of use of property (the *Betty L*), and it suggests that this loss is separate and distinct from the losses contemplated by Exclusion "e," which are specific to expenses. This argument is without merit. The Supreme Court long ago defined demurrage as "the loss of profits or of the use of a vessel pending repairs or other detention," commenting that this definition "is too well settled both in England and America to be open to question." *The Conqueror*, 166 U.S. 110, 125, 17 S. Ct. 510, 41 L. Ed. 937 (1897). Additionally, Exclusion "e" is intentionally expansive, and includes "similar and/or substituted expenses." Here, J.A.M.'s four state court petitions make it clear that it is in the business of providing offshore rigs and vessels with fuels and lubricants through the use of its barge and tug boats. Due to the need for further repairs, J.A.M. lost the use of its vessel, including the profits it could obtain by using the vessel to provide other vessels with fuel and lubricants. There is no ambiguity in the Policy on this point, and, by its terms, there is no SRL coverage for Claim Two.

3. Damage to J.A.M.'s property resulting from FSI's negligent installation of the engines.

J.A.M. alleged that its port engine exhibited mechanical failure ten months after it was installed and that the starboard engine exhibited mechanical failure shortly thereafter. FSI seeks a defense for this claim under CGL coverage. However, CGL Exclusion "k" precludes coverage for "'Property damage' to 'your product' arising out of it or any part of it." As previously mentioned, the Policy defines "Your

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[5] The SRL provision only applies to damage or physical loss that occurs while the vessel is in FSI's "care, custody or control." ***

product" as "[a]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by . . . You."

Under Texas law, liability policies containing similar exclusions "[do] not insure the policyholder against liability to repair or replace his own defective work or product, but [they do] provide coverage for the insured's liability for damages to other property resulting from the defective condition of the work, even though injury to the work product itself is excluded." *Travelers Ins. Co. v. Volentine*, 578 S.W.2d 501, 503-04 (Tex. Civ. App.—Texarkana 1979, no writ). FSI argues that Exclusion "k" does not apply because J.A.M. alleges damage to internal parts of the engines that are not FSI's "product." However, a plain reading of the Policy shows that the exclusion applies to "any part of" FSI's product, which are the engines that FSI handled and distributed. The internal parts of the engine are still components of the engine. Moreover, J.A.M.'s petitions alleged that FSI installed the *entire* engine. FSI's attempt to separate the engine components is unavailing, and Exclusion "k" applies to this claim.

3. Damage to J.A.M.'s property resulting from FSI's negligence in performing diagnostic work and repairs.

The fourth claim encompasses J.A.M.'s allegation that the *Betty L* was damaged as the result of FSI's diagnostic and repair work on both engines in May and June 2007. This damage necessitated additional repairs and the replacement of an entire engine. FSI argues that there is CGL and SRL coverage for this claim.

Since J.A.M. alleged damage to the engine, which constitutes FSI's "product," for the reasons discussed under Claim Three, Exclusion "k" bars coverage under the CGL portion of the Policy. Likewise, there is no SRL coverage under Exclusion "n," which applies to "the expense of redoing the work improperly performed by [FSI] or on [FSI's] behalf or the cost of replacement of materials, parts or equipment furnished in connection therewith." J.A.M. clearly alleged that FSI performed substandard repair work, and, as a result, it "was forced to pay, out of its own pocket, for what should have been warranty work on the . . . engines." Thus, there is no SRL coverage for this fourth claim.

IV. Conclusion

Since all of FSI's claims fall within an exclusion to the CGL and SRL coverage portions of the Policy, Continental has no duty to defend FSI.***

XL Specialty Insurance Co. v. Bollinger Shipyards, Inc., 800 F.3d 178 (5th Cir. 2015)

Edith H. Jones, Circuit Judge:

Bollinger Shipyards won a multimillion dollar contract to upgrade eight United

States Coast Guard 110-foot cutters to 123-foot craft. The vessels failed and the United States sued Bollinger. The defendant insurers refused to undertake Bollinger's defense. In Bollinger's suit to enforce the insurance contract, the district court in a comprehensive opinion, granted summary judgment for the insurers. We need not reach numerous issues raised concerning the insurance contracts' interpretation because we may affirm on a narrow basis.

BACKGROUND

As part of the Coast Guard's "Deepwater" modernization program, Bollinger Shipyards converted eight 110-foot patrol boats (vessels it had built originally) to 123-foot patrol boats. The underlying lawsuit alleges that throughout the bidding and development stages of the project, the Coast Guard was concerned about the ability of the boats' hulls to accommodate the extensions. In response, Bollinger submitted a longitudinal strength analysis that compared the "required section modulus" for the redesign to the upgraded vessels' "actual" section modulus. This report showed that the redesigned boats would have well over twice the required strength. Bollinger later revised its reported figure down to a number still well above the "required" figure. This revised calculation allegedly produced three different results, two of which indicated the hull strength was *not* sufficient for the conversion. Bollinger allegedly did not disclose the problematic results but completed the work anyway and delivered the vessels.

On September 10, 2004, one of the vessels Bollinger refitted "suffered a structural casualty that included buckling of the hull." The Coast Guard determined that all eight vessels were similarly and irreparably deficient; all of them are now "unusable" despite efforts to remedy the hull strength. The Department of Justice sent Bollinger a litigation hold letter in December 2006 and the Coast Guard revoked acceptance of the vessels on May 17, 2007. Bollinger cooperated with the Government investigation and entered into 21 successive agreements tolling the statute of limitations.

During the 21st tolling agreement, in July 2011, the United States sued Bollinger, alleging five causes of action: two under the False Claims Act and one each of common law fraud, negligent misrepresentation, and unjust enrichment. The district court dismissed the case for failure to state a claim, *United States v. Bollinger Shipyards, Inc.,* 979 F. Supp. 2d 721 (E.D. La. 2013), and this court reversed, 775 F.3d 255 (5th Cir. 2014). However, the Government had only appealed the dismissal of the FCA claims, and those are the only claims remaining in the underlying lawsuit. *See* Brief of United States at 13 n.5, *Bollinger Shipyards,* 775 F.3d 255 ("The United States also alleged liability under common law theories, but has not pursued those theories on appeal."). Trial is currently scheduled for April 11, 2016. Scheduling Order, *Bollinger Shipyards*, 979 F. Supp. 2d 721, No. 12-920-SSV-MBN (E.D. La. Apr. 14, 2015), ECF No. 193.

Just days before the Government filed suit, Bollinger advised its general maritime liability insurer XL Specialty and excess insurer Continental of the impending civil claims. XL responded with a "reservation of rights" letter indicating that it was unsure whether the policy covered the Government's claims; meanwhile, Bollinger obviously continued to pay for its own defense.

Before XL formally acted on Bollinger's claim, Bollinger sued XL and Continental in Louisiana state court to enforce its insurance policies, alleging common law breaches of contract and bad faith under Louisiana Revised Statutes §§ 22:1892 and 22:1973. Continental counterclaimed for a declaration that it owed Bollinger no duty to defend and no liability for bad faith. XL separately sued Bollinger in federal court for a declaratory judgment on coverage and removed the state case; the two were consolidated in the Eastern District of Louisiana. A few months later, Continental moved for and was granted summary judgment on the bad faith claims.

Bollinger and XL then filed competing summary judgment motions. The district court granted summary judgment for XL, holding "that the XL policy does not cover the United States' lawsuit and hence does not impose upon XL a duty to defend Bollinger[.]" *XL Specialty Ins. Co. v. Bollinger Shipyards, Inc.*, 57 F. Supp. 3d 728, 752 (E.D. La. 2014). The court granted summary judgment to Continental at the same time. Bollinger appealed and XL cross-appealed. We essentially agree with the district court on the points discussed below, and therefore affirm.

DISCUSSION***

I. XL Specialty

The underlying complaint contained five causes of action: two FCA claims, common-law fraud, unjust enrichment, and negligent misrepresentation. Under the eight-corners rule XL is obliged to defend Bollinger unless all of the claims in the underlying suit are excluded from policy coverage. The district court concluded that all five claims in the underlying complaint fit into either Exclusion 28 or Exclusion 32, but it rejected XL's argument that other exclusions applied. We agree that Exclusions 28 and 32 exempt all claims.

A. Exclusion 28: Predetermined Level of Fitness

Exclusion 28 of Bollinger's insurance contract with XL provides that it

> shall not apply to . . . [t]he failure of your products to meet any predetermined level of fitness or performance and/or guarantee of such fitness or level of performance and/or any consequential loss arising therefrom.

On appeal, Bollinger makes two arguments in support of its contention that this provision does not apply. First, Bollinger argues that Exclusion 28 does not preclude coverage for the claims in the underlying suit because the United States was seeking damages for the entire value of the vessels, not only the "work product" for which Bollinger was responsible. Second, Bollinger argues that the underlying suit did not allege a failure to meet a "predetermined level of fitness." We conclude, however, that Exclusion 28 applies to the government's unjust enrichment and negligent misrepresentation claims.

The precedent on which Bollinger relies for its first argument is inapposite. In *OSCA*, for example, the contractor "had only been hired to set a bridge plug inside of an already constructed well, and the allegedly faulty work damaged not only the plug but the entire well[.]" *Underwriters at Lloyd's London v. OSCA, Inc.,* No. 03-20398, 2006 U.S. App. LEXIS 9717, 2006 WL 941794 (5th Cir. Apr. 12, 2006) (per curiam) (unpublished). The insurance policy at issue excluded coverage for claims

> arising out of the failure of any Insured's Products or of work . . . by or on behalf of any Insured to meet any warranty or representation by any Insured as to the level of performance, quality, fitness or durability or extent that such liability is for the diminished value or utility of Insured's Products or work by or on behalf of any Insured[.]

2006 U.S. App. LEXIS 9717, at *20. Such "work product exclusions" typically restrict coverage on the basis of "the well-settled principle that liability policies are not intended to serve as performance bonds." *Rivnor Properties v. Herbert O'Donnell, Inc.*, 633 So. 2d 735, 751 (La. Ct. App. 1994); *see also Old River Terminal Co-op v. Davco Corp. of Tenn.,* 431 So. 2d 1068 (La. Ct. App. 1983). But work product exclusions do not apply in cases like *Hendrix Electric Co. v. Casualty Reciprocal Exchange*, 297 So. 2d 470 (La. Ct. App. 1974), in which

> [t]he job involved running an underground electrical cable to an existing power distribution panel and installing a new circuit breaker in the panel. An employee accidentally dropped a metal strip and thereby caused a short which started a fire and destroyed the entire panel. The court held that the "damage was not to any 'work performed on or on behalf of the named insured.' The damage was to existing property of the Government, that is the panel and attached circuit breakers." Thus, the court found that the exclusion clearly did not apply.

OSCA, 2006 U.S. App. LEXIS 9717, 2006 WL 941794, at *21 (citations omitted) (citing *Hendrix Elec.*, 297 So. 2d at 472); *see also Todd Shipyards Corp. v. Turbine Serv., Inc.*, 674 F.2d 401 (5th Cir. 1982) (distinguishing cases in which "[w]hat was lost to use in those cases was the insured's own product").

Bollinger argues that this is a case like *OSCA* and *Hendrix* because the United States is not seeking damages for Bollinger's work or product alone, but for the entirety of the eight vessels that all unexpectedly failed. Because the damage for which the United States seeks to recover is "the result of something" other than its work product, "Exclusion 28 was not triggered."

This argument cannot succeed. As the district court noted, the policy exclusions in those cases did not exempt the insurer from coverage for "consequential damages" arising from the failure of the insured's work. *See, e.g.*, OSCA, 2006 U.S. App. LEXIS 9717, 2006 WL 941794, at *20. Exclusion 28, by its own terms, exempts claims for damage not only to the insured's work product but also to things other than the insured's product.

Bollinger's second argument, that the underlying suit did not allege a failure to meet a "predetermined level of fitness," relies in part on the district court's previous dismissal of the underlying suit because the complaint did not, in the court's words, "allege what the program and contract requirements were for the converted vessels." *See United States v. Bollinger Shipyards, Inc.,* No. CIV. A. 12-920, 2013 U.S. Dist. LEXIS 12499, 2013 WL 393037, at *1 (E.D. La. Jan. 30, 2013)). But just before that, the district court wrote, "The United States alleges that one of the *requirements* was that Bollinger provide the Coast Guard with a Hull Load and Strength Analysis ('HLSA') in order to verify that the modified vessels met the program and contract *requirements." Id.* (emphases added).

Moreover, the district court was assessing whether the complaint met the FCA's materiality requirement as codified at 31 U.S.C. § 3729(a)(1)(B). In contrast, the issue in regard to this exclusion is not the FCA claims at all but the unjust enrichment and negligent misrepresentation claims. The United States pled that "Bollinger . . . was responsible for the . . . performance requirements" of the modified boats. Other "requirements" referenced in the complaint include "the *required* section modulus," a *requirement* to comply with American Bureau of Shipping standards, and a *requirement* to provide a hull strength analysis, which itself was used to determine conformity with "program and contract *requirements*." Even if the United States had not alleged sufficient facts to show materiality under the FCA—a determination this court reversed—that would not mean that the complaint did not allege liability because Bollinger's work failed to meet performance requirements.

Citing dictionaries, Bollinger also contends that its "representations" cannot amount to a "predetermination." The argument is that "representations" are unilateral and "predeterminations" imply bilateral agreement. But "pre-determined" means only "established, decided upon, or decreed beforehand." OED Online, http://www.oed.com/view/Entry/149830. It implies nothing about how a determination comes about, or who has the authority to determine. A single party can "determine" something, and can do so in advance: there is nothing inherently bilateral about predetermination. And even if there were, the complaint lays out straightforwardly that Bollinger failed to meet a requirement that the parties together determined in advance. The Deepwater contract required the vendor to submit a hull strength analysis, which stated the required longitudinal strength that Bollinger's work failed to meet. As the district court noted, "the complaint makes plain that Bollinger, the party responsible for 'performance requirements,' recognized and communicated from the earliest stages of the project that the 'ABS required section modulus' was 3113 cubic inches." *Bollinger Shipyards*, 57 F. Supp. 3d at 755 (footnotes omitted). Thus, however many parties were involved in the predetermination, this was a predetermined level of fitness.

B. Exclusion 32

With the factual basis for the unjust enrichment and fraudulent misrepresentation claims excluded under Exclusion 28, only the FCA and common law fraud claims remain. These fall out under Exclusion 32, which absolves XL from covering:

> e. Actual or alleged liability arising out of or incidental to any alleged violation(s) of any federal or state law regulating, controlling, and governing antitrust or the prohibition of monopolies, activities in restraint of trade, unfair methods of competition or deceptive acts and practices in trade and commerce, including, without limitation, the Sherman Act, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission Act and the Hart-Scott-Rodino Antitrust Improvements Act; or
>
> f. Actual or alleged liability arising out of or contributed to by [Bollinger's] dishonesty or infidelity.

In the district court, Bollinger "rightfully concede[d] that these exclusions, by their plain terms, preclude coverage for the United States' common law fraud claims and its claims under the False Claims Act." *Bollinger Shipyards*, 57 F. Supp. 3d at 757. Bollinger has changed its position following this court's reversal of the district court's FCA materiality decision, in which we focused on "reckless disregard" as the basis of an FCA claim. *See Bollinger Shipyards,* 775 F.3d at 260. Bollinger continues to concede, however, that Exclusion 32.f "may" exempt the underlying fraud claim. Of course it does.

We need not decide whether "reckless disregard for the truth" qualifies as "dishonesty or infidelity" under 32.f, since the FCA claims clearly fall under Exclusion 32.e. It is irrelevant that the FCA is not listed among the statutes excluded, since the FCA is a "federal law . . . regulating . . . deceptive acts and practices in trade and commerce[.]" Bollinger itself cites authority holding that the FCA is the legal tool by which the Government seeks recompense for "deceptive practices directed at the public purse." *Cook Cnty., Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 130-31, 123 S. Ct. 1239, 1247, 155 L. Ed. 2d 247 (2003) (quoting *United States v. Halper*, 490 U.S. 435, 445, 109 S. Ct. 1892, 1900, 104 L. Ed. 2d 487 (1989), *abrogated on other grounds by Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997)). Moreover, the alleged FCA violation need not itself be "deceptive." The plain language of Exclusion 32.e embraces laws that regulate deceptive acts, not allegations of deceptive acts.

CONCLUSION

The contract between the parties did not require XL to defend Bollinger . . . .

Jones v. Francis Drilling, *Fluids Ltd*, 642 F. Supp. 2d 643 (S.D. Tex. 2009)

Rosenthal, District Judge:

I. Background

This lawsuit arises out of the exposure by the plaintiff, Kevin Jones, to the fumes of an allegedly toxic concentration of a sodium hypochlorite solution. The incident occurred while Jones was working as a cleaning technician for Francis Drilling Fluids, Ltd., a Louisiana oilfield service company that provides industrial cleaning services to barges, vessels, tanks, and other equipment. Jones was working for Francis Drilling on RIG 46, a drilling barge owned by TODCO d/b/a TODCO Inc., the Offshore Drilling Company d/b/a TODCO ("TODCO"). The barge was near the Intercoastal Canal in Louisiana on January 7, 2007, when the incident occurred. Francis Drilling was a contractor for Applied Drilling Technologies, Inc. ("ADTI"), which in turn was in operating under a contract to provide turnkey drilling services to TODCO, when Jones was injured.

BJ Services Company ("BJ Services") was working under a contract with ADTI to provide filtration services to RIG 46.

Baker Hughes Incorporated ("Baker Hughes") and Baker Hughes's subsidiary, Baker Hughes Oilfield Operations, Inc. d/b/a/ Baker Hughes Drilling Fluids ("Baker Fluids"), were working under a contract with ADTI to provide completion fluid engineering services to RIG 46.

ADTI and Francis Drilling were parties to a Master Services Agreement ("MSA"). Under this MSA, each party agreed to indemnify the other for claims asserted against the other by their respective employees. Each party also agreed to procure insurance for the indemnity obligation and to name the other as an additional insured. ADTI had similar MSAs with BJ Services and Baker Hughes.

Liberty Mutual Insurance Company provided Francis Drilling a Comprehensive General Liability (CGL) Policy with a Blanket Additional Insured Endorsement and a Total Pollution Exclusion.

Jones sued Francis Drilling, TODCO, ADTI, BJ Services, Baker Hughes, and Baker Fluids. Of these defendants, TOCDO, ADTI, BJ Services, Baker Hughes, and Baker Fluids (the "third-party plaintiffs") filed third-party claims against Liberty Mutual, asserting coverage as additional insureds under the CGL Policy that Francis Drilling obtained from Liberty Mutual. (Docket Entry No. 157). The third-party plaintiffs filed cross-claims against Francis Drilling for indemnification under the MSA between Francis Drilling and ADTI. (Docket Entry No. 156). BJ Services and Baker Hughes also cross-claimed against ADTI for indemnification under the MSA between Francis Drilling and ADTI. (Docket Entry Nos. 86, 87). Liberty Mutual and Francis Drilling filed cross-claims against BJ Services and Baker Hughes for indemnification under the "pollution or contamination" provision of BJ Services's and Baker Hughes's MSAs with ADTI. This provision required BJ Services and Baker Hughes to indemnify ADTI and its other subcontractors for "pollution or contamination" caused by materials under their control. (Docket Entry Nos. 166, 169).

Jones dismissed his claims against Francis Drilling early in the case. On April 30, 2009, Jones settled his claim against the third-party plaintiffs for $ 145,000. Without reaching a final determination as to who would ultimately be responsible for paying the settlement amount, Liberty Mutual advanced $ 55,000, Francis Drilling advanced $ 65,000, and the third-party plaintiffs advanced $ 25,000.

This court has denied two motions for summary judgment filed by Liberty Mutual and Francis Drilling. In the first motion, Liberty Mutual contended that the CGL Policy was governed by Texas law, and that under Texas law, the Total Pollution Exclusion in the CGL Policy would bar coverage for Jones's accident. (Docket Entry No. 78). This court concluded that the CGL Policy was governed by Louisiana law, and that under Louisiana law, fact issues remained as to whether the Total Pollution Exclusion applied. (Docket Entry No. 107). In the second summary judgment motion, Liberty Mutual and Francis Drilling contended that they had no insurance or indemnification obligations to the third-party plaintiffs because the MSA, which applied to "offshore" work, did not apply to the work that Francis Drilling was performing on RIG 46 because it was stationed in inland Louisiana waters when Jones was injured. Liberty Mutual and Francis Drilling also argued that they had no insurance or indemnification obligations to the third-party plaintiffs because the MSA was governed by Louisiana law and indemnification provisions are void under the Louisiana Oilfield Anti-Indemnity Act ("LOAIA"). (Docket Entry No. 109). This court concluded that there were disputed fact issues material to determining whether the MSA applied to work done on inland waters, including the Louisiana marsh where RIG 46 was located when Jones was injured. This court also concluded that the MSA was governed by maritime law, under which its insurance and indemnification provisions were valid. (Docket Entry No. 127).***

Based on the pleadings, the parties' submissions, the evidence, the arguments of counsel, and the applicable law, this court enters the following findings of fact and conclusions of law:

> Francis Drilling is required to indemnify the third-party plaintiffs under its MSA with ADTI.
>
> The CGL Policy that Francis Drilling obtained from Liberty Mutual provides coverage for the indemnification owed the third-party plaintiffs, and that coverage is not barred by the Total Pollution Exclusion in the CGL Policy. The third-party plaintiffs are entitled to coverage as additional insureds under the CGL Policy.***

C. Francis Drilling's CGL Policy with Liberty Mutual

To fulfill its obligation under the MSA, Francis Drilling obtained Commercial General Liability Policy No. TB1-641-005206-036 (the "CGL Policy") from Liberty Mutual. (TODCO Trial Binder, Ex. 19). The effective dates were September 1, 2006 to September 1, 2007. Under the CGL Policy, Liberty Mutual promised to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages." (*Id.*, Ex. 19, endorsement 26). The CGL Policy stated that "[s]olely for purposes of liability assumed in an 'insured contract,' reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of 'bodily injury,' provided . . . [that] [s]uch attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged." (*Id.*, Ex. 19 at 2).

The CGL Policy contained a Blanket Additional Insured Endorsement, which stated that additional insureds under the Policy included "any person or organization for whom you have agreed in writing to provide liability insurance." (*Id.*, Ex. 19, endorsement 22). Additional insureds were covered for liability arising out bodily injury arising out of "your [Francis Drilling's] work." (*Id.*). "Your work" was defined as "[w]ork or operations performed by you or on your behalf." (*Id.*, Ex. 19 at 15). The coverage was to be for the "minimum limits of insurance required by the written agreement," but "in no event exceeds either the scope of coverage or the limits of insurance provided by this policy." (*Id.*, Ex. 19, endorsement 22).

The CGL Policy contained the following "Total Pollution Exclusion":

f. Pollution

> (1) "Bodily injury" or "property damage" which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.
>
> (2) Any loss, cost or expense arising out of any:

> (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or
>
> (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of "pollutants."

(*Id.*, Ex. 19, endorsement No. 9).

The CGL Policy defined "pollutants" as follows:

> 15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
> (*Id.*, Ex. 19 § 15).***

E. The Nature and Location of RIG 46

TODCO's RIG 46 is a type of "inland barge" known as a "posted barge." An inland barge is a submersible drilling structure that can be positioned over the drill site and sunk so its hull rests on the floor of the body of water. A posted barge is an inland barge with the hull and superstructure separated by 10 to 14 foot columns, which increase the rig's water-depth capabilities. RIG 46 is 198 feet long, 54 feet tall, can navigate in water that ranges in depth from 8 to 18 feet, and can drill to a depth of 25,000 feet. RIG 46 could be sunk by filling compartments at the bottom with water. RIG 46 has quarters for 43, including galley, mess hall, bath facilities, changing room, laundry, staterooms, and offices. (TODCO Trial Binder, Ex. 8 at 18-19).

When Jones was injured, RIG 46 was located at the Charles M. Peterson, Jr. Well No. 1 in Bayou Carlin, an inland marsh in St. Mary Parish, Louisiana. The well was located in a dead-end canal slip approximately 1,700 feet off of the Intercoastal Canal. The slip was no more than 8 feet deep. Approximately 20,634 cubic yards of the canal strip had to be dredged before RIG 46 could be pulled into place by tugboat. The dredged part of the canal was "non-vegetated waterbottoms." (Liberty Mutual Trial Binder, Ex. 62).

RIG 46 did not have navigational aids, a navigational crew, or a captain. It could not self-propel. At the time of the accident, RIG 46 had been sitting on the bottom of the marsh at the Peterson well site. RIG 46 remained there for almost one year. While at the Peterson well site, RIG 46 was serviced by crew boats and supply boats that navigated up the Intercoastal Canal. Workers on RIG 46 reached it by crew boat, in a 30-to 40-minute trip up the Intercoastal Canal from the Baker Hughes dock in Morgan City. (Liberty Mutual Depo. Binder, Ex. 1 at 54-55). Francis Drilling's crew worked on RIG 46 on a "week on, week off" basis. (*Id.*, Ex. 1 at 48). ADTI's Darrell Miller testified that the work done on RIG 46 at the Peterson well site was a "zero discharge" operation--no components of the job were allowed to go overboard into the canal, and everything had to stay contained on the rig.

F. Jones's Injury

On January 7, 2007, Jones was in "Tank 4," a "sand trap," using a "supersucker" to clean oil-based drilling mud out of the trap. The oil-based mud had been used to drill the well. That mud had to be removed from the trap before the well-completion phase, so that completion fluid could be pumped into the well. Tank 4 was a five-by-six-foot room with a slanting roof that was six feet tall at its highest point. Jones could stand up straight only in the highest parts of the sand trap and otherwise had to bend or crouch. The sand trap was filled with eight to twelve inches of oil-based mud, which Jones was cleaning out. (*Id.*, Ex. 1 at 96-101).

The fumes that sickened Jones came from approximately three gallons of a chemical called "W.O. Break" that Paul Domingues, a BJ Services filtration technician, had poured into the "possum belly" of "shaker 3," an apparatus above the sand trap. (*Id.*, Ex. 1 at 103-07; Ex. 4 at 35). A "possum belly," also known as a "distribution box" or "flowline trap," is a metal container located at the head of the shaker that receives and slows the flow of drilling fluid before it reaches the shale shaker. A shale shaker is a vibrating screen used to remove impurities from circulating drilling fluid. Shaker 3 was connected by a four-to-five foot trough or "flow line" to the Tank 4 sand trap. (*Id.* at 107-08; TODCO Depo. Binder, Ex. C at 28-30). A sand trap is a small pit, located just after the shaker screens, used as a settling pit to separate coarser solids that accidentally bypass the shale shakers. Domingues did not know that anyone was in the sand traps when he poured the W.O. Break solution into the "possum belly." He also believed that the valves connecting the shakers with the sand traps were closed. (TODCO Depo. Binder, Ex. C at 38-39). Those valves, however, would frequently leak. (Liberty Mutual Depo. Binder, Ex. 2 at 37).

Jones testified that when the fumes from the W.O. Break entered the sand trap, which he had been cleaning for an hour to an hour-and-a-half, his "throat and nose started to burn." He "got dizzy, started gagging and coughing and had to get out of the tank." (*Id.*, Ex. 1 at 100-01). A TODCO incident report made that day states that "[w]hile cleaning out sand trap pit, Baker Hughes Intec Drilling Fluids W.O. Break (Sodium Hypochlorite Solution) was poured into shale shaker by Baker Hughes filtration hand, which was next to man hole, fumes from Sodium Hypochlorite Solution went down into tank [that] Kevin was working in[.] [H]e noticed bad smell and taste and got dizzey [sic] and came out of hole."***

W.O. Break is a 12.5% "sodium hypochlorite solution" comprised of sodium hypochlorite, sodium hydroxide, and chlorine. Sodium hypochlorite solution in lower concentrations is commonly referred to as bleach. Baker Hughes does not manufacture W.O. Break but supplies it to customers using the proprietary name "W.O. Break." A 2008 Material Safety Data Sheet issued by Baker Hughes states that W.O. Break is "[v]ery toxic to aquatic organisms," "severely irritating to the skin and may cause burns," "toxic by inhalation" and "may cause severe irritation and burns to the nose, throat, and respiratory tract." The Data Sheet also describes W.O. Break as "a water pollutant [that] should be prevented from contaminating soil or from entering sewage and drainage systems and bodies of water." (Liberty Mutual Trial Binder, Ex. 11). Sodium hypochlorite is classified as a "hazardous substance" under the Federal Water Pollution Control Act. 40 C.F.R. § 116.4. It is also classified as a "hazardous substance" under the CERCLA regulations, with a reportable quantity of 100 pounds. 49 C.F.R. § 172.101, App'x A. The CERCLA regulations also define chlorine, another component of W.O. Break, as a "marine pollutant." 49 C.F.R. § 172.101, App'x B. The W.O. Break that caused Jones's injury was not released into the water or onto the land; it was confined to the shaker and tank on RIG 46. Neither TODCO, ADTI, nor any of the subcontractors reported or were required to report Jones's exposure to any environmental agency.

There is conflicting evidence in the record as to why the W.O. Break was used and whether its use was for its intended purpose. Domingues testified that he poured the W.O. Break at the suggestion of Justin Knox, a Baker Hughes employee. According to Domingues, Knox suggested that the W.O. Break could prevent "pills and spacers"--chemicals injected into the well between the drilling fluid and the completion fluid to prevent these fluids from mixing--from plugging up the filtration unit that Domingues was tending. (Liberty Mutual Depo. Binder, Ex. 4 at 27-28). Knox agrees that he told Domingues to use W.O. Break to break up pills and spacers. But according to Knox, Domingues was told to pour the W.O. Break into the filtration unit, not the "possum belly." Knox testified that he did not tell Domingues exactly where to pour the W.O. Break because he "assumed that [Domingues] knew to use it in the filter unit." Knox testified that he had never heard of anybody pouring W.O. Break directly into a "possum belly." (*Id.*, Ex. 5 at 28, 38).

By contrast, Darrell Miller of ADTI testified at trial that W.O. Break is a "cleaner" used "[t]o help clean the pits and tanks." Miller testified that W.O. Break was particularly useful in breaking up the "film" left by oil-based drilling mud on the sand trap walls and in the mud pit. Miller rejected the possibility that W.O. Break was being used on RIG 46 as an aid in filtration or to break up pills and spacers. Miller testified that BJ Services had a different product, called "D.E.," that was used for this purpose. Domingues testified that on prior jobs, he had seen W.O. Break poured into the sand traps or mud pits, but that the purpose of pouring the W.O. Break into those units was to break up pills and spacers, and that the W.O. Break would "eventually get to the filter unit." (Liberty Mutual Depo. Binder, Ex. 4 at 71-72).***

D. The Total Pollution Exclusion Does Not Apply

Liberty Mutual contends that the Total Pollution Exclusion in the CGL Policy bars coverage. Francis Drilling and the third-party defendants argue that the Total Pollution Exclusion does not apply. The evidence showed that Jones was injured through exposure to sodium hypochlorite solution vapors in the Tank 4 sand trap. There is also evidence that other crew members smelled the vapors, although there is no other evidence of injury to any one besides Jones. W.O. Break is a chemical used on oil rigs and is considered a pollutant and a hazardous substance. There is conflicting evidence as to whether the W.O. Break was used for its intended purpose when Jones was injured. There is no evidence that the W.O. Break was released outside a contained vessel within RIG 46. The "zero discharge" operation of the rig was maintained. There is no evidence that TODCO, ADTI, or the subcontractors had to perform any environmental cleanup as a result of the use of WO. Break that led to Jones's injury.

In *Doerr v. Mobil Oil Corporation,* 774 So.2d 119 (La. 2000), the Louisiana Supreme Court clarified Louisiana law on the proper interpretation of total pollution exclusions. *Doerr* held that such clauses "w[ere] designed to exclude coverage for environmental pollution only" and cannot be "applied to all contact with substances that may be classified as pollutants." *Id.* at 123, 127-28. The *Doerr* court analyzed the history of total pollution exclusions, observing that such clauses originated in response to federal and state legislation, such as CERCLA, that assigned responsibility for the costs of cleaning up environmental pollution. The exclusions were designed to prevent insureds from shifting the risk of such cleanup costs to their general liability policies. *Id.* at 126-27. The *Doerr* Court concluded that "[a] literal reading of the total pollution exclusions would alter the general scope and expectation of the parties." *Id.* at 127. An insured under a CGL Policy "expect[s] to be insulated generally from liability claims" and would not expect that policy to bar coverage for events that "one would not ordinarily characterize . . . as pollution." *Id.* at 124, 127. The court gave examples of events that would not ordinarily be characterized as pollution, including "the release of carbon monoxide from a small business owner's delivery truck," "'a slip and fall on the spilled contents of a bottle of Drano,'" or "'bodily injury caused by an allergic reaction to the chlorine in a public pool.'" *Id.* at 124 (quoting *Pipefitters Welfare Educ. Fund. v. Westchester Fire Inc. Co.,* 976 F.2d 1037, 1043 (7th Cir. 1992)*)*. Some "limiting principle" was necessary because a broad reading of total pollution exclusion clauses would lead to "absurd results." *Id.*

The *Doerr* Court instructed that whether a total pollution exclusion applies turns on the following considerations:

> (1) Whether the insured is a "polluter" within the meaning of the exclusion;

> (2) Whether the injury-causing substance is a "pollutant" within the meaning of the exclusion; and
>
> (3) Whether there was a "discharge, dispersal, seepage, migration, release or escape" of a pollutant by the insured within the meaning of the policy.

Id. at 135. The court emphasized the fact-intensive nature of this inquiry:

> First, the determination of whether an insured is a "polluter" is a fact-based conclusion that should encompass consideration of a wide variety of factors. In making this determination, the trier of fact should consider the nature of the insured's business, whether the type of business presents a risk of pollution, whether the insured has a separate policy covering the disputed claim, whether the insured should have known from a read of the exclusion that a separate policy covering pollution damages would be necessary for the insured's business, who the insurer typically insures, any other claims made under the policy, and any other factor the trier of fact deems relevant to this conclusion . . . .
>
> Second, the determination of whether the injury-causing substance is a "pollutant" is also a fact-based conclusion that should encompass a wide variety of factors. As pointed out above, there are a variety of substances that could fall within the broad definition of irritants and contaminants as provided in this policy. For example, under pollution exclusions similar to the one at issue here, courts have found "pollutant" to include everything from asbestos, carbon monoxide, gasoline, lead paint, and some pesticides; on the other hand, some courts have found that "pollutants" do not include muriatic acid, styrene resins, and other forms of pesticide. Consequently, when making this determination, the trier of fact should consider the nature of the injury-causing substance, its typical usage, the quantity of the discharge, whether the substance was being used for its intended purpose when the injury took place, whether the substance is one that would be viewed as a pollutant as the term is generally understood, and any other factor the trier of fact deems relevant to that conclusion.
>
> Finally, the determination of whether there was "discharge, dispersal, seepage, migration, release or escape" is likewise a fact-based conclusion that must result after a consideration of all relevant circumstances. Specifically, the trier of fact should consider whether the pollutant was intentionally or negligently discharged, the amount of the injury-causing substance discharged, whether the actions of the alleged polluter were active or passive, and any other factor the trier of fact deems relevant. These factual conclusions should be made to assist a court in determining whether the total pollution exclusion in any particular case will exclude coverage for a claim.

Id. at 135-36 (internal citations omitted).

Subsequent case law indicates that a lengthy analysis of these factors is not required if the type of "pollution" alleged is so far removed from the type of "environmental pollution" contemplated by *Doerr* that the policy's total pollution exclusion obviously does not apply. In *Gaylord Container Corp. v. CNA Ins. Cos.,* 807 So. 2d 864 (La. App. 1st Cir. 2001), for example, a Louisiana appellate court concluded that a total pollution exclusion in the plaintiff's general liability policies did not exclude coverage for an explosion that occurred when a railcar filled with nitrogen tetroxide, which the plaintiff had ordered for use in its chemical production business, exploded on the way to the factory. The plaintiff sought coverage for the many personal injury suits. Noting the statement in *Doerr* that total pollution exclusion clauses applied to "environmental pollution only," the court concluded that it was "unnecessary to engage in an extensive analysis of the *Doerr* three-step inquiry." *Id*. at 872. The court reasoned that the plaintiff was not seeking a defense or indemnity "for suits that relate to environmental cleanup claims arising out of the" explosion, but instead for personal injury claims arising out of the accident. *Id*. The *Gaylord* case emphasized that under *Doerr*, pollution exclusion clauses would not be applied to "exclude coverage for routine accidents" or "fortuitous event[s] such as an explosion," that "incidentally involved a chemical agent." *Id.*

Similarly, in *Smith v. Reliance Co. of Illinois*, 807 So.2d 1010, 1013 (La. App. 5th Cir. 2002), a Louisiana appellate court concluded that a total pollution exclusion did not bar coverage for personal injury claims against a wastewater treatment plant for the accidental release of hydrogen sulfide and "noxious odors" for a discrete period as a result of a faulty mechanical aerating pump and abnormally high amounts of sugar in the waste water. The claims included "respiratory and eye problems, headaches, nausea, sleeplessness, diarrhea and rashes." *Id*. at 1015. Citing *Doerr* for the propositions that "the general purpose of the pollution exclusion clause is to exclude coverage for environmental pollution," and that such clauses must not be "read strictly to exclude coverage for all interactions with irritants or contaminants at any time," the court concluded that "the record fails to support the application of the factors enunciated by *Doerr* to the facts of this case." *Id*. at 1019-020.

In *State Farm and Casualty Co. v. M.L.T. Construction Co*., 849 So.2d 762, 771 (La. App. 4th Cir. 2003), the court observed that *Doerr* solidified "a fairly consistent line of jurisprudence in Louisiana." One such *pre-Doerr* case, which *State Farm* cited with approval, vacated a summary judgment in favor of the insurer, which had invoked a pollution exclusion clause to deny coverage for injuries sustained by a city investigator injured when he inhaled pesticide fumes that had leaked from insecticide containers warehoused at the insured's facility. *West v. Bd. of Comm'rs,* 591 So.2d 1358, 1360 (La. App. 4th Cir. 1991). The *West* court, noting that "the exclusion is applicable to 'polluters'--those who indifferently pollute our environment--and not to those who only incidentally possess the pollutant in the course of their other business," remanded for trial on whether the exclusion applied. *Id.* at 1360-61.

Cases in other jurisdictions that have applied *Doerr* have reached similar results. In *Gainsco Insurance Co. v. Amoco Production Co.*, 2002 WY 122, 53 P.3d 1051, 1056 (Wy. 2002), for example, the insurer invoked a total pollution exclusion clause as a basis for denying coverage for an employee's death from exposure to poisonous hydrogen sulfide gas while emptying a vacuum truck in an oil field. The Wyoming Supreme court, citing *Doerr* for the proposition that an "absolute pollution exclusion [is] not intended to exclude coverage for all interactions with irritants or contaminants and should be construed to exclude coverage only for environmental pollution," concluded that "[w]e cannot believe that any person in the position of the insured would understand the word "pollution" in this exclusion to mean anything other than environmental pollution." The court concluded that the exclusion did not apply. *Id.* at 1065-66.

By contrast, *Grefer v. Travelers Insurance Co.*, 919 So.2d 758 (La. App. 5th Cir. 2005), which Liberty Mutual cites, provides an example of an incident sufficiently related to "environmental pollution" to require consideration of the *Doerr* factors. The insured, an oilfield pipe-cleaning, storage, and trucking operator, was sued by the owners of the land it had leased for twenty-four years for its business. Four years after the lease expired and the insured vacated the land, the landowners discovered that the land had been contaminated during the lease by waste products from the insured's pipe-cleaning business. The contaminants included barium sulfate, strontium sulfate, calcium sulfate, calcium carbonate, and radium sulfate, some of which were radioactive. There was evidence that these waste products were "blown into the air," "mixed with soil," and "used to fill holes all over the property at least twice per week" while the insured occupied the land. *Id.* at 769. The appellate court reversed the trial court's conclusion that the total pollution exclusions contained in the insured's general liability policies did not apply. Applying the *Doerr* factors, the appellate court concluded that the insured was a "polluter" because the cleaning of the oilfield pipes, which produced the waste products, was the insured's business, and because the insured's method of handling those waste products created a strong risk of pollution. *Id.* The court concluded that the radioactive waste products were "clearly" pollutants. *Id.* at 771. The waste products were generated on a "massive" scale and "released on to the ground and then dispersed throughout" the property. The court emphasized the fact that the dispersal was "active, purposeful and intended." *Id.* at 772.

Liberty Mutual also cites *Pro-Boll Chemical & Fertilizer Co.*, No. 01-1531, 2004 U.S. Dist. LEXIS 28579, 2004 WL 3494045, at *7 (W.D. La. 2004). In *Pro-Boll*, the plaintiff owned a pesticide storage facility. The soil underneath the facility had become contaminated over fourteen years by pesticide that leaked from storage tanks the defendants built. The leakage required removing 165 tons of pesticide-contaminated soil and additional investigation and cleanup. The district court concluded that the total pollution exclusion in the insured's general liability policy applied. The court concluded that the plaintiff, a pesticide dealer, applicator, and producer, was a "polluter"; the pesticide that leaked was a "pollutant"; and the soil and groundwater contamination showed a "discharge, dispersal, seepage, migration, release, or escape." *Id.* The court concluded: "[t]he purpose of the pollution exclusion (to strengthen environmental protection standards by imposing the full risk of loss due to personal injury or property damage from pollution upon the polluter by eliminating the option of spreading that risk through insurance coverage) [w]as fulfilled through application to the facts of this case." *Id.*

The evidence shows that the chemical-exposure incident in this case is more similar to the isolated, limited events found not to exclude coverage in *Gaylord, Smith*, and *West* than to the systematic, long-term environmental pollution that triggered the exclusions in *Grefer* and *Pro-Boll*. The release of the W.O. Break at issue was a one-time, discrete, sudden accident. Jones sustained the only injury. The release was in a limited and confined area. There is disputed evidence in the record that the W.O. Break was being used for its intended purpose--which ADTI's Darrell Miller contends included cleaning oil-based drilling fluid--even if it was poured into the wrong vessel. There is no evidence that the W.O. Break came into contact with the water or land around RIG 46, and no environmental cleanup or reporting was required. This is not a case in which the surrounding land and water became contaminated after an extended period of release or dispersal. Applying the *post-Doerr* case-law, the Total Pollution Exclusion does not apply.

The *Doerr* factors confirm this result. The issue of whether the third-party defendants are "polluters" cuts both ways. The oil and gas industry requires the use of numerous chemicals that are considered "pollutants," and these chemicals are "the very nature of [that] business." *Grefer*, 919 So.2d at 771. There is evidence that some of the subcontractors carried separate pollution insurance policies and that TODCO has reported incidents of environmental pollution. But there is also undisputed evidence that RIG 46 was a "zero discharge" operation. There is no indication that the third-party plaintiffs' handling of chemicals on RIG 46 "created a strong risk of pollution." *Id.* The third-party plaintiffs concede that W.O. Break is a "pollutant," at least in some contexts. But there was no "discharge, dispersal, seepage, migration, release or escape" similar to that present in the cases finding that a policy's pollution exclusion applies. There is no indication that the W.O. Break reached any area beyond the enclosed vessel within RIG 46 or that it caused any negative effects beyond the injury to Jones. *Cf. Lumbermens Mut. Cas. Co. v. S-W Indus., Inc.,* 39 F.3d 1324 (6th Cir. 1994) ("The fumes and dust that injured [the employee] . . . were confined inside [the] plant and, in fact, were confined to that portion of that plant involved in the gluing process in which [the employee] worked. It strains the plain meaning, and obvious intent, of the language to suggest that these fumes, as they went from the container from to [the employee's] lungs, had somehow been "discharged, dispersed, released, or escaped. . . . Without belaboring the obvious, we hold that this exclusion is intended to shield the insurer from the liabilities of the insured to outsiders, either neighboring landowners or governmental entities enforcing environmental laws, rather than injuries caused by toxic substances that are still confined within the area of their intended use."). Under the *Doerr* factors, the Total Pollution Exclusion does not apply. The Total Pollution Exclusion does not provide a basis for Liberty Mutual to deny coverage under the CGL Policy.

National Union Fire Insurance Co. v. CBI Industries, Inc., 907 S.W.2d 517 (Tex. 1995)

Per curiam:

***In this action for damages, injunctive relief, and a declaration of coverage, the issue is whether so-called "absolute pollution exclusions" in insurance policies unambiguously apply to exclude damage coverage from an accidental explosion producing a toxic hydrofluoric acid cloud over a city. The trial court granted summary judgment in favor of the defendant insurance companies. The court of appeals reversed the summary judgment and remanded the cause to the trial court. 860 S.W.2d 662. We agree with the trial court that the provisions unambiguously apply under the circumstances presented. We reverse the judgment of the court of appeals and affirm the trial court's judgment.

CBI Industries, Inc. ("CBI") brought this action against various insurance companies which insured CBI under general liability policies. The insurers fall into three groups providing successive "layers" of coverage: (1) National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union"); (2) Anglo American Insurance Company, Ltd. and others (collectively "Anglo American"); and (3) Rome and Companies (collectively "Rome"). Each of the policies issued to CBI by these companies contained a version of what is known in the industry as an "absolute pollution exclusion." The National Union policy contained the following exclusion:

> This policy does not apply to . . . any Personal Injury or Property Damage arising out of the actual or threatened discharge, dispersal, release or escape of pollutants, anywhere in the world; . . . "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste material. Waste materials include materials which are intended to be or have been recycled, reconditioned or reclaimed.

The Anglo American and Rome policies contained this exclusion:

> Notwithstanding anything to the contrary contained in this policy, this policy is amended in that it shall not apply to any claim or claims:

> For personal injuries or property damages directly or indirectly caused by seepage or pollution or contamination of air, land, water or any other property, however caused and whenever occurring.

In October of 1987, CBI, through its wholly owned subsidiary CBI Na-Con, Inc., was working as a contractor for Marathon Petroleum Company ("Marathon") in connection with a periodic "turnaround" of Marathon's Texas City Refinery, during which the refinery is shut down and equipment removed for cleaning, maintenance and replacement. As contractor, CBI was supervising the removal by crane of the convection section of a heater unit. An accident occurred when the crane's load was dropped onto a pipe connected to a storage tank which contained hydrofluoric acid, a substance identified by the United States Environmental Protection Agency as a toxic waste. CBI claims that Marathon, in contravention of standard industry practices, had failed to empty the storage tank prior to the commencement of the turnaround and that CBI was unaware of the presence of hydrofluoric acid in the tank prior to the accident.

In numerous lawsuits brought against CBI and others in connection with the accident, residents of Texas City and others alleged that they were injured when a large cloud of hydrofluoric acid was released as a result of the accident. CBI tendered these claims to National Union, Anglo American and Rome. All of the companies denied coverage and CBI filed this suit.

The insurance companies moved for summary judgment on the ground that the "absolute pollution exclusions" in their policies precluded coverage as a matter of law. CBI argued in response that the policies, by virtue of these exclusions, contained both patent and latent ambiguities. The trial court granted summary judgment for the insurance companies before CBI had the opportunity to obtain any documents through the discovery process. However, the trial court did accept for the record certain insurance industry documents which, CBI contends, indicate that "absolute pollution exclusions" such as those involved in this case are ambiguous and will not be read literally to exclude coverage for every situation involving the discharge of pollutants.[3]

Insurance policies are controlled by rules of interpretation and construction which are applicable to contracts generally. *See Forbau v. Aetna Life Insurance Company,* 876 S.W.2d 132 (Tex. 1994); *Barnett v. Aetna Life Ins. Co.,* 723 S.W.2d

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[3] For example, during testimony at a 1985 hearing conducted by the Texas State Board of Insurance, Ward Harrel, a representative of Liberty Mutual Insurance Company, indicated that the pollution exclusion could be read literally to exclude coverage in situations where "no one would read it that way," noting that "our insureds would be at the State Board ... quicker than a New York minute if, in fact, everytime [sic] a bottle of Clorox fell off a shelf at a grocery store and we denied the claim because it's a pollution loss."

663, 665 (Tex. 1987). The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument. *Forbau,* 876 S.W.2d at 133. If a written contract is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous. *Coker v. Coker,* 650 S.W.2d 391, 393 (Tex. 1983); *see also Universal CIT Credit Corp. v. Daniel,* 150 Tex. 513, 243 S.W.2d 154, 157 (Tex. 1951). Parol evidence is not admissible for the purpose of creating an ambiguity. *See Universal,* 243 S.W.2d at 157: *Lewis v. East Texas Finance Co.,* 136 Tex. 149, 146 S.W.2d 977, 980 (Tex. 1941).

If, however, the language of a policy or contract is subject to two or more reasonable interpretations, it is ambiguous. *See Glover v. National Insurance Underwriters,* 545 S.W.2d 755, 761 (Tex. 1977); *see also Coker,* 650 S.W.2d at 393; *Universal*, 243 S.W.2d at 157. Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered. *See Coker,* 650 S.W.2d at 394; *R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.,* 596 S.W.2d 517, 518 (Tex. 1980). Only where a contract is first determined to be ambiguous may the courts consider the parties' interpretation. *see Sun Oil Co. (Delaware) v. Madeley,* 626 S.W.2d 726, 732 (Tex. 1981), and admit extraneous evidence to determine the true meaning of the instrument. *See R & P Enterprises,* 596 S.W.2d at 518.

An ambiguity in a contract may be said to be "patent" or "latent." A patent ambiguity is evident on the face of the contract. *See Universal Home Builders, Inc. v. Farmer,* 375 S.W.2d 737, 742 (Tex. Civ. App.--Tyler 1964, no writ). A latent ambiguity arises when a contract which is unambiguous on its face is applied to the subject matter with which it deals and an ambiguity appears by reason of some collateral matter. [4] *See Murphy v. Dilworth*, 137 Tex. 32, 151 S.W.2d 1004 (Tex. 1941); *see also Bache Halsey Stuart Shields, Inc. v. Alamo Sav. Ass'n,* 611 S.W.2d 706, 708 (Tex. Civ. App.--San Antonio 1980, no writ). If a latent ambiguity arises from this application, parol evidence is admissible for the purpose of ascertaining the true intention of the parties as expressed in the agreement. *See Murphy,* 151 S.W.2d at 1005.

In this case, the court of appeals did not decide that the contract was either patently or latently ambiguous. Rather, the court held that the trial court abused its discretion when it rendered summary judgment before allowing discovery. 860 S.W.2d at 666. On that basis alone, the court of appeals reversed and remanded to the trial court "without deciding whether there are ambiguities in the exclusions." 860 S.W.2d at 664. The court reasoned that "CBI was not given sufficient time to make reasonable attempts to discover evidence on the issue of 'applying the contract to the subject matter with which it deals,' and thereby raise a fact issue on

[4] For example, if a contract called for goods to be delivered to "the green house on Pecan Street," and there were in fact two green houses on the street, it would be latently ambiguous.

latent ambiguity." *Id.* at 666. In support of its holding, the court summarized the industry-wide evidence in the record. *Id.* These items of evidence, the court opined, should have indicated to the trial court that with more time for discovery, CBI *"might* have raised a fact issue on latent ambiguity." *Id.* The discovery sought by CBI is of evidence that its insurers "knew and approved" of industry-wide discussions concerning the breadth of the absolute pollution exclusion and "understood that the pollution exclusions would not exclude coverage in construction accident situations."

The court of appeals relies on the *Bache* decision, which held that if a latent ambiguity is discovered when "applying the contract to the subject matter with which it deals," *then* the proponent of the ambiguity may introduce parol evidence to establish the parties' intent. *Bache,* 611 S.W.2d at 708. The ambiguity must become evident when the contract is read in context of the surrounding circumstances, not after parol evidence of intent is admitted to create an ambiguity. Neither the court of appeals' opinion nor the parties' briefs have raised any need for additional facts to apply the insurance policies to the subject matter with which they deal. The facts relating to the accident, the release of hydrofluoric acid as a result of that accident, and the personal injury and property damage claims allegedly resulting from that release appear to be fully developed. The surrounding circumstances present when the contract was entered into were amply established for the purpose of determining whether an ambiguity exists in this case on these facts. The discovery sought by CBI is not necessary for the application of the contract to its subject matter, but rather goes to the issue of the parties' interpretation of the "absolute pollution exclusion." The court of appeals erred in holding, in effect, that CBI must be allowed an opportunity to discover parol evidence going to the parties' intentions in order to create a latent ambiguity.

The question to be decided here is whether these insurance policies, by virtue of their "absolute pollution exclusions," are patently or latently ambiguous. On its face, the language of the policies is clear and not patently ambiguous. Nor are the policies latently ambiguous. Applying the policies' language to the context of the claim here does not produce an uncertain or ambiguous result, but leads only to one reasonable conclusion: the loss was caused by a cloud of hydrofluoric acid, a substance which is clearly a "pollutant" for which coverage is precluded.

CDI correctly contends that the language of the policies must be interpreted with reference to both the facts of the claim *and* the facts within the contemplation of the parties at the signing of the policies. *See Coker,* 650 S.W.2d at 394. CBI argues that extrinsic evidence (such as trade usage, prior dealings, and prior negotiations) is relevant in interpreting the policies and must be considered to ascertain whether a latent ambiguity exists. Specifically, CBI argues that extrinsic evidence concerning industry-wide discussions of the exclusion at issue here shows that the parties shared a mutual, yet unstated, intent that the exclusions would not encompass "accidental" releases of pollutants.

Extrinsic evidence may, indeed, be admissible to give the words of a contract a meaning consistent with that to which they are reasonably susceptible, *i.e.*, to "interpret" contractual terms. If the contract language is not fairly susceptible of more than one legal meaning or construction, however, extrinsic evidence is inadmissible to contradict or vary the meaning of the explicit language of the parties' written agreement. *Hubacek v. Ennis State Bank,* 159 Tex. 166, 317 S.W.2d 30, 32 (Tex. 1958); *Lewis*, 146 S.W.2d at 980. In this case, the policies unequivocally deny coverage for damage resulting from pollutants, however the damage is caused. The relevant facts and extrinsic evidence necessary to apply this contract exclusion language to the subject matter with which it deals in this case reveals no latent ambiguity.

Courts usually strive for uniformity in construing insurance provisions, especially where, as here, the contract provisions at issue are identical across the jurisdictions. Most courts which have examined the same or substantially similar absolute pollution exclusions have concluded that they are clear and unambiguous. "This pollution exclusion is just what it purports to be -- absolute . . ." *Alcolac,* 716 F. Supp. 1546, 1549 (D.Md. 1989). We agree. The language in this pollution exclusion is clear and susceptible of only one possible interpretation in this case. Because there are no latent or patent ambiguities in the policies, there are no fact issues that merit discovery. We conclude that the record is sufficiently developed to support the trial court's summary judgment in favor of the defendant insurance companies. Accordingly, we reverse the judgment of the court of appeals and affirm the judgment of the trial court.***

***Travelers Property Casualty Co. of America v. Klick*, 867 F.3d 989 (8th Cir. 2017)**

Colloton, Circuit Judge:

Christopher Klick was seriously injured after suffering carbon monoxide poisoning while aboard a friend's fishing boat. Klick sued the boat dealer in state court. The dealer had an insurance policy from Travelers Property Casualty Company of America that required Travelers to pay for liabilities resulting from bodily injury. The policy, however, had a pollution exclusion providing that the policy did not cover liability for injuries arising out of the release, dispersal, or migration of certain pollutants. Travelers sued in federal court, seeking a declaration that the policy did not cover liability for Klick's injuries. The district court granted summary judgment for Travelers. We conclude that the pollution exclusion applies, and we therefore affirm.

Klick and his two friends, Lonnie Norberg and Jeffrey Wheeler, were fishing aboard Norberg's 25-foot fishing boat on Lake of the Woods in northern Minnesota. According to Klick, Choice Financial Group and Rainy River Marina, Inc., sold Norberg the boat a few weeks earlier. Norberg was at the helm of the boat as the men returned to shore. The helm was near the front of the boat in the wheelhouse, a roofed area with walls or windows to the front, left, and right. The back of the wheelhouse was open. The boat's engine was housed in an enclosed compartment beneath the wheelhouse.

Norberg and Klick noticed that the engine was not operating properly. Klick took the helm and Norberg opened the hatch of the engine compartment to check the engine. Unbeknownst to Klick and Norberg, an exhaust pipe had broken off at the spot where it connected with the engine. As a result, the engine had been expelling carbon monoxide gas into the engine compartment rather than through the exhaust pipe and out behind the boat.

When Norberg opened the engine compartment hatch from within the wheelhouse, carbon monoxide flowed up into the wheelhouse. Klick quickly lost consciousness and fell into the engine compartment. He awoke there several hours later, severely burned from lying on the engine. He also suffered brain damage from the carbon monoxide. The gas killed Norberg and Wheeler, but Klick survived.

Klick sued Rainy River and Choice in state court, seeking damages for injuries from the accident. Rainy River held a marine general liability insurance policy from Travelers at the time of the accident. The policy required Travelers to pay damages resulting from bodily injury. The policy, however, included a pollution exclusion stating that Travelers had no obligation to pay for "[a]ny liability . . . arising out of the actual . . . seepage, discharge, dispersal, disposal or dumping, release, migration, emission, spillage, escape, or leakage of 'pollutants' into . . . atmosphere."

Travelers then sued Klick, Rainy River, and Choice in the district court, seeking a declaration that the policy did not cover Klick's injuries because of the pollution exclusion. The district court granted summary judgment for Travelers, concluding that Klick's injuries arose out of the release of a pollutant into atmosphere.

Our jurisdiction in this case is based on diversity of citizenship, and the parties agree that Minnesota law applies. Under Minnesota law, a provision in an insurance policy is "to be interpreted according to both plain, ordinary sense and what a reasonable person in the position of the insured would have understood the words to mean." *Farmers Home Mut. Ins. Co. v. Lill*, 332 N.W.2d 635, 637 (Minn. 1983) (internal quotations omitted). Because most insurance policies are preprinted forms drafted by insurance companies, Minnesota courts construe an insurance policy's words of inclusion broadly and words of exclusion narrowly. *Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 575 (Minn. 2009). "An insurer has the burden of proving that a policy exclusion applies." *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986).

The policy's pollution exclusion provides that Travelers does not cover liability for injuries "arising out of" the movement of pollutants into "atmosphere." The parties agree that carbon monoxide is a "pollutant" under the exclusion. *See Midwest Family Mut. Ins. Co. v. Wolters,* 831 N.W.2d 628, 637 (Minn. 2013). Klick argues, however, that his injuries did not arise out of the release, dispersal, or migration of carbon monoxide into "atmosphere," and that the exclusion therefore does not apply.

Klick first posits that the engine compartment did not contain "atmosphere." He then reasons that his injuries arose out of the engine's initial "release" of carbon monoxide into the engine compartment, not the subsequent movement of the gas from the engine compartment into the wheelhouse.

Assuming for the sake of analysis that Klick is correct that the engine compartment did not contain "atmosphere," Klick's injuries did not arise only out of the release of carbon monoxide into the engine compartment. The movement of the carbon monoxide from the engine compartment into the wheelhouse was also a "release," "dispersal," or "migration" of a pollutant. The pollution exclusion is not limited to liability arising out of an *initial* "release" of pollutant or a "dispersal" or "migration" of the pollutant from an *original* source.

Klick argues next that the boat dealer's liability would not be "arising out of" a release, dispersal, or migration of a pollutant into the wheelhouse, because his injuries arose out of the release of carbon monoxide into the engine compartment. Under Minnesota insurance law, the phrase "arising out of" means "'causally connected with' and not 'proximately caused by.'" *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 419 (Minn. 1997) (quoting *Faber v. Roelofs*, 311 Minn. 428, 250 N.W.2d 817, 822 (Minn. 1977)). The release of the carbon monoxide into the wheelhouse is causally connected to Klick's injuries: it caused him to lose consciousness and fall into the engine compartment, where Klick suffered most of his injuries. That the release of carbon monoxide from the engine into the engine compartment was also a cause of Klick's injuries does not make the exclusion inapplicable, for an injury can arise out of multiple causes with varying degrees of proximity to the injury. The pollution exclusion applies where, as here, a release, dispersal, or migration of a pollutant into atmosphere was causally connected with the injury.

Klick contends finally that even if the boat dealer's liability would arise out of the release of carbon monoxide into the wheelhouse, the wheelhouse did not contain "atmosphere." In *Board of Regents of the University of Minnesota v. Royal Insurance Co. of America*, 517 N.W.2d 888, 892-93 (Minn. 1994), the Minnesota Supreme Court concluded that the word "atmosphere," as used in a pollution exclusion, meant "ambient air." The court thus held that a pollution exclusion similar to the one at issue here did not exclude coverage for injuries resulting from asbestos fibers being released into the air within a building. *Id.* at 893. In reaching this conclusion, the court juxtaposed "ambient air" in its "natural setting" (atmosphere) with the air in the "controlled environment" of a building's interior (not atmosphere). *Id.*

The wheelhouse where Klick was exposed to a pollutant was not a "controlled environment." The back of the wheelhouse was wide open, and air readily flowed to and from the surrounding environment. A person standing in the wheelhouse was exposed to ambient air. A reasonable person in the position of the insured thus would have understood that a person in the wheelhouse is in "atmosphere."

The undisputed facts show that the insured boat dealer's liability for Klick's injuries would arise out of the release, dispersal, or migration of a pollutant into atmosphere. The pollution exclusion therefore applies, and Travelers is entitled to a declaratory judgment in its favor. The judgment of the district court is affirmed.

Chapter 13: Limitations on Insurance

Coverage for Punitive Damages

Taylor v. Lloyd's Underwriters of London, 972 F.2d 666 (5th Cir. 1992)

Emilio M. Garza, Circuit Judge:

This is an appeal from a summary judgment. Albert Taylor, Jr. and his wife originally filed suit against Lloyd's Underwriters, Institute of London Underwriters, and Underwriters at Lloyd's, London (collectively "Lloyd's") in Louisiana state court, which Lloyd's later removed to federal court. In this action, Taylor sought a judicial declaration that an earlier federal court punitive damages award in his favor and against Drynorth (USA), Inc. was recoverable from Lloyd's, Drynorth's insurer. The district court, concluding that general maritime law prohibits the collection of punitive damages from an insurance company, granted Lloyd's motion for summary judgment. Taylor now appeals. Finding that the district court erred in applying general maritime law to this dispute, we reverse and remand.***

On October 16, 1985, the DMC-1--a liftboat chartered to Drynorth--capsized in the Gulf of Mexico. As a result of the capsize, Taylor and several other seamen were injured. Alleging that the DMC-1 was unseaworthy, Taylor brought suit against Drynorth in federal court under general maritime law. Following trial, the jury returned a verdict, assessing $ 751,780 in compensatory damages and $ 500,000 in punitive damages against Drynorth. Drynorth has not operated since 1986 and, at all times relevant to the events surrounding this dispute, Drynorth has been insolvent. Accordingly, Drynorth's insurers paid the majority of the compensatory damages award and will be responsible for the payment of any punitive damages award.

Taylor subsequently filed a declaratory judgment action in Louisiana state court against Lloyd's, seeking a declaration that the three insurance policies. Lloyd's issued to Drynorth provide coverage for punitive damages and that Lloyd's is required to pay the damages award assessed against Drynorth. Lloyd's removed the case to federal court, and the parties filed cross motions for summary judgment. Lloyd's argued that coverage for punitive damages does not exist under any of the three insurance policies covering Drynorth at the time of the DMC-1's capsize. Taylor maintained, however, that the Comprehensive General Liability Insurance (CGL) policy provides coverage for punitive damages.[3]

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[3] The CGL policy states in part that:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of [a] bodily injury or [b] property damages to which this insurance applies, caused by an occurrence ..., but the company shall not be obligated to pay any claim or

Although the district court set forth the language of the CGL policy in its Order and Reasons, the district court did not analyze the language of any of the insurance policies to determine whether the language provided coverage for punitive damages; instead, the district court concluded that it had to first determine whether to apply Louisiana state law or general maritime law to the dispute. Concluding that general maritime law applies and that maritime law disallows the recovery of punitive damages from an insurance company, the district court granted Lloyd's motion for summary judgment.***

In determining the applicable law governing the interpretation of the CGL policy, our analysis begins with *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955). In *Wilburn Boat,* the Supreme Court determined that there was no federal admiralty rule regarding the breach of warranties in marine insurance policies and that the Court would not fashion one, but would instead apply state law. *Id.* at 315-16, 75 S. Ct. at 371. Since 1955, this court, in addressing maritime cases, has interpreted *Wilburn Boat* to require "the application of state insurance law principles if there is no specific and controlling federal rule." *Truehart v. Blandon,* 884 F.2d at 226, *citing Transco Exploration Co. v. Pacific Employers Ins. Co.,* 869 F.2d 862, 863 (5th Cir. 1989); *see also Ingersoll-Rand Fin. Corp. v. Employers Ins*., 771 F.2d 910, 911-12 (5th Cir. 1985), *cert. denied,* 475 U.S. 1046, 106 S. Ct. 1263, 89 L. Ed. 2d 573 (1986) ("The interpretation of a contract of marine insurance is--in the absence of a specific and controlling federal rule--to be determined by reference to appropriate state law."), *citing Wilburn Boat, supra.*

Lloyd's has presented this court with three cases in support of the proposition that general maritime law prohibits the collection of punitive damages from an insurance company. *See Dubois v. Arkansas Valley Dredging Co.,* 651 F. Supp. 299 (W.D. La.1987); *Smith v. Front Lawn Enterprises, Inc.,* No. 83-5147, 1987 AMC 1130 (E.D. La., Sept. 29, 1986); *Northwestern Nat'l Casualty Co. v. McNulty,* 307 F.2d 432 (5th Cir. 1962). However, these cases do not establish a specific and controlling federal rule disallowing the recovery of punitive damages from an insurance company.

In *Smith,* the district court considered whether the Protection & Indemnity policy provided coverage for punitive damages claims and, after examining the insurance policy, the court found that the insurance policy in question did not provide coverage for punitive damage claims. [6] The *Smith* court based its decision to

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> judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.***

[6] The policy in *Smith* did not expressly enumerate coverage for punitive damage liability. The policy language read in part:

disallow the recovery of punitive damages on the specific language of the insurance policy at issue, reasoning that "the clear language of this portion of the policy is that payment will be made for injury or illness, thus suggesting compensatory damages." *Smith,* 1987 AMC at 1130. The district court addressed the question whether public policy should permit an insurance company to pay for punitive damages only in the penultimate paragraph of the two-page opinion. That paragraph states: "In conclusion, the Court notes that it has been held, in relation to an automobile liability policy, that public policy forbids an insurer and an insured to enter into an insurance contract covering punitive damages." *Id.* at 1131, *citing McNulty,* 307 F.2d at 432.

The issue whether punitive damages may be collected from an insurance company was also addressed by the district court in *Dubois v. Arkansas Valley Dredging Co.,* 651 F. Supp. 299 (W.D. La. 1987). The *Dubois* court hypothesized that all requisites to a recovery of punitive damages were satisfied--that is, that the assured's actions were willful and wanton and that the insurance policy provided coverage for punitive damages--but then held that, in any event, "enforcement of the insuring provisions of the policy would be contrary to public policy." *Id.* at 302. Relying on *McNulty* and *Smith,* the *Dubois* court concluded that general maritime law prohibits the collection of punitive damages from an insurance company, reasoning that public policy disallows recovery of punitive damages from an insurance company. *Id.* at 302-03.

Both district court cases rely heavily on *McNulty* [7] to arrive at their conclusion that punitive damages are not recoverable against an insurance company under general maritime law. The thirty-year old *McNulty* decision did not even involve federal law; it was a diversity case, where the district court interpreted the public policy of Virginia and Florida. Additionally, *McNulty,* involved automobile insurance, not maritime insurance. The *Smith* court, then, while purporting to rely on *McNulty,* nevertheless primarily based its decision on the express policy language, buttressing its opinion with a citation to *McNulty*. Similarly, in *Dubois,* the court relied on both *McNulty* and *Smith* to reach its conclusion that maritime law prohibits the recovery of punitive damages from an insurance company. *See Dubois,* 651 F. Supp. at 299.

> this Company hereby undertakes to pay such sums as the assured ... shall have become legally liable to pay and shall have paid on account of: Loss of life of, or injury to, or illness of, any person.***

[7] In *McNulty,* after examining an automobile liability policy in a diversity case, the court articulated the policy behind disallowing wrongdoers to insure themselves against punitive damages, stating:

> It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy. The same public policy should invalidate any contract of insurance against the civil punishment that punitive damages represent.***

We find that these cases have not established a specific and controlling federal rule disallowing the recovery of punitive damages from an insurance company. The district court, therefore, should have applied the law of the state having the greatest interest in the resolution of the issues. *See Truehart v. Blandon,* 884 F.2d 223, 226 (5th Cir. 1989) In identifying the appropriate state law to apply, we look to the state having the greatest interest in the resolution of the issues."), *citing Transco Exploration Co. v. Pacific Employers Ins. Co.,* 869 F.2d 862, 863 (5th Cir. 1989). Accordingly, we find that the district court erred in granting summary judgment in favor of Lloyd's on the basis of maritime law.***

***Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994), *overruled on other grounds*, *Bienvenu v. Texaco*, *Inc.*, 164 F.3d 901 (5th Cir. 1999) (en banc)**

King, Circuit Judge:

***3. *Chevron's Expenses Incurred Defending Mrs. Randall's Punitive Damages Claim*

Chevron argues that the district court erred by refusing to award Chevron costs and attorneys' fees incurred in connection with Mrs. Randall's claims for punitive damages. Chevron contends that it is entitled to reimbursement for these expenses under both the indemnity provision of the time charter and the P & I policies. The claim based on the indemnity provision of the time charter must fail because, as we have already held, Chevron is not entitled to indemnification from Sea Savage for any losses suffered by Chevron as a result of its own negligence. We must now consider whether Chevron may recover its costs and attorneys' fees from Sea Savage's underwriters.

As has been observed, the seminal question in resolution of this coverage issue is the choice of law to be applied. 2 Parks, *supra,* at 1039. We have recently resolved this issue in favor of state law. In *Taylor v. Lloyds Underwriters,* 972 F.2d 666, 667 (5th Cir. 1992), *cert. denied,* [507] U.S. [952], 113 S. Ct. 1366, 122 L. Ed. 2d 744 (1993), several seaman were injured when their lifeboat capsized in the Gulf of Mexico, and they recovered compensatory and punitive damages against the boat's charterer in an action brought under general maritime law. The charterer was insolvent, and the plaintiffs sought to recover against three insurance policies, including a comprehensive general liability policy and a P & I policy. *Id.* The district court granted the insurer's motion for summary judgment, holding that the general maritime law disallows the recovery of punitive damages from an insurance company. *Id.* We reversed, holding that no specific and controlling federal rule disallowed such recovery. *Id.* at 669. We held that the district court should have applied the law of the state having the greatest interest in the resolution of the issues, and we remanded so that the district court could make that determination. *Id.* In this case, Louisiana law provides the rule of decision.

The P & I policy in question insures Chevron with respect to "costs, charges, and expenses, reasonably incurred and paid by the Assured in defense against any liabilities insured against hereunder in respect of the vessel named herein." Thus, if punitive damages are liabilities covered by the P & I policy, Chevron is entitled to recover from the underwriters the attorneys' fees it spent defending against the punitive damages claim. Chevron cites several Louisiana cases for the proposition that liability insurance contracts provide coverage for claims for punitive damages unless specifically excluded by the policy. *See Sharp v. Daigre,* 555 So. 2d 1361, 1363 (La. 1990) (holding that exemplary damages may be recovered from an insurer on a policy reading "We will pay damages which a covered person is legally entitled to recover ... because of bodily injury...."); *Creech v. Aetna Casualty & Sur. Co.,* 516 So. 2d 1168, 1171 (La. Ct. App. 1987), *cert. denied*, 519 So. 2d 128 (La. 1988). Thus, argues Chevron, because the underwriters would have been obligated to cover any award of punitive damages against Chevron, they must provide coverage for the costs and attorneys' fees Chevron incurred in defending the claim for punitive damages.

The underwriters argue that punitive damages, and by extension expenses incurred in defending against such damages, are excluded from coverage under the policy. They contend that punitive damages are not liabilities "for loss of life of ... any person" as are covered by the policy. For support the underwriters cite *Smith v. Front Lawn Enters.,* 1987 A.M.C. 1130, 1130-31 (E.D. La. 1986), in which the court held that an essentially identical policy did not provide coverage for a claim for punitive damages based on unseaworthiness and refusal to pay maintenance and cure. In *Taylor,* however, we took note of the view expressed in *Smith* and declined to interpret it as establishing a controlling federal rule, holding instead that state law should provide the rule of decision. *Taylor,* 972 F.2d at 668-69; *see also* 2 Parks, *supra,* at 1041 (noting that no federal cases exist regarding the coverage of punitive damages issue).

Although the *Sharp* case, decided by the Louisiana Supreme Court, deals with uninsured motorist insurance only, there is nothing in the opinion to suggest that its holding would not apply with equal force to other types of insurance. P & I policies are, strictly speaking, indemnity policies rather than liability policies, but the indemnity is itself basically against liabilities, Parks, *supra,* at 1004, and in general indemnity policies are construed like any other insurance policy. *Id.* at 839. Sea Savage's underwriters have not directed our attention to any Louisiana cases suggesting that the application of *Sharp* should be limited in any way, nor does our research uncover any. The policy language at issue in *Sharp,* which covered damages arising "because of bodily injury, sickness, or disease," is not more general or all-encompassing than the "liability for loss of life of, or personal injury to, or illness of, any person" language in the instant P & I policy. We therefore hold that under Louisiana law, applied in the absence of a controlling federal rule, punitive damages are covered by the P & I insurance policy at issue in the instant case. Chevron is therefore entitled to recover its costs and attorneys' fees expended in defending Mrs. Randall's claim for punitive damages. The district court's holding to the contrary is reversed.***

***American International Specialty Lines Insurance Co. v. Res-Care, Inc.*, 529 F.3d 649 (5th Cir. 2008)**

Reavley, Circuit Judge:

We are confronted in this case with an insurance coverage and apportionment dispute in which both the insurer and the insured have appealed from the district court's judgment after a bench trial. The insurer, American International Specialty Lines Insurance Company, sued its insured, Res-Care, Inc., for breach of contract arising out of a non-waiver agreement that the parties executed in connection with the settlement of an underlying wrongful death suit against Res-Care. After American settled the underlying suit for $ 9 million, it sought reimbursement from Res-Care pursuant to the non-waiver agreement. The district court conducted an allocation trial to apportion the settlement between covered and uncovered claims and entered judgment against Res-Care for $ 5 million. We hold that Texas public policy bars punitive damages coverage in this case and AFFIRM the district court's judgment.

I. Background

Res-Care and its subsidiary, Texas Home Management, Inc., (collectively "Res-Care") operate Appleridge, a group-home in Houston, Texas, that provides services for mentally disabled individuals. From July 1, 1997, through July 1, 1998, American insured Res-Care through a Hospital Professional Liability and Commercial General Liability Policy (the "primary policy") and a Commercial Umbrella Policy (the "umbrella policy"). The primary policy provided coverage for, *inter alia*, damages due to bodily injury caused by an "occurrence," which was defined as "an accident, including continuous exposure to substantially the same general harmful conditions." The primary policy had a coverage limit of $ 1 million. The umbrella policy provided coverage for "loss in excess of the retained limit . . . which the insured shall become legally obligated to pay as compensatory damages" due to, *inter alia*, personal injury. The umbrella policy had a limit of $ 15 million. Both the primary and umbrella policies excluded from coverage damages arising from intentional acts. The umbrella policy also excluded from coverage damages payable by the insured as punitive or exemplary damages. Res-Care maintained similar annual primary and umbrella policies with American from July 1993 to July 1998.

From June 1, 1992, until her death on April 16, 1998, Trenia Wright, a 37-year old woman with cerebral palsy and mental disabilities, lived at Appleridge. On the evening of Sunday, April 12, 1998, Wright fell in the hallway and defecated on the floor. Vickie Kennerly, an employee at Appleridge, poured a mixture of undiluted bleach and another cleaner onto the floor and escorted other residents outside, leaving Wright inside the home. Wright was later found clad only in a T-shirt lying in the feces and the bleach, where she had been left for over one hour, and possibly for several hours, while Kennerly ate pizza outside. Although Wright apparently called for help, no one assisted her in getting up. Wright later told other residents that Kennerly had poured bleach directly onto her and had "set her on fire." When Kennerly eventually returned inside the house, she dragged Wright into the bathroom and cleaned the hallway floor, but she did not wash the bleach off of Wright. Kennerly left the facility soon afterward when her shift ended.

Two other staff members later found Wright on the floor in the bathroom and put her to bed in clean clothes. The staff put Vaseline on Wright, but they did not attempt to wash the bleach off of her. Although she had chemical burns on her legs, arms, stomach, and back, Wright received little medical care in the following days. She was not taken to the facility's doctor, Dr. Yalamanchili, until approximately 17 hours after the incident. Dr. Yalamanchili diagnosed Wright with only superficial burns. He prescribed pain medication and recommended whirlpool treatments, which were not provided. The pain medication was not given to Wright until almost 24 hours after she sustained the chemical burns.

A facility LVN examined Wright late in the afternoon on April 13, 1998, and was shocked by Wright's burns and surprised that the doctor had diagnosed only superficial wounds. A facility RN also saw Wright that day and observed the burns on Wright's arms. The RN did not fully assess Wright because Wright had been seen by the doctor and never followed-up on Wright's condition after April 13.

Wright's skin began peeling off in patches, and Wright began drinking a lot of water, a sign of dehydration from the chemical exposure. In the early morning hours of April 15, 1998, Wright fell out of bed and was found unresponsive. She was taken to the emergency room and diagnosed with extensive chemical burns. On the morning of April 16, 1998, Wright died from complications due to the severe burns, which covered over 40% of her body. Kennerly was later convicted in state court of recklessly causing bodily injury to a disabled individual.

In June 1998, Wright's family filed a wrongful death and survival suit for compensatory and punitive damages against Res-Care, the hospital, the treating physicians, and four Res-Care employees, including Kennerly. American assumed the defense of Res-Care. In February 2000, the Wright plaintiffs demanded $ 16 million to settle the suit, and on February 25, 2000, American issued its first reservation of rights letter. The Wright plaintiffs settled their claims against the hospital and treating physicians for $ 1,085,000 in March 2000.***

On August 1, 2000, American and Res-Care executed a separate non-waiver agreement that authorized American to seek a settlement of the Wright suit. Prior to the execution of the agreement, American believed that coverage under its policies would be limited to Wright's actual damages, which it estimated would be no more than $ 2.5 million. It refused to make a settlement offer above that amount. The parties acknowledged in the non-waiver agreement that the Wright plaintiffs were seeking both compensatory and punitive damages and that American believed it was responsible under the policies for only actual damages, but that Res-Care believed American had had an opportunity to settle all claims within the available coverage limits. The parties agreed that if American was able to negotiate a settlement with the Wright plaintiffs, American "shall then have a right to proceed with a claim for recoupment from the Res-Care Defendants of all sums paid by [American] attributable to any claims not covered under the applicable Policies." Thereafter, American settled the Wright suit for $ 9 million and paid that sum to the Wright plaintiffs.

American then sought recovery in the district court for breach of contract under the non-waiver agreement. American contended that Res-Care breached the agreement by refusing to reimburse it for uncovered claims paid as part of the Wright settlement. The district court conducted a bench trial to apportion the settlement between covered and uncovered claims pursuant to *Enserch Corporation v. Shand Morahan & Company*, 952 F.2d 1485 (5th Cir. 1992).

American contended at trial that the actual damages in the Wright lawsuit were between $ 2 and $ 3.5 million, while Res-Care contended that the entire $ 9 million settlement represented actual damages. The district court determined that the portion of the settlement for the Wright plaintiffs' actual damages was $ 4 million and that punitive damages were $ 5 million. The district court determined that the entire $ 9 million was settlement of the claim for the April 12, 1998 bleach incident. The court held that the additional 74 claims first alleged on the eve of trial in the Wright plaintiffs' ninth amended complaint did not substantially factor into the settlement. As punitive damages were not covered under the umbrella policy, the district court entered judgment for American for $ 5 million.

Res-Care has appealed the district court's judgment. American has filed a cross-appeal.

II. Discussion***

D. Punitive damages

Res-Care next argues that the district court erroneously failed to permit coverage of punitive damages under the multiple primary policies, which are silent as to such coverage. Because, as we concluded above, the district court correctly determined that multiple policy periods were not at issue, Res-Care's contention must be limited to the primary and excess umbrella policies in effect on April 12, 1998.

The umbrella policy in effect on April 12, 1998, specifically excludes punitive damages from coverage. Thus, American could seek reimbursement from Res-Care under the non-waiver agreement for any part of the settlement attributable to punitive damages that were paid under the umbrella policy. The primary policy, however, which has a policy limit of $ 1 million, does not address coverage for punitive damages. Therefore, if punitive damages are covered under the primary policy, they would be limited to $ 1 million, and the amount of Res-Care's reimbursement to American might be reduced. The question is whether the primary policy covers punitive damages.

Res-Care asserted in its opening brief that Texas law permits an insured to recover punitive damages under the primary policy at issue here. After briefing and oral argument in this case, the Texas Supreme Court considered the issue of punitive damages and public policy in *Fairfield Insurance Company v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008). Although it expressly considered whether public policy precludes insurance coverage of punitive damages in the workers' compensation regime, the court also provided guidance for consideration of the issue in other contexts. We subsequently requested supplemental briefing from the parties.

The Texas Supreme Court established a two-step process for courts to determine whether punitive damages are insurable. The court first asks whether the plain language of the policy covers the punitive damages in the underlying suit against the insured. Second, if the court determines that the policy provides coverage, it determines whether Texas public policy allows or prohibits such coverage. At the second step of the inquiry, the court looks to express statutory provisions to determine whether the legislature has made a policy decision; if the legislature has not made an explicit policy decision, the court will then consider general public policies.

The primary Commercial General Liability policy in this case provides that the insurer "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' . . . to which this insurance applies." The policy states that coverage applies for "bodily injury" that "is caused by an 'occurrence'" and that "occurs during the policy period." "Bodily injury" is defined as "bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time." The policy defines an "occurrence" to be "an accident, including continuous or repeated exposure to substantially the same harmful conditions." A policy exclusion states that the insurance does not apply to bodily injury that is "expected or intended from the standpoint of the insured."

American argues in its supplemental brief that punitive damages are precluded from coverage at step one of the *Fairfield* analysis--the plain language of the policy--because although the primary policy is silent as to punitive damages, the umbrella policy specifically excludes them from coverage and provides that excess coverage is not triggered unless the primary policy is first exhausted by payment of claims that would be covered under the umbrella policy. Since claims for punitive damages are excluded by the umbrella policy, American reasons, they may not be used to exhaust the primary policy, and therefore only the Wright plaintiffs' actual compensatory damages may be applied to the primary policy. We decline to pass on American's policy construction because American effectively waived its argument by not urging it in the district court, and by relying in its primary appellate brief only on the exclusion of punitive damages under Texas public policy. We therefore believe it prudent to presume that the primary policy language here encompasses punitive damages, and we turn to the next step in the public policy inquiry, examining legislative policy decisions.

As noted by the court in *Fairfield*, the Texas legislature has been sensitive to the issue of insurance coverage for punitive damages and has made the policy decision to preclude such coverage in certain circumstances. For example, "health care providers" have generally been prohibited from obtaining insurance coverage for punitive damages, although the legislature has recognized exceptions for hospitals, nursing homes, and assisted living facilities by permitting those entities to obtain specific endorsements for such coverage. Res-Care operated the Appleridge facility as an Intermediate Care Facility for the Mentally Retarded (ICF/MR). The Texas legislature has not included ICF/MRs in the definition of "health care providers" found in the Texas Insurance Code. As American concedes in its supplemental brief, such entities have not been precluded by an explicit legislative policy decision from obtaining insurance for punitive damages, and they are not required to obtain a specific endorsement for such coverage. Thus, we next consider general public policy and whether insurance coverage for punitive damages is precluded in this case.

In the absence of a specific legislative policy directive, courts determine whether an agreement is unenforceable on public policy grounds "by weighing the interest in enforcing agreements versus the public policy interest against such enforcement." The Texas Supreme Court has framed the analysis as a consideration of the interest in freedom of contract versus the extent to which enforcement of an agreement would frustrate important public policy.

On one hand, Texas recognizes a "strong public policy in favor of preserving the freedom of contract." Although this freedom is not unbounded, a court may not lightly interfere with it. The freedom to contract between an insured and insurer must be upheld absent strong public policy reasons for holding otherwise.

Opposing the freedom of contract is the purpose of punitive damages. The "*primary* purpose of exemplary damages [is] to punish and deter." In its most recent enactments on the subject, however, the Texas legislature has downplayed the deterrence aspect of exemplary damages in favor of the punitive aspect. "[P]unishment imposed through exemplary damages is to be directed at the wrongdoer." But the Texas Supreme Court recognized in *Fairfield* that there may be instances when insurance coverage for exemplary damages should be allowed, such as when the insured is a corporation or a business responsible for damages due to the conduct of its employees. In that case, "[w]here other employees and management are not involved in or aware of an employee's wrongful act, the purpose of exemplary damages may be achieved by permitting coverage so as not to penalize many for the wrongful act of one."

Res-Care argues that its case falls squarely within these parameters for permitting punitive damages insurance coverage for corporations and businesses. It asserts that no public policy considerations are offended by insurance coverage because no Res-Care officers, directors, or shareholders participated in or had knowledge of the Wright plaintiffs' allegations.

The *Fairfield* court expressed reservations, however, for "[e]xtreme circumstances" where "extreme and avoidable conduct that causes injury" may warrant different considerations. The court expressed concern that insurance coverage for punitive damages could encourage reckless conduct. "Were the existence of insurance coverage to completely eviscerate the punitive purpose behind awarding exemplary damages, it could defeat not only an explicit legislative policy but also the court's traditional role in deterring conscious indifference."

We conclude that the extreme circumstances which gave pause to the *Fairfield* court are present in the instant case. The Wright plaintiffs' complaint is rife with allegations of gross negligence for which the responsibility should not be shifted from the defendants to the insurer. The complaint alleged that *all* defendants, including Res-Care, were grossly negligent in their actions, not only for direct participation in the bleach incident on April 12, 1998, but also for failure to take reasonable steps to prevent the situation from occurring, and for failure to alleviate the harm immediately afterward. The many allegations of gross negligence on the part of Res-Care included failing to ensure a safe environment, to properly hire and train its employees, and to ensure that Wright received proper medical care. The complaint also alleged that Kennerly and another individual permitted Wright to lie in the bleach for a prolonged period, failed to bathe or wash the chemicals from Wright's body, and failed to seek appropriate medical care. It further alleged that the defendants' conduct violated the Texas Penal Code by recklessly and negligently causing injury to a disabled person.

Moreover, there were allegations that reports from the State of Texas showed Res-Care poorly operated other facilities, thereby establishing a course of conduct warranting exemplary damages. In Wright's case, an investigation by the Texas Department of Health and Human Services concluded that Wright did not receive an assessment by medical personnel for 17 hours after her exposure to the bleach and that, although she was seen by a nurse the following day, she received no follow-up assessment or medical care for 34 hours until she was sent to the emergency room. The investigation revealed that "the facility failed to ensure that adequate and timely medical assessment and treatment as well as follow up assessment and care were routinely provided to clients residing in the facility." It concluded that "[f]acility negligence is substantiated due to the facility failing to provide prompt, adequate treatment for a client with chemical burns who subsequently died due to complications of those burns." Significantly, the report concluded that the failure of care evidenced systemic problems at the facility. It therefore recommended that the Appleridge facility be closed.

We conclude that the circumstances of Wright's injury and death, occurring while living in a facility with documented systemic problems of care, were so extreme that the purposes of punishment and deterrence of conscious indifference outweigh the normally strong public policy of permitting the right to contract between insurer and insured. This case demonstrates the kind of "avoidable conduct that causes injury" where public policy is best served by requiring the insured to bear the costs of punitive damages. The district court did not err by failing to apportion any of the punitive damages to the primary policy.***

***In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 841 F. Supp. 2d 988 (E.D. La. 2012) (Order and Reasons as to Transocean and BP's Cross-Motions for Partial Summary Judgment Regarding Indemnity)**

Barbier, District Judge:

Before the Court are Transocean's Motion for Partial Summary Judgment (Rec. Doc. 4477) and BP's Cross-Motion for Partial Summary Judgment (Rec. Doc. 4827) as to whether BP must defend and indemnify Transocean for pollution claims asserted by third parties. For reasons explained below, both Motions are GRANTED IN PART and DENIED IN PART.

I. BACKGROUND AND PARTIES' ARGUMENTS

This Multi-district Litigation ("MDL") arises from the April 20, 2010 explosion and fire on the DEEPWATER HORIZON mobile offshore drilling unit ("MODU"), and the subsequent discharge of millions of gallons of oil into the Gulf of Mexico. The consolidated cases include claims for the death of eleven individuals, numerous claims for personal injury, and various claims for environmental and economic damages.

Two member cases provide the context for the instant Motions. The first, *In re Triton Asset Leasing GmbH, et al.*, No. 10-2771 (the "Limitation Action"), was instituted by Transocean, as owner of the DEEPWATER HORIZON, pursuant to the Limitation of Shipowners' Liability Act, 46 U.S.C. § 30501, *et seq.*; Fed. R. Civ. P. Supp. R. F. Numerous claims were asserted in the Limitation Action against Transocean for personal injury, wrongful death, economic loss, property damage, etc. Transocean, in turn, impleaded BP (and other parties not relevant here) under Fed. R. Civ. P. 14(c), tendering BP to the claimants and demanding judgment in the claimants' favor. (Rec. Doc. 1320). BP and Transocean then crossclaimed against one another, each seeking contribution, indemnity, and affirmative damages from the other for certain liabilities resulting from the casualty. (Rec. Docs. 2068, 2074).

In the second case, *United States v. BP Exploration & Prod. Inc., et al.*, No. 10-4536 (the "United States' Action"), the United States asserted claims for civil penalties under Section 311(b)(7) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(b)(7*)*, and a declaration of liability for removal costs and damages under the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2701, *et seq*. BP and Transocean were named as defendants (as long with other parties not relevant here), who crossclaimed against each other, similar to what occurred in the Limitation Action. (Rec. Docs. 2075, 2574).

Transocean's Motion for Partial Summary Judgment asserts that the contract between BP and Transocean ("the Drilling Contract") requires BP to defend and indemnify Transocean from claims and liabilities related to pollution originating below the surface of the water, even if Transocean is strictly liable or the pollution was caused by Transocean's negligence or gross negligence. Transocean asserts that the scope of BP's indemnity obligation extends to compensatory damages, punitive damages, and statutory penalties. However, Transocean admits that the Drilling Contract does not provide indemnity in the event of intentional or willful misconduct in excess of gross negligence. (Transocean's Reply to U.S. p.1, Rec. Doc. 4862 at 2).

BP filed a Cross-Motion for Partial Summary Judgment on this issue. BP does not contest that the Drilling Contract requires BP to indemnify Transocean for some claims, but disputes the scope of indemnity. BP admits that the contract requires it to indemnify Transocean for pollution claims arising from Transocean's "fault or negligence," but denies that it owes indemnity for claims based on strict liability-such as a claim for unseaworthiness or under OPA or the CWA-or where Transocean acted with gross negligence. Furthermore, and in any respect, BP argues that even if Transocean's interpretation of the contract is correct, public policy prohibits and invalidates a contractual indemnity that purports to include gross negligence, punitive damages, or CWA civil penalties. BP also asserts that the indemnity clause is void if Transocean breached the Drilling Contract or materially increased risks to BP.

Finally, the parties dispute the extent of BP's obligations under the contractual duty to defend.***

A. Interpretation of the Drilling Contract

The parties agree that maritime law governs the Drilling Contract. Under maritime law, "an indemnity agreement . . . should be read as a whole and its words given their plain meaning unless the provision is ambiguous. Disagreement as to the meaning of a contract does not make it ambiguous, nor does uncertainty or lack of clarity in the language chosen by the parties." *Breaux v. Halliburton Energy Servs.,* 562 F.3d 358, 364 (5th Cir. 2009) (citations and quotations omitted). Furthermore,

> A contract of indemnity should be construed to cover all losses, damages, or liabilities which reasonably appear to have been within the contemplation of the parties, but it should not be read to impose liability for those losses or liabilities which are neither expressly within its terms nor of such a character that it can be reasonably inferred that the parties intended to include them within the indemnity coverage. Thus, for example, it is widely held that a contract of indemnity will not afford protection to an indemnitee against the consequences of his own negligent act unless the contract clearly expresses such an obligation in unequivocal terms.***

B. Public Policy and Indemnification for Gross Negligence, Punitive Damages

Article 25.1 expressly requires indemnification for liabilities caused by the indemnitee's gross negligence (bold and italics added):'

> . . . THE INDEMNIFYING PARTY SHALL . . . INDEMNIFY . . . THE INDEMNIFIED PARTY OR PARTIES FROM AND AGAINST ANY AND ALL CLAIMS . . . WITHOUT REGARD TO THE CAUSE OR CAUSES THEREOF, INCLUDING . . . THE NEGLIGENCE OF . . . THE INDEMNIFIED PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR . . . ***GROSS*** . . . .

Nevertheless, BP argues that an indemnity clause purporting to include gross negligence is void as against public policy.***

This issue creates tension between two policies: freedom of contract, which weighs in favor of enforcing the indemnity, and a reluctance to encourage grossly negligent behavior, which weighs against enforcing the indemnity. *See, e.g., La Esperanza,* 124 F.3d at 19 (discussing these policy issues in the context of a release). The general rule is that competent persons have the utmost liberty of contracting, and therefore agreements voluntarily and fairly made are upheld. *Twin City Pipe Line Co. v. Harding Glass Co.,* 283 U.S. 353, 356, 51 S. Ct. 476, 75 L. Ed. 1112 (1931). Although a contract can be invalidated on the grounds that it violates public policy, courts are instructed to apply this principle with caution and only in cases plainly within the reasons on which that doctrine rests, because the phrase "public policy" can be vague and variable. *Id.*

As to the argument that contractual indemnity for gross negligence contravenes public policy, it is significant that the Drilling Contract allocated risk to both

Transocean and BP, not just BP. For example, Transocean admits that it bears liability for the deaths and injuries to its crew members and the loss of its equipment (namely, the DEEPWATER HORIZON) under Articles 21.1 and 22.2. (Transocean's Reply Br. to BP p.7, Rec. Doc. 4867 at 8). With regards to pollution, Transocean assumed responsibility for pollution originating at or above the water's surface in Article 24.1. Given these risk allocations, a grossly negligent act by Transocean could result in liability to Transocean as easily as it could have resulted in liability to BP. In other words, the reciprocal nature of these indemnity clauses arguably created an incentive for Transocean to avoid grossly negligent conduct, or at least did not encourage Transocean to act in a grossly negligent manner. These considerations weaken the argument that the indemnity should be invalidated.

As to the "freedom of contract" argument, Transocean and BP appear to have held "roughly" equal bargaining power. Transocean and BP are sophisticated entities that engaged in a potentially lucrative and obviously risky endeavor. The Drilling Contract reflects that they attempted to allocate risk ahead of time, ostensibly in the hopes that some degree of certainty may be brought to the risks inherent in that undertaking. *Cf.* Evans, *supra* note 11. Given that their bargaining power was roughly equal, the "freedom of contract" policy weighs in favor of upholding the indemnity.

Another point to be considered is that this indemnity clause does not leave an injured party without recourse, as would occur in a release. As discussed above, in a release the injured party is uncompensated for its injury (assuming it did not insure itself against the risk), because it has waived its cause of action against the wrongdoer. In an indemnity, the injured third party typically is not restrained from seeking compensation; rather, the source of the compensation is shifted to the indemnitor. Accordingly, the Restatement (Second) of Contracts states, "A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy," but then explains, "The rule stated in this Section does not apply to an agreement by a third person to indemnify a party against liability in tort." Restatement (Second) of Contracts § 195(1), cmt. (b) (updated 2011). Another treatise explains:

> [I]t has been said that "[i]ndemnification agreements are unenforceable as violative of public policy only to the extent that they purport to indemnify a party for damages flowing from the intentional causation of injury" ***so that indemnification may be permitted when grossly negligent conduct was alleged and found.*** Decisions with respect to these issues raise difficult policy concerns: On the one hand, the courts are, with good cause, reluctant to encourage wrongdoing by permitting the wrongdoer to be indemnified for misconduct. On the other hand, a refusal to permit indemnity will often, if not usually, result in an injury being unredressed by compensation. Balancing these competing interests is difficult and often results in subtle distinctions.

8 Richard A. Lord, Williston on Contracts § 19:20 (4th ed. updated 2011) (footnote omitted, emphasis added). Relying on this distinction, some non-maritime courts from other jurisdictions have held that indemnification for gross negligence does not violate public policy. *See, e.g. First Jersey Nat'l Bank v. Dome Petroleum Ltd.*, 723 F.2d 335, 341-42 (3d Cir. 1983) (New Jersey law); *Austro v. Niagara Mohawk Power Corp.*, 66 N.Y.2d 674, 487 N.E.2d 267, 267-68, 496 N.Y.S.2d 410 (N.Y. 1985) (New York law).[13]

It is also significant that OPA, the primary federal legislation governing compensatory damages arising from oil pollution, expressly permits contractual indemnity for liability established under that Act, but is silent as to whether or not such indemnity may include gross negligence. *See* 33 U.S.C. § 2710.[14] However, in another Section OPA states that gross negligence will remove the limit of liability for removal costs and damages. *See* 33 U.S.C. § 2704(c)(1). The fact that gross negligence was plainly contemplated elsewhere in OPA, but ***not*** mentioned in Section 2710, tends to show that contractual indemnification for gross negligence is not inconsistent with OPA. Similarly, Section 2716(f)(1) states that a responsible party's "guarantor" may raise as a defense that the responsible party acted with "willful misconduct," but not gross negligence.[15] Although different policy

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[13] Two other cases did not express any hostility toward an indemnity that included to gross negligence, but admittedly, those cases did not address the public policy argument. *See In re Horizon Vessels, Inc.*, No. 03-3280, 2005 U.S. Dist. LEXIS 42110, *35-36 (S.D. Tex. Nov. 18, 2005) (Mag. Rec. & Order), *opinion adopted as modified*, 2005 U.S. Dist. LEXIS 42117 (S.D. Tex. Dec. 22, 2005) (maritime law); *Griffin v. Tenneco Oil Co.*, 625 So. 2d 1090, 1096-97 (La. App. 4 Cir. 1994) (Louisiana law). Still, these cases lend some additional support for the position that public policy does not prohibit indemnification for gross negligence. Furthermore, and as mentioned above, Louisiana Civil Code Article 2004 states that gross negligence will invalidate a release, but Revision Comment (e) states that Article 2004 does not apply to an indemnity contract.

[14] Section 2710 states:

> (a) Agreements not prohibited
>
> Nothing in this Act prohibits any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this Act.
>
> (b) Liability not transferred
>
> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer liability imposed under this Act from a responsible party or from any person who may be liable for an incident under this Act to any other person.
>
> (c) Relationship to other causes of action

Nothing in this Act, including the provisions of subsection (b) of this section, bars a cause of action that a responsible party subject to liability under this Act, or a guarantor, has or would have, by reason of subrogation or otherwise, against any person.

[15] Section 2716(f)(1) states:

concerns may govern an OPA guarantor, Section 2716(f)(1) serves as another indication that OPA is not opposed to indemnification for gross negligence.

For the above reasons, and in the absence of a binding rule to the contrary, the Court finds that ***if*** Transocean committed gross negligence that caused pollution originating below the surface of the water, public policy would not bar its claim for contractual indemnity from BP.[16] However, this holding is limited to compensatory damages, and does not include any punitive damages which might arise if Transocean is found grossly negligent.

In *Daughdrill v. Ocean Drilling & Exploration*, another judge from this court explained that the purpose of punitive damages would be defeated if the burden of such damages were shifted by contractual indemnity:

> The public policy purpose behind permitting [punitive] damages is to punish the defendant for egregious conduct, teaching him not to do it again, and to deter others from engaging in similar behavior. . . .
>
> . . . [I]n the case at bar we are confronted with contractual indemnification. No clearer example of a situation which would subvert the purposes of awarding punitive damages can be imagined than to permit such indemnification. To require a party, without recompense, to shoulder the burden of egregious conduct by another and hence permit that other to avoid punitive damage liability would make a mockery of the very concept. In situations where the defendant's conduct is so extreme as to merit an award of punitive damages, the cost of such must be placed upon the party responsible, and not transferred to a party innocent of any wrongdoing. Accordingly, this Court feels that, even if indemnification is allowed, liability for punitive damages will not be compensable.

> Subject to paragraph (2), a claim for which liability may be established under section 2702 of this title may be asserted directly against any guarantor providing evidence of financial responsibility for a responsible party liable under that section for removal costs and damages to which the claim pertains. In defending against such a claim, the guarantor may invoke-
>
> . . .
>
> (C) the defense that the incident was caused by the willful misconduct of the responsible party. The guarantor may not invoke any other defense that might be available in proceedings brought by the responsible party against the guarantor.

[16] To the extent *Nexen Petroleum U.S.A., Inc. v. Sea Mar Division of Pool Well Services Co.*, 497 F. Supp. 2d 787 (E.D. La. 2007), holds to the contrary, the Court is not bound by, and declines to follow, that decision.

665 F. Supp. 477, 481-82 (E.D. La. 1987) (citation omitted). The Court agrees with this reasoning and holds that Transocean's right to contractual indemnity does not extend to punitive damages.

C. Public Policy and CWA Penalties

Similar to the argument regarding punitive damages, the United States and BP contend that contractual indemnity is unenforceable with respect to CWA penalties. Transocean, however, argues that CWA civil penalties are primarily remedial in nature, and therefore a CWA civil penalty may be shifted by contract. Transocean also argues that the CWA expressly allows contractual indemnification, *see* 33 U.S.C. § 1321(h), and to the extent this statute does not apply, indemnification is allowable under OPA, 33 U.S.C. §§ 2709, 2710.

Section 311(b)(7) of the CWA, 33 U.S.C. § 1321(b)(7), imposes a civil penalty on "[a]ny person who is the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility," from which a "harmful" quantity of oil discharges. Liability is strict, although gross negligence or willful misconduct will increase the amount of the penalty. *See 33 U.S.C. § 1321(b)(7)(D)*. In assessing the amount of a Section 311(b)(7) penalty, Courts are directed to

> consider the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

33 U.S.C. § 1321(b)(8).

Legislative history and case law reveal that a Section 311(b)(7) civil penalty has multiple goals, including restitution, but the primary objectives are to punish and deter future pollution. For example, the House Conference Report on OPA (which also amended the CWA) stated, "Civil penalties [under the CWA] should serve primarily as an additional incentive to minimize and eliminate human error and thereby reduce the number and seriousness of oil spills." H.R. Rep. No. 101-653, Sec. 4301, at 52 (1990) (Conf. Rep.), *reprinted in* 1990 U.S.C.C.A.N. 779, 833. In *Tull v. United States*, the Supreme Court analogized a civil penalty under Section 309(d) of the CWA, 33 U.S.C. § 1319(d)-which is similar in relevant aspects to Section 311(b)(7)-to punitive damages; i.e., those "remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo." 481 U.S. 412, 422, 107 S. Ct. 1831, 95 L. Ed. 2d 365 & n.7 (1987) (analyzing whether a claim for CWA penalties implicated the Seventh Amendment). The Court added, "The legislative history of the [CWA] reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties." *Id.* at 422; *see also Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000) (citing *Tull*, 481 U.S. at 422-23) ("Civil penalties under the [CWA] are intended to punish culpable individuals and deter future violations, not just to extract compensation or restore the status quo."); *Montauk Oil Transp. Corp. v. Tug El Zorro Grande*, 54 F.3d 111, 114 (2d Cir. 1995) (stating that a penalty under CWA Section 311(b)(6), which is similar in many respects to Section 311(b)(7), "is not predicated upon the cost of removal, but upon the happening of the discharge. The determinative factor . . . is the discharge of oil, not its cleanup," indicating that the primary purpose is deterrence); *United States v. Atlantic Richfield Co.,* 429 F. Supp. 830, 837 (E.D. Pa. 1977) ("[T]he principal goal of [Section 311](b)(6) is to deter spills. . . .[T]he Congressional purpose here was to impose a standard of conduct higher than that related just to economic efficiency. . . . [E]ven where defendants are not at fault, the penalty does not act only as punishment but serves the ends of civil regulation."); *cf. United States v. Coastal States Crude Gathering Co.*, 643 F.2d 1125, 1128 (5th Cir. 1981) ("The purpose of [CWA Section 311] is to achieve the result of clean water as well as deter conduct causing spills." (citation and quotations omitted)); *United States v. Tex-Tow, Inc.,* 589 F.2d 1310, 1315 (7th Cir. 1978) ("Tex-Tow's claim of irrationality is grounded in the assumption that the purpose of the civil penalty [in Section 311(b)(6)] is to Deter spills. . . . [However,] the civil penalty ***also*** has certain non-deterrent, economic purposes . . . ." (emphasis added)). *But cf. United States v. Ward*, 448 U.S. 242, 249, 254, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980).[17] This indicates that, similar to punitive damages, public policy prohibits contractual indemnification for civil penalties under CWA Section 311(b)(7).

Furthermore, as mentioned above, assessing a CWA penalty requires a Court to consider factors such as the seriousness of the violation, the defendant's culpability, and the economic impact the penalty will have on the defendant. *See* 33 U.S.C. § 1321(b)(8). Thus, the penalty becomes somewhat "tailored" to the specific defendant and situation; an amount appropriate for one defendant might be ineffective (or grossly excessive) for another. *See Tull*, 481 U.S. at 422-23. ("A

[17] In *Ward*, the Supreme Court stated, "We turn then to consider whether Congress, despite its manifest intention [in CWA Section 311(b)(6)] to establish ***a civil, remedial mechanism***, nevertheless provided for sanctions so punitive as to transfor[m] what was clearly ***intended as a civil remedy*** into a criminal penalty. . . . ***Here*** the penalty is ***much more analogous to traditional civil damages.***" 448 U.S. at 249, 254 (emphasis added). However, at issue in *Ward* was whether Section 311(b)(6)-empowering the Secretary of the department in which the Coast Guard operates to impose a civil penalty for a harmful discharge-was "***so far criminal*** in [its] nature" as to trigger the **Fifth Amendment's** protection against self-incrimination. *Id.* at 253 (emphasis added). In other words, the Court focused on whether Section 311(b)(6) was ***so*** punitive that it crossed the threshold between civil and criminal penalties. A very different question is presented here.

court [assessing a penalty under Section 309(d)] can require retribution for wrongful conduct based on the seriousness of the violations, the number of prior violations, and the lack of good-faith efforts to comply with the relevant requirements. It may also seek to deter future violations by basing the penalty on its economic impact." (citations omitted)). This feature would be undermined if a penalty tailored to discharger X is contractually shifted to Y. In such an instance, X, who may be culpable, avoids punishment (and by extension, is not deterred), while Y, who may be innocent of misconduct, is liable for a penalty that may be totally unsuited to it.

Transocean contends that Section 311(h), 33 U.S.C. § 1321(h), authorizes contractual indemnity for a CWA civil penalty. That Section provides:

> The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) The United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance.

However, the Court interprets Section 311(h) as providing a right to equitable (as opposed to contractual) indemnity or contribution, given that it refers to rights against "any third party whose ***acts*** may in any way have ***caused or contributed*** to such discharge." Assuming *arguendo* that equitable indemnity applies to CWA civil penalties, it does not follow that contractual indemnity also applies. Equitable and contractual indemnity are based on different concepts. Generally speaking, the former is based on the fault of a third party defendant, while the latter is based on an agreement (which may have nothing to do with the indemnitor's fault). *See* 1 Thomas J. Schoenbaum, Admiralty and Maritime Law §§ 5-19, 5-21 (5th ed. 2011). Thus, Section 311(h) does not support Transocean's position.

Transocean also points to a note in the CWA that states, "Subsections (f), (g), (**h**), and (i) of section 311 of the [CWA] (33 U.S.C. 1321) shall not apply with respect to any incident for which liability is established under section [2702] of [OPA]," and argues that Congress effectively substituted equitable indemnity in the CWA with contractual indemnity in OPA, 33 U.S.C. §§ 2709, 2710. It appears the reason these CWA subsections are effectively repealed when OPA applies is because subsections (f), (g), and (i) concern removal costs, which is also addressed in Title I of OPA (and subject to different limits of liability). Thus, this note merely instructs that where ***removal costs*** could be sought under either OPA or the CWA, OPA's provisions apply. This note does not implicate a penalty under Section 311(b)(7) of the CWA. Moreover, the fact that removal costs, whether sought under the CWA or OPA, are subject to contractual indemnity is not surprising. Removal costs are intended to restore the status quo; they are remedial in nature. Thus, unlike a penalty that is primarily designed to deter certain conduct and punish the wrongdoer, it does not contravene public policy if removal costs are shifted by contract.

For these reasons, the Court holds that public policy invalidates the Drilling Contract's indemnity clause to the extent it includes civil penalties under Section 311(b)(7) of the CWA.

Further Reading:

Kenneth G. Engerrand, *Indemnity for Gross Negligence in Maritime Oilfield Contracts*, 10 Loy. Mar. L.J. 319, 361-62 (2012) (discussing the relationship between indemnity and insurance provisions in maritime oilfield contracts)

Statutory Limitations on Marine Insurance

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905

(b) Negligence of vessel. In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act [33 U.S.C. § 933], and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

(c) Outer Continental Shelf. In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under the Act by virtue of section 4 of the Outer Continental Shelf Lands Act (43 U.S.C. 1333), then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel in accordance with the provisions of subsection (b) of this section. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this Act by virtue of section 4 of the Outer Continental Shelf Lands Act (43 U.S.C. 1333) and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

Texas Oilfield Anti-Indemnity Act

Tex. Civ. Prac. & Rem Code § 127.003 Agreement Void and Unenforceable

(a) Except as otherwise provided by this chapter, a covenant, promise, agreement, or understanding contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral is void if it purports to indemnify a person against loss or liability for damage that:

(1) is caused by or results from the sole or concurrent negligence of the indemnitee, his agent or employee, or an individual contractor directly responsible to the indemnitee; and

(2) arises from:

(A) personal injury or death;

(B) property injury; or

(C) any other loss, damage, or expense that arises from personal injury, death, or property injury.

Tex. Civ. Prac. & Rem Code § 127.004 Exclusions

This chapter does not apply to loss or liability for damages or an expense arising from:

(1) personal injury, death, or property injury that results from radioactivity;

(2) property injury that results from pollution, including cleanup and control of the pollutant;

(3) property injury that results from reservoir or underground damage, including loss of oil, gas, other mineral substance, or water or the well bore itself;

(4) personal injury, death, or property injury that results from the performance of services to control a wild well to protect the safety of the general public or to prevent depletion of vital natural resources; or

(5) cost of control of a wild well, underground or above the surface.

Tex. Civ. Prac. & Rem Code § 127.005 Insurance Coverage

(a) This chapter does not apply to an agreement that provides for indemnity if the parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor subject to the limitations specified in Subsection (b) or (c).

(b) With respect to a mutual indemnity obligation, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as indemnitor has agreed to obtain for the benefit of the other party as indemnitee.

(c) With respect to a unilateral indemnity obligation, the amount of insurance required may not exceed $500,000.

Louisiana Oilfield Indemnity Act, La. R.S. § 9:2780

A. The legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, to the extent those provisions apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.

B. Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

C. The term "agreement," as it pertains to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, as used in this Section, means any agreement or understanding, written or oral, concerning any operations related to the exploration, development, production, or transportation of oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, including but not limited to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in or in connection with any well drilled for the purpose of producing or excavating, constructing, improving, or otherwise rendering services in connection with any mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral, or an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental transportation, and other goods and services furnished in connection with any such service or operation.

D.

(1) The provisions of this Section do not affect the validity of any insurance contract, except as otherwise provided in this Section, or any benefit conferred by the workers' compensation laws of this state, and do not deprive a full owner or usufructuary of a surface estate of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals on the owner's land.

(2) Any language in this Section to the contrary notwithstanding, nothing in this Section shall affect the validity of an operating agreement or farmout agreement, as defined herein, to the extent that the operating agreement or farmout agreement purports to provide for defense or indemnity as defined in Subsection B of this Section. This exception shall not extend to any party who physically performs any activities pursuant to any agreement as defined in Subsection C of this Section. ***

E. ***

F. The provisions of this Section do not apply to loss or liability for damages, or any other expenses, arising out of or resulting from:

(1) Bodily injury or death to persons arising out of or resulting from radioactivity; or

(2) Bodily injury or death to persons arising out of or resulting from the retainment of oil spills and clean-up and removal of structural waste subsequent to a wild well, failure of incidental piping or valves and separators between the well head and the pipelines or failure of pipelines, so as to protect the safety of the general public and the environment; or

(3) Bodily injury or death arising out of or resulting from performance of services to control a wild well so as to protect the safety of the general public or to prevent depletion of vital natural resources.

The term “wild well,” as used in this Section, means any well from which the escape of salt water, oil, or gas is unintended and cannot be controlled by the equipment used in normal drilling practices.

G. Any provision in any agreement arising out of the operations, services, or activities listed in Subsection C of this Section of the Louisiana Revised Statutes of 1950 which requires waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the provisions of this Section, shall be null and void and of no force and effect.

***LeBlanc v. Global Marine Drilling Co.*, 193 F.3d 873 (5th Cir. 2008)**

Politz, Circuit Judge:

This litigation involves a contractual dispute which requires a determination whether Marine Drilling Management Co. is entitled to assured status under its contract with Frank's Casing Crew & Rentals Tools, Inc. For the reasons assigned we conclude and hold in the affirmative.

BACKGROUND

Marine entered into a contract with Shell Offshore, Inc. requiring Marine to perform certain drilling services. In turn, Shell contracted with Frank's for the performance of casing operations in connection with Shell's contract with Marine. Marine, as contractor, and Frank's, as subcontractor, executed a master service agreement (MSA) which covered the drilling/casing work. Paragraph 7.2 of the MSA obligated Frank's to indemnify Marine, and paragraph 6.3 required Frank's to list Marine as an additional assured in its insurance policies. Paragraph 7.1 limited these obligations to injuries "arising out of the performance of [the MSA]."

Murphy LeBlanc, a Frank's employee, was injured while performing work for Shell on a rig owned by Marine. LeBlanc sued Marine which filed a third-party complaint against Frank's, seeking assured status under paragraph 6.3 of the MSA.

The trial court granted summary judgment to Frank's, holding that the assured clause was not triggered by the injury, reasoning that LeBlanc's injury arose out of the contract between Shell and Frank's, and not out of the MSA. This appeal followed.

ANALYSIS

***This appeal involves a contractual interpretation. The trial court found the MSA inapplicable. We do not agree. The pertinent provision of the MSA prescribes:

> With respect to work or service performed by Subcontractor [Frank's] pursuant to contracts or work orders with other parties as aforesaid on or for any drilling barges, vessels, platforms, installations or other property of any kind owned by, leased to, chartered to, under the control of, or upon which Contractor [Marine] may be performing services or operations, paragraphs 6 [under which Frank's must list Marine as an assured in certain insurance policies], 7, 8, 9, 10, 12 and 16 shall be applicable as between Contractor and Subcontractor.

We view this language as reflecting a clear contemplation that Frank's would work for a third party on a rig owned by Marine, and that paragraph 6 -- which contains the clause regarding assured status -- would apply in such a situation. Paragraph 7.1, limiting liability to injuries "arising out of the performance of [the MSA]," is not to the contrary.

Frank's advances an alternative basis for the trial court's holding. Relying on a provision in the Longshore and Harbor Workers' Compensation Act, Frank's contends that the agreement with respect to assured status is invalid because it is tied to the statutorily-barred agreement to indemnify.

The specific statutory section upon which Frank's relies, 33 U.S.C. § 905(b), provides that an employer shall not be liable for any injury to a covered employee caused by the negligence of a vessel, and that any agreement "to the contrary shall be void." In **Voisin v. O.D.E.C.O. Drilling Co.**,[5] under virtually identical circumstances as the case at bar, we held that § 905(b) does not invalidate an agreement requiring an employer to list a vessel owner as an additional assured. We concluded that "neither the [LHWCA] nor its legislative history suggests that additional assured clauses such as the one before us are a proscribed form of indirect liability." Although we affirmed the trial court's invalidation of the indemnity clause, we reversed its determination that the assured clause similarly was void.

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[5] 744 F.2d 1174 (5th Cir. 1984).

Frank's seeks to distinguish the case before us from **Voisin**, suggesting that, unlike the contract in **Voisin**, the MSA conditions the enforceability of the assured clause upon the enforceability of the indemnity clause. Frank's focuses upon the following language:

> **To the extent Subcontractor [Frank's]** assumes liability hereunder, and **agrees to indemnify Contractor [Marine]**, Contractor shall be named an additional insured in [certain] insurance policies.

The emphasized phrasing, Frank's insists, specifically makes contingent the validity of the assured clause upon that of the indemnity clause. Continuing, Frank's maintains that if the indemnity clause is invalid the assured clause also must fall. [Marine now concedes that the indemnity clause is invalid.]

We are not persuaded that any provision in the MSA, or any language excerpted above, intends such a result. The contractual interpretation advanced by Frank's would have significant force if the MSA required a **valid** indemnity agreement as a precondition to one obtaining assured status. Such is not the situation before us. The MSA merely states that as Frank's **agrees** to indemnify Marine, it concomitantly agrees to list it as an additional assured on its policies. Consequently, we conclude that Frank's obligation to list Marine as an additional assured automatically arose upon its agreement to indemnify Marine in paragraph 7.2. The language of indemnification defines the parameters of the agreement regarding assured status. If the parties had determined to condition Marine's assured status upon the legal enforceability of the indemnity agreement, they very easily could have done so. Under the contractual language as agreed to, however, the MSA may not reasonably be construed as Franks proposes.***

***Wagner v. McDermott, Inc.*, 79 F.3d 20 (5th Cir. 1996)**

Duhe, Circuit Judge:

McDermott, appellant/third-party plaintiff, appeals from a judgment dismissing its third-party claims for contractual indemnity against Appellees. The district court in a cogent and well reasoned opinion entered judgment against McDermott because its claims are barred by the Louisiana Oilfield Indemnity Act. *Wagner v. McDermott, Inc.,* 899 F. Supp. 1551 (W.D.La.1994). We affirm.

BACKGROUND

McDermott was hired to construct an offshore platform located on the outer Continental Shelf. McDermott hired Capital Welding & Fabrication, Inc. (Capital) to do welding on the platform. Capital dispatched welders on loan from Landry Enterprises, Inc. (Landry) to the worksite. McDermott provided a barge on which the welders were housed and fed. Mark Wagner, one of the Capital/Landry welders, sued McDermott under the Jones Act, general maritime law and § 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA) after he slipped and fell aboard the barge. The district court found that Wagner was not a seaman and Wagner settled his claims.

During the litigation with Wagner, McDermott filed third-party claims against Capital and Landry (and their insurers) seeking indemnity under their nearly identical contracts with McDermott. The district court ruled that McDermott's claims are barred by the Louisiana Act because the McDermott-Capital/Landry contract is not maritime and § 905(c) of the LHWCA does not apply to McDermott's contractual claims. The district court also found that state law applies even if § 905(c) applies because the Louisiana Act is not inconsistent with § 905(c).

DISCUSSION

The parties do not dispute that if Louisiana law applies to McDermott's claims, the claims are barred under the Louisiana Act. McDermott argues that maritime law, which enforces indemnity provisions barred by the Louisiana Act, governs the dispute because its contract with Capital/Landry is a maritime contract. We adopt Judge Doherty's thorough analysis and holding that the contract is non-maritime in nature. *Wagner,* 899 F. Supp. at 1554-55 ("Nature of the Contract"). Since the contract is non-maritime, maritime law does not apply. *Hollier v. Union Texas Petroleum Corp.,* 972 F.2d 662 (5th Cir. 1992).

McDermott contends that § 905(c) of the LHWCA governs the dispute to the exclusion of state law. Appellees, on the other hand, argue that Louisiana law applies either as the law of the adjacent state by default, or through the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333 (1986), which incorporates state law as surrogate federal law if state law is not inconsistent with applicable federal law. If the OCSLA does not apply, Louisiana law governs the dispute. See *Domingue v. Ocean Drilling and Exploration Co.*, 923 F.2d 393 (5th Cir. 1991). But as the district court points out, authority exists for both the applicability and non-applicability of the OCSLA to this dispute. *Wagner,* 899 F. Supp. at 1556. Like the district court, we do not decide whether the OCSLA applies. We assume without deciding that the OCSLA applies and makes the LHWCA applicable to Wagner's claim. The LHWCA is a workers' compensation scheme for certain workers engaged in maritime employment. Additionally, LHWCA coverage extends to workers engaged in the production of natural resources on the outer Continental Shelf through § 1333(b) of the OCSLA. We hold, however, that the McDermott-Capital/Landry contract is not governed by § 905(c) of the LHWCA.

The LHWCA codifies a negligence cause of action in favor of covered workers against a negligent vessel that causes injury. 33 U.S.C. § 905(b) (1986). When a non-OCSLA worker brings an action for vessel negligence, any indemnity agreements between the worker's employer and the vessel in favor of the vessel are void. *Id*. If the plaintiff is an OCSLA worker, the proscription of 905(b) is removed to the extent that the indemnity provisions are reciprocal and are between the employer and a vessel. 33 U.S.C. § 905(c) (1986).

Both the 905(b) proscription and 905(c) exception to the proscription apply by their very terms only to agreements between employers and vessels. The LHWCA defines "vessel" as the actual vessel and its "owner, owner pro hac vice, agent, operator, charterer or bare boat charterer, master, officer, or crew member." 33 U.S.C. § 902(21). Here, Wagner was injured on a vessel owned by McDermott. Therefore, McDermott argues, its contract is enforceable under *§ 905(c)* because McDermott is a vessel as defined by the LHWCA and has a reciprocal indemnity agreement with Wagner's employer.

This Circuit has clearly stated, however, that neither 905(b) nor 905(c) proscribe non-vessel related indemnity agreements. *Knapp v. Chevron USA, Inc.,* 781 F.2d 1123 (5th Cir. 1986); *Doucet v. Gulf Oil Corp.,* 783 F.2d 518 (5th Cir. 1986). In *Knapp,* an employee of a contractor sustained injuries when he fell from a safety net attached to an offshore platform. The employee sued the platform owner who filed a third-party claim for contractual indemnity against the contractor. The platform owner prevailed in the trial court but lost on appeal because the indemnity agreement was void under the Louisiana Act. The court explained:

> Neither the 1972 amendments adding § 5(b) nor the 1984 amendments adding § 5(c) to the LHWCA proscribe non-vessel related indemnity agreements. The distinction between vessels and non-vessels is well-established. We will not impute to congressional silence a desire to apply the 1984 LHWCA amendments to non-vessels. Nor are we persuaded that these amendments preempt the field.

Knapp, 781 F.2d at 1131 (citations omitted).

Similarly in *Doucet,* a roustabout was injured on an offshore platform. The platform owner filed third-party claims for contractual indemnity against the roustabout's employer. The Court again found that the indemnity claim was barred by the Louisiana Act.

> The Compensation Act [LHWCA] neither expressly permits nor forbids contractual indemnity agreements between non-vessels and compensation-paying employers. This silence is a gap in federal law that, according to the Shelf Lands Act, is to be "filled" by state law governing such indemnity contracts.

Doucet, 783 F.2d at 525 (citations omitted).

We recognize that neither *Knapp* nor *Doucet* involves a vessel nor a 905(b) claim as this incident does. Nevertheless, McDermott's claims are treated the same because McDermott contracted with Capital/Landry in its capacity as contractor, not as vessel owner, the same position as the relevant parties in *Knapp* and *Doucet*.

We interpret the § 905(c) requirement of an indemnity contract between "the employer ... and the vessel ..." to require that the contracting entity must be contracting in its capacity as the vessel, not as a party who incidentally utilizes a vessel in other operations. Here, McDermott entered into a contract for welders to work on a fixed platform it was constructing. McDermott was not acting in its capacity as vessel owner but only as a contractor who incidentally utilized a vessel to accomplish its work. The fact that McDermott happens to own the vessel does not place the contract within § 905(c). McDermott argues that because Plaintiff asserted a § 905(b) claim, § 905(c) must govern the contract dispute. While § 905(b) liability is a requisite for § 905(c) applicability, the contract must be of the type covered by § 905(c). It must be with a vessel. The McDermott-Capital/Landry contract is not.

Having held that the McDermott-Capital/Landry contract is not governed by § 905(c), we need not determine whether the Louisiana Act is inconsistent with § 905(c). The indemnity provisions of the McDermott-Capital/Landry contract are governed by state law and are barred by the Louisiana Oilfield Indemnity Act. ***

***Getty Oil Co. v. Insurance Company of North America*, 845 S.W.2d 794 (Tex. 1992)**

Chief Justice Phillips delivered the opinion of the Court.

The purchaser of certain chemicals brought suit against the seller and its insurers, claiming that they were contractually obligated to provide insurance to cover a judgment against the purchaser in a wrongful death action precipitated by the explosion of the chemicals. The trial court granted summary judgment for the defendants on four grounds: (1) a contract provision requiring the seller to purchase liability insurance for the buyer violated the Texas Oilfield Anti-Indemnity Statute, Tex. Rev. Civ. Stat. Ann. art. 2212b (now codified and amended at Tex. Civ. Prac. & Rem. Code §§ 127.001-.007 (Vernon 1986 & Supp. 1992)); (2) the same contractual provision violated the common law express negligence rule . . . .

I. Facts and Procedural Background

Getty Oil Company ("Getty") purchased various chemicals from NL Industries, Inc. ("NL") for Getty's oil production and exploration operations in the Midland, Texas, area. A purchase order numbered "HB-5357" was in effect from August 1, 1983, to July 31, 1984. It included the following provisions:

4. INSURANCE AND INDEMNITY: Seller agrees to maintain at

> Seller's sole cost and expense, from the time operations are commenced hereunder until Order is fully performed and discharged, insurance of all types and with minimum limits as follows, and furnish certificates to Purchaser's Purchasing Department evidencing such insurance with insurers acceptable to Purchaser:
>
> WORKMEN'S COMPENSATION STATUTORY
>
> EMPLOYERS' LIABILITY $ 500,000
>
> GENERAL LIABILITY: BODILY INJURY 500,000
> . . .
>
> AUTOMOBILE LIABILITY: BODILY INJURY 500,000
>
> . . .
>
> All insurance coverages carried by Seller, whether or nor required hereby, shall extend to and protect Purchaser . . . to the full amount of such coverages and shall be sufficiently endorsed to waive any and all claims by the underwriters or insurers against Purchaser . . .
>
> Seller shall indemnify, defend and hold harmless Purchaser . . . from any and all losses, claims, actions, costs, expenses, judgments, subrogations, or other damages resulting from injury to any person (including injury resulting in death), or damage (including loss or destruction to property of whatsoever nature of any person[)] arising out of or incident to the performance of the terms of this Order by Seller (including, but not limited to, Seller's employees, agents, subcontractors, and others designated by Seller to perform work or services in, about, or attendant to, the work and services under the terms of this Order.) Seller shall not be held responsible for any losses, expenses, claims, subrogations, actions, costs, judgments, or other damages, directly, solely, and proximately caused by the negligence of Purchaser. Insurance covering this indemnity agreement shall be provided by Seller.
>
> The liability of Seller, as herein above provided, shall not be limited by the insurance coverage required of Seller.

On November 22, 1983, a barrel of chemical demulsifier delivered by NL under Order No. HB-5357 exploded in the vicinity of a Getty well, killing Carl Duncan, an independent contractor working for Getty.

Duncan's estate and survivors brought wrongful death and survival actions in the 130th Judicial Court of Matagorda County against Getty, NL and its subsidiaries, and others. Getty filed a cross-claim against NL, alleging that NL's negligence proximately caused the injury to Duncan, that the chemicals manufactured by NL were defective, and that NL breached warranties in connection with the sale of the chemicals. Getty also asserted a contractual right of indemnity against NL under the terms of HB-5357 (quoted above), and a contribution claim because of NL's negligence. The jury found Getty 100% negligent and grossly negligent in causing the accident. The trial court rendered judgment on the jury verdict for $ 3,757,000 actual damages and $ 25,000,000 punitive damages. The trial court also rendered judgment that "all Cross-Actions for contributions and/or indemnity based upon the contracts are denied." Getty appealed the portion of the judgment denying it contribution and indemnity, and the court of appeals affirmed the judgment of the trial court. *Getty Oil Corp. v. Duncan*, 721 S.W.2d 475 (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.). Getty's insurers, Travellers Insurance Company, Travellers Indemnity Company, and English & American Insurance Company, settled the claim for $ 14 million.

Getty then filed an insurance claim with NL's insurers. After they refused to honor the claim, Getty sued NL and its primary and excess insurance carriers, Insurance Company of North America ("INA") and Youell and Companies ("Youell"), respectively. Getty alleged that, pursuant to the terms of the HB-5357 "Insurance and Indemnity" provision, NL's insurance should cover Getty for its liability in the *Duncan* case. Getty brought claims against NL for breach of the contract to purchase insurance in its behalf, violation of Tex. Bus. & Com. Code § 1.203 (Tex. UCC) (Vernon 1968) (obligation of good faith), breach of the duty of good faith and fair dealing, negligence, violation of the Texas Deceptive Trade Practices Act (DTPA), Tex. Bus. & Com. Code §§ 17.41-.63 (Vernon 1987 & Supp. 1992), and common law fraud. Against INA and Youell, Getty asserted claims for breach of the contract to extend it insurance coverage, violation of Tex. Ins. Code art. 3.62 (Vernon 1981) (repealed) (failure to pay claim), breach of the duty of good faith and fair dealing, negligence, violation of the DTPA, and common law fraud.

NL, INA and Youell jointly moved for summary judgment, arguing that (1) the terms of HB-5357 did not make Getty an additional insured under NL's policies; (2) the Insurance and Indemnity scheme of HB-5357 was prohibited by the Texas Oilfield Anti-Indemnity Statute, Tex. Rev. Civ. Stat. Ann. art. 2212b (now codified and amended at Tex. Civ. Prac. & Rem. Code §§ 127.001-.007); and (3) Getty's claims were barred by res judicata and collateral estoppel. The defendants also joined Getty's insurers as third party defendants, claiming that Getty's policies with them at least partially relieved the defendants of covering Getty's liability.

On May 3, 1990, the trial court granted the defendants' motions for summary judgment. The trial court also granted the defendants' motion to sever the third party claims against Getty's insurers, and ordered that the severed actions not go forward until resolution of the action between Getty and the defendants. Getty appealed the summary judgment for defendants, and the court of appeals affirmed on res judicata grounds, holding that Getty's claims were barred because it was seeking the same relief under a different theory that it unsuccessfully sought in the first suit. 819 S.W.2d at 915. Getty now seeks a reversal of the court of appeals' judgment and the trial court's summary judgment.

IV. Anti-Indemnity Statute

The Texas Oilfield Anti-Indemnity Statute, Tex. Rev. Civ. Stat. Ann. art. 2212b (now codified and amended at Tex. Civ. Prac. & Rem. Code §§ 127.001-.007), provides that an agreement pertaining to an oil or gas well is void if it purports to indemnify a party from loss or liability for damage arising out of its own negligence. Prior to the enactment of Article 2212b in 1973, many oil companies and oil well operators had "hold harmless" agreements with oil well drilling and service contractors. These agreements generally required the contractors to indemnify the operators for losses caused by the negligence of the contractor, and often for the negligence of the operator and third parties as well. Many believed that such agreements placed an undue financial burden on what were perceived to be small contractors with less bargaining power than the operators with whom they were negotiating contracts. *See* HOUSE INTERIM STUDY COMMITTEE ON HOLD HARMLESS AGREEMENTS, REPORT, 63rd Leg., at 3-8 (1973) [hereinafter HOUSE STUDY COMMITTEE]. In 1973, the legislature attempted to cure this perceived inequity by enacting Article 2212b, which prohibits agreements that indemnify a party for its own negligence.

The court of appeals held that under the statute, the "additional insured" provision of HB-5357 is facially invalid because it makes NL indemnify Getty for Getty's own negligence. It reasoned:

> The effect of upholding [the provision] would be to allow Getty to avoid liability for its sole negligence. This result . . . contravenes the statutory goal of prohibiting agreements allowing a party to avoid responsibility for the results of its own negligence.

819 S.W.2d at 914.

Getty argues that the court of appeals erred because the provision at issue is an "additional insured" provision, and the Anti-Indemnity Statute only applies to indemnity provisions, which are different. Prohibited indemnity provisions make the indemnitor (NL) liable for the indemnitee's (Getty's) negligence. Additional insured provisions, on the other hand, make the insurance-purchaser's insurers (INA and Youell) liable for the loss caused by the insured's (Getty's) negligence. The insurance-purchaser is responsible only for paying the insurance premiums, presumably far less than the actual loss. Moreover, the cost of premiums is certain and exact. Thus, contractors are still protected by the Anti-Indemnity Statute from large and uncertain liabilities caused by an indemnitee's negligence.

Respondents argue that recognizing a distinction between the indemnity and insurance provisions would allow Getty to accomplish indirectly what it otherwise could not achieve directly: avoiding liability for its own negligence. Section 5 of the Anti-Indemnity Statute specifically provides:

> Each party to an agreement defined in Section 3 of this Act shall be responsible for the results of his own actions and for the actions of those persons over whom he exercises control.

They contend that if the additional insured provision of this contract is not rendered unenforceable, Getty will be able to evade responsibility for its actions, in contravention of this statutory command.

NL, in particular, argues that under § 4(c) of article 2212b, the burden of procuring insurance may be shifted only when the insurance supports an obligation to provide indemnity against claims for injury to the contractor's own employees. Because Duncan was an independent contractor working for Getty, and not an NL employee or contractor, this limited exception does not authorize the "insurance shifting" scheme of the contract.

We conclude that section 5 of article 2212b simply states the policy behind the prohibition of indemnity agreements, and does not have substantive effect. Section 5, if interpreted as broadly as respondents urge, would prohibit a party from obtaining its own liability insurance, clearly not the intent of the statute.

We further conclude that the language of article 2212b applies exclusively to indemnity agreements. Section 4(c) does not prohibit "insurance shifting" schemes that do not fall within its parameters; rather it *permits* certain indemnity agreements if they are supported by liability insurance and meet the section's other requirements. Art. 2212b, § 4(c) (now codified and amended at Tex. Civ. Prac. & Rem. Code § 127.005). The Anti-Indemnity statute does not purport to regulate any agreements for the purchase of insurance unless they are in support of indemnity agreements.

Respondents argue that the additional insured provision of HB-5357 does support the indemnity agreement which follows it. They cite *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.,* 490 S.W.2d 818, 823 (Tex. 1972), in which we reasoned that the liability insurance provision of a contract should be construed as assuring performance of an indemnity agreement also contained in the contract.
While we express no opinion as to whether Getty is an additional insured under NL's insurance policies, we agree with the court of appeals that the contract in the instant case is significantly different from that in *Fireman's Fund*. *See* 819 S.W.2d at 912. The indemnity provision in paragraphs 3-4 of HB-5357 is supported by an insurance provision separate from and additional to the additional insured provision in paragraphs 1-2. The last sentence of paragraph 3 provides that "insurance covering this indemnity agreement shall be provided by Seller." This

provision, not the first sentence of paragraph 2, which begins "All insurance coverage carried by Seller . . . shall extend to and protect Purchaser," supports the indemnity agreement. Moreover, the additional insured provision requires that NL extend insurance coverage to Getty "whether or not required [by the other provisions of the contract]." Thus, the additional insured provision of the contract does not support the indemnity agreement, but rather is a separate obligation. We disagree with the concurring and dissenting opinion that the contract is susceptible to any other reasonable interpretation. The additional insured provision, which does not support an indemnity agreement, is not prohibited by the language of the Anti-Indemnity Statute. ***

Respondents argue that the practical effect of the additional insured provision in HB-5357 is to indemnify Getty by relieving it of responsibility for its sole negligence, and that it thus violates the intention of the Anti-Indemnity statute. While we do not deny the effect of insurance coverage, we decline to expand the language of our Anti-Indemnity statute to encompass insurance procurement provisions that are not actually indemnity agreements and that do not directly support indemnity agreements. Rather, we construe the language of the statute strictly to permit parties to contract freely with regard to agreements not covered by the statutory language. Thus, the additional insured provision of HB-5357 is not covered by the Anti-Indemnity statute.

V. Express Negligence Doctrine

The trial court rendered summary judgment for respondents on the ground that the express negligence doctrine invalidates the additional insured provision of HB-5357. This common law doctrine, as stated in *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705, 708 (Tex. 1987), provides that:

Parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms . . . within the four corners of the contract.

Although the court of appeals recognized that the express negligence doctrine has been applied only to "contractual indemnity provisions," it reasoned as follows:

> Texas courts would undoubtedly extend this limitation to insurance provisions covering the indemnity obligation that purport to protect the indemnitee from the results of its sole negligence.

819 S.W.2d at 914. As discussed above, however, the additional insured provision of HB-5357 does not support an indemnity agreement. As amicus curiae Texas Mid-Continent Oil and Gas Association points out, the express negligence doctrine in Texas has been applied only to indemnity provisions, not insurance-shifting provisions. *See Atlantic Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 (Tex. 1989); *Gulf Coast Masonry, Inc. v. Owens-Illinois, Inc.*, 739 S.W.2d 239

(Tex. 1987) (per curiam); *Singleton v. Crown Central Petroleum Corp.,* 729 S.W.2d 690 (Tex. 1987) (per curiam); *Whitson v. Goodbodys, Inc.*, 773 S.W.2d 381 (Tex. App.--Dallas 1989*, writ denied).*

We decline to extend the express negligence doctrine to contractual provisions other than indemnity agreements in this case, and we thus hold that this doctrine does not invalidate the additional insured provision of HB-5357. ***

***Marcel v. Placid Oil Co.*, 11 F.3d 563 (5th Cir. 1994)**

Garwood, Circuit Judge:

Plaintiffs Jeffrey and Penny Marcel, individually and on behalf of their three minor children, filed this action in Louisiana state court against defendant Placid Oil Company (Placid), seeking damages for an injury sustained by Mr. Marcel (Marcel) while working on an offshore platform operated by Placid. Placid removed to the United States District Court for the Eastern District of Louisiana and filed a related third party claim against SEE, Inc. (SEE) for alleged breach of an insurance agreement. The district court granted summary judgment for SEE. A jury rendered a verdict in favor of plaintiffs, which the district court amended to increase the award to Marcel. The award to Mrs. Marcel was decreased upon Placid's motion for new trial and/or motion for remittitur. Placid appeals, and Marcel cross-appeals.

Facts and Proceedings Below

At the time of his accident, Marcel worked as a maintenance man for SEE, on the South Marsh Island 281-C (the platform), a fixed platform located on the outer continental shelf in the Gulf of Mexico off the coast of Louisiana. Placid operated the platform for mineral lease holders; SEE provided workover services for several oil and gas wells on the platform.

On January 3, 1990, Marcel was injured in a slip-and-fall accident on the platform. He and a SEE roustabout, Clarence Etheridge, were walking along the deck of the platform on their way to repair a mud pump; as Marcel turned a corner and ducked under a platform beam, he looked back over his shoulder to see if Etheridge were still behind him. As he turned back around, Marcel slipped on the deck, landing on his lower back. He testified that he had slipped in a puddle of oil on the deck measuring six feet by four feet and one inch deep; the source of the puddle was a nearby trough drain. Marcel claimed that he did not see the puddle because the light in the area was not operating.

Following this accident, Marcel was treated by Dr. Walker, an orthopedic surgeon who performed a laminectomy and diskectomy on him in May 1990. Dr. Walker advised him to avoid continuous work on a vibrating surface and work requiring continuous standing or frequent bending and stooping. Marcel had not returned to work at the time of the trial.

Plaintiffs filed suit against Placid in Louisiana state court on July 5, 1990, raising claims of strict liability and negligence. Placid timely removed the action to the United States District Court for the Eastern District of Louisiana on grounds of diversity of citizenship and claims involving the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331, *et seq.* The Travelers Insurance Company intervened, seeking reimbursement for payments it had made to Marcel under the Longshore and Harbor Workers' Compensation Act.

An October 1989 agreement between Placid and SEE provided that SEE would perform workover services on fixed platforms operated by Placid, including the platform on which Marcel was working. As part of the agreement, SEE agreed to obtain insurance indemnifying Placid and identifying Placid as a named insured. Placid was to be billed directly by the insurance brokers for its share of the insurance premiums. Although Schedule E of the contract stated that SEE had "already negotiated the premium," it is undisputed that SEE did not procure the insurance for Placid. Placid discovered only after Marcel's accident that SEE had never obtained this coverage.

Placid filed a third-party complaint against SEE, alleging breach of contract arising out of SEE's failure to provide Placid with insurance coverage as provided in the agreement between the two parties. SEE filed a motion for summary judgment, claiming that the agreement to procure insurance coverage for Placid violated the Louisiana Oilfield Indemnity Act (LOIA), La.Rev.Stat. § 9:2780. The district court initially denied this motion but later reconsidered the motion, *sua sponte,* and granted summary judgment for SEE.

A jury trial in May 1991 resulted in a verdict for the plaintiffs; the jury found Placid negligent but not strictly liable for the injuries sustained by Marcel and awarded $ 313,800 to Marcel, $ 40,000 to Mrs. Marcel, and $ 15,000 to each of the three children. The district court amended the judgment to increase the award to Marcel to $ 332,188.83, adding in the amount stipulated for past medical expenses. ***

IV. Summary Judgment for SEE

Placid challenges the district court's grant of summary judgment for SEE, claiming that its agreement with SEE does not violate the LOIA because it falls within the exception created in *Patterson v. Conoco, Inc.,* 670 F. Supp. 182 (W.D.La.1987). The LOIA voids oilfield agreements to the extent the agreements contain provisions for indemnification for losses caused by negligence or fault of the indemnitee. Under the agreement at issue in *Patterson,* the employer of the injured plaintiff was required to provide insurance coverage indemnifying a third party, an arrangement within the reach of the LOIA and similar to the terms agreed to by Placid and SEE. The agreement provided, however, that the indemnitee would reimburse the employer for the insurance premiums. The indemnitee produced evidence documenting its payment of these premiums over a period of approximately eighteen months. Based upon this reimbursement, the court concluded that the agreement was not void because the indemnitee had paid for its own insurance.

Although this Court has not ruled directly on the *Patterson* exception, we tacitly approved it in *Davis v. Mobil Oil Exploration & Producing Southeast, Inc.,* 864 F.2d 1171, 1176 (5th Cir. 1989) (affirming dismissal, without indicating disapproval of *Patterson,* because request to court for inquiry into payment of premiums was untimely).

We now adopt the exception created in *Patterson* as law of this Circuit and find that it has potential application here.[12] The LOIA is aimed at preventing the shifting of the economic burden of insurance coverage or liability onto an independent contractor. If the principal pays for its own liability coverage, however, no shifting occurs. We see no need to prevent such an arrangement in order to give effect to the LOIA. Indeed, agreements such as the one in *Patterson* may be economically desirable in situations where it is less expensive for the independent contractor to add the principal as an additional insured than for the principal to obtain its own insurance on a particular operation.

In approving this exception, however, we stress that the exception does not apply if any material part of the cost of insuring the indemnitee is borne by the independent contractor procuring the insurance coverage.

SEE, as the party requesting summary judgment, had the burden of demonstrating that the insurance agreement was void under the LOIA and that there was no fact issue regarding any economic burden on SEE. It is not clear from the record, however, that this is true. Amendments to the agreement between Placid and SEE provide that Placid was to pay one-half of the premium paid by SEE

> "for this Contract to perform these services which shall be 0.6757 of Daily Revenue. Insurance premiums will be over and above the contract rates and will be in consideration for insurance supplied, not consideration paid to or for the benefit of SEE, Inc. Essentially, this means that over the life of the job Placid would be paying approximately $ 34-$ 36/day to be named as an additional insurer

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[12] SEE asserts that the exception should not apply because, unlike the situation in *Patterson,* Placid never paid any insurance premiums. We disagree. As SEE did not procure the insurance, which it had agreed to do, there were no premiums for Placid to pay. Further, only two months separated the time the parties entered the agreement at the end of October 1989 and the time of the accident on January 3, 1990; in *Patterson,* the indemnitee had paid premiums for approximately eighteen months.

> [sic] under the policy. Monthly billings will be transmitted to Placid by our Brokers after the revenues for the previous month have been determined." Amendment to Exhibit E of the Workover Contract.

Although Placid's payment is to be one-half the premium paid by SEE, our analysis does not end without knowing how much of the insurance cost is attributable to insuring Placid. The burden to show this was on SEE, the summary judgment movant that was to procure the insurance. Because it is not clear from the record before us whether SEE paid for any cost of insuring Placid, we cannot determine that this contract does not fall within the *Patterson* exception.

We reverse the district court's summary judgment for SEE and remand Placid's third-party claims for reconsideration in light of *Patterson*. If Placid was responsible for the full cost of obtaining its insurance, the agreement is similar to that in *Patterson* and is not void under the LOIA; if SEE paid any material part of the cost of Placid's insurance, however, the district court should reinstate its summary judgment in favor of SEE.***

Tullier v. Halliburton Geophysical Services, Inc., 81 F.3d 552 (5th Cir. 1996)

Edith H. Jones, Circuit Judge:

The contracting parties to a time charter for a vessel used in the offshore oil and gas industry agreed to indemnify each other for job-related liabilities and to back up the cross-indemnity provisions with insurance. Their dispute involves which comes first, the "additional assured" coverage of McCall Boat Rentals, Inc., or Halliburton Geophysical Services' indemnity obligation. Following established caselaw in this circuit, we hold that the "additional assured" coverage must be exhausted before HGS's indemnity responsibility is called into play. It is therefore necessary to reverse the district court's contrary decision and remand for further proceedings.

BACKGROUND

Shawn Tullier, an HGS employee, slipped and fell in a pool of water while working in the galley of McCall's vessel M/V JOYCE McCALL. Tullier sued and settled with HGS and McCall, triggering this controversy under the parties' time charter agreement. McCall and HGS had each agreed broadly to indemnify and defend the other party from and against claims brought by or on behalf of the indemnitor's employees. Time Charter Agreement PP 5.11.1 and 5.11.2. While the cross-indemnity provisions are for our purposes identical, the parties agreed to treat the insurance provisions backing up their indemnities quite differently. HGS was required "to insure the liabilities it assumes under this Time Charter with a manuscript comprehensive general liability coverage with appropriate maritime endorsements." P 6.4. McCall, however, agreed to provide insurance as follows:

5.9 (b)

> Protection and Indemnity (P&I) insurance on SP-23 form to at least the full value of the vessel with minimum limits equal to $ 1,000,000.00 per occurrence. The P&I policy shall . . . be endorsed to amend the sistership clauses to provide full coverage for Additional Assureds for claims involving vessels or equipment owned, chartered or involving vessels or equipment owned, chartered or otherwise controlled by OWNER or Additional Assureds, and to provide contractual liability coverage covering the obligations of OWNER to HGS under time charter, and to delete the "as owner" limitations as respects the Additional Assureds to underwriters against claims by the Additional Assureds. . . .

(e)

> Comprehensive General Liability insurance)or equivalent third party liability insurance) with bodily injury and property damage limits of

> $ 1,000,000.00 per accident or occurrence. Follow form excess liability insurance shall be obtained to provide single limit coverage of no less than $ 5,000,000.00 per occurrence.

5.9.1

> On all policies of insurance referred to above, OWNER (McCall) shall obtain endorsements from its underwriters providing that HGS . . .shall be named by endorsement as Additional Assureds.

5.9.2

> All such insurance required herein shall be endorsed to provide that the insurance provided thereby shall be primary insurances, as respects to the Additional Assureds, irrespective of any "excess" or "other insurance" clauses contained therein.

Thus, McCall's insurance was intended specifically to cover HGS as an additional assured, to delete the "as owner" limitations with respect to HGS, and to constitute primary coverage for the additional assureds.

Based on these provisions, McCall cross-claimed against HGS for defense and contractual indemnity for Tullier's settlement, and Halliburton cross-claimed against McCall for breach of the time charter because of McCall's alleged failure to provide insurance for HGS. (Each party had incurred costs in defending the Tullier claim.) The district court, ruling on cross-motions for summary judgment, approved McCall's position that because HGS was obliged to indemnify McCall's for injuries to HGS's employee, HGS could not rely on McCall's insurance -- through the additional insured provision -- to fulfill its responsibility. The court relied on two cases, *Wilson v. JOB, Inc.*, 958 F.2d 653 (5th Cir. 1992), and *Spell v. NL Industries, Inc.*, 618 So. 2d 17 (La. App. 3rd Cir. 1993). Judgment was entered against HGS for McCall's indemnity and defense costs. HGS has appealed the judgment for McCall's and the rejection of its cross-claim for breach of contract.

DISCUSSION

In a line of cases commencing with *Ogea v. Loffland Brothers Co.*, 622 F.2d 186 (5th Cir. 1980), this court has held that a party such as McCall, who has entered into a contractual indemnity provision but who also names the indemnitor, here HGS, as an additional assured under its liability policies, must first exhaust the insurance it agreed to obtain before seeking contractual indemnity. *See also, Klepac v. Champlin Petroleum Co.*, 842 F.2d 746 (5th Cir. 1988), rehearing denied 844 F.2d 788 (1988); *Woods v. Dravo Basic Materials Company*, 887 F.2d 618 (5th Cir. 1989). *Ogea* held that the insurance procurement and indemnity provisions of a drilling contract "must be read in conjunction with each other in order to properly interpret the meaning of the contract." *Ogea*, 622 F.2d at 190. The court continued:

> By so doing, it is clear that the parties intended that Phillips would not be held liable for injuries incurred on its off-shore platform up to $ 500,000.00. The insurance to be acquired and maintained by *Loffland* would cover such damages. For damages in excess of $ 500,000.00, the indemnity provisions would come into effect. Because Ogea's claim . . . and actual settlement are both less than $ 500,000.00, Phillips should not incur any liability. The indemnity provisions do not come into play. 622 F.2d at 190.

Shortly after this case was orally argued, another panel of this court affirmed a district court decision that relied on *Ogea* to interpret cross-indemnity and insurance procurement clauses in an HGS time charter that are nearly identical to those before us. *LeBlanc v. Halliburton Geophysical Services, Inc.*, No. 95-30501 (5th Cir. 1995) (summary calendar). When *LeBlanc* was issued, it became a precedential decision in our circuit. *LeBlanc* is dispositive of this case. But because similar disputes seem to arise regularly, it is useful briefly to recapitulate the reasoning that supports application of the *Ogea* principle even where both parties have insured their indemnity obligations.

McCall seeks to distinguish *Ogea* on two grounds and to gain support from it on one. First, in *Ogea*, the only insurance obligation under the contract required *Loffland* (the party entitled to indemnity) to secure insurance for Phillips (the indemnitor) as an additional assured. But here, McCall points out, HGS, the indemnitor, agreed to cover its liability under the time charter agreement by purchasing insurance. Second, *Ogea* states that Phillips specifically negotiated the obligation of *Loffland* to procure insurance for Phillips, whereas no similarly specific bargain was struck with HGS. Taking advantage of *Ogea*, however, McCall observes that the opinion criticized *Loffland's* emphasis on the mutual indemnity clauses to the exclusion of the insurance purchase clause of the parties' contract. Similarly, according to McCall, HGS hopes to enforce the insurance procurement provision imposed on McCall while ignoring its own contractual liability to furnish insurance.

These distinctions are not persuasive. The controlling fact in *Ogea,* as in this case and in *LeBlanc, Klepac*, and *Woods* is the existence of "additional assured" coverage whereby an indemnitee agreed to procure insurance coverage for the benefit of the indemnitor. The import of the additional assured clause is emphasized here because the time charter also required that insurance procured by McCall must afford primary coverage to HGS. The time charter could hardly have been

The fact that the parties may not have directly negotiated this result, as they apparently did in *Ogea*, is not controlling. *Ogea* rests on the legal imperative to read the indemnity and insurance procurement provisions harmoniously. Ogea, supra at 190. Moreover, as HGS notes, it is not unfair for McCall's additional assured coverage to bear HGS's indemnity obligation here because, if McCall complied with the insurance procurement provision, it could have charged HGS for the enhanced insurance coverage as part of its daily rental rate. HGS paid for the insurance one way or another.

Finally, this interpretation of the insurance procurement provision does not ignore HGS's agreement to "insure the liabilities it assumes" under the contract. McCall was required to supply primary coverage up to $ 1,000,000 per incident, with HGS as an additional assured. HGS, therefore, contracted to insure liabilities over that amount in fulfillment of its indemnity responsibility. All provisions of the HGS-McCall time charter are integrated by the *Ogea-LeBlanc* reasoning that the unilateral insurance procurement provision precedes the indemnity requirement of the contract.

Like the district court, McCall also relies on *Wilson v. JOB, Inc., supra*, a case that interpreted reciprocal indemnity provisions and mutual insurance requirements. *Wilson* did not cite *Ogea, Klepac or Wood*, and it is distinguishable from those cases. The indemnity provisions in *Wilson* required the charterer of the vessel to hold the owner harmless for claims arising directly out of the charterer's "actual drilling operations". *Id.* at 655. In addition, the charterer was required to procure insurance to protect the owner for liability only with respect to "actual drilling operations." *Wilson*, at 658. In mirror-image provisions, the vessel owner was required to indemnify the charterer and procure insurance for the charterer's benefit with respect to "vessel operations." The insurance policies obtained by each party could not satisfy the other's indemnity obligation. The interrelationship and substance of the indemnity and insurance clauses in *Wilson* cannot be compared with the dissimilar provisions between HGS and McCall.

Ogea and its progeny most appropriately guide the resolution of this case, even though HGS as well as McCall undertook an obligation to insure liabilities under the time charter. HGS's insurance obligation, however, like its indemnity duty, was qualified by the provision requiring McCall to name HGS as an additional assured and to render that insurance as primary coverage.

For these reasons, the district court erred in granting McCall's summary judgment motion while denying HGS's demand for insurance coverage from McCall and dismissing HGS's cross-claim for breach of contract in the event McCall did not comply with its obligation to obtain such insurance. The record is not clear as to whether McCall purchased the appropriate insurance or what remedy is due to HGS. Consequently, we must remand for the district court to conduct further proceedings on HGS's cross-claim.***

***International Offshore Services, L.L.C. v. Linear Controls Operating, Inc.*, 647 F. App'x 327 (5th Cir.2016)**

Per curiam:

Third Party Plaintiff-Appellant Apache Corporation ("Apache") appeals the district court's final judgment dismissing, on summary judgment, Apache's claim against Third Party Defendant-Appellee Catlin Specialty Insurance Company ("Catlin"). Apache sought insurance coverage under the terms of a policy issued by Catlin (the "Policy") to its insured (and Apache's subcontractor), Controls Operating, Inc. f/k/a Linear Controls Operating, Inc. f/k/a Linear Controls, Inc. ("Linear").

This case arises out of an incident in which an employee of Linear, Jake Bergeron, was injured on a boat owned by International Marine, L.L.C. and International Offshore Services, L.L.C. (collectively "International Marine"), while en route to an Apache jobsite. International Marine had chartered the boat to Apache pursuant to a Master Time Charter Agreement ("MTCA"). International Marine filed a limitation of liability action, in which Bergeron asserted a personal injury claim. International Marine also filed a declaratory judgment action against Linear and Apache, seeking a determination that one or both owed it defense and indemnity and insurance coverage. Apache then asserted this claim for insurance coverage against Catlin, arguing that the Policy it issued to Linear required it to provide coverage to Apache for Apache's contractual liability to International Marine.

Resolution of the case turns entirely on the Policy, but it is helpful to understand the underlying contractual obligations. First, under the MTCA, International Marine agreed to provide marine vessels to Apache on request. The MTCA also required Apache to defend and indemnify International Marine for the injury or death of the employees of Apache or its subcontractors, which is the basis for Apache's contractual liability at issue in this appeal.

Apache, in turn, argues that its Master Service Contract ("MSC") with Linear required Linear to provide defense and indemnity to Apache, even for Apache's contractual liability to International Marine under the MTCA. More relevant to this appeal, Apache argues that the Policy issued by Catlin provides coverage to the full extent of Linear's obligations under the MSC, including coverage for Apache's contractual liability under the MTCA.

The MSC required Linear to maintain insurance coverage for Apache and Apache-affiliated parties as additional insureds "for obligations undertaken and liabilities assumed by [Linear] under" the MSC, including "Contractual Liability, insuring the indemnity agreements contained in this contract." The parties amended the MSC for work performed in Louisiana to circumvent the general prohibition against such indemnity agreements established in the Louisiana Oilfield Indemnity Act ("LOIA"), La. Rev. Stat. § 9:2780. Under the exception set out in

Marcel v. Placid Oil Co., 11 F.3d 563 (5th Cir. 1994), which the parties expressly referenced in the amendment, Linear was to secure insurance coverage for the "indemnities as required by this Contract," but Apache would pay the actual premiums for that coverage.

Linear listed Apache as an additional insured in an endorsement to the Policy. The Policy expressly excludes coverage for contractual liability except for such liability assumed in an "insured contract," which the Policy defines, in relevant part, as "[t]hat part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for "bodily injury" . . . to a third person." The Policy also provides: "Throughout this policy the words 'you' and 'your' refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy."

In essence, Apache argues that Linear was required under the MSC to indemnify Apache for Apache's contractual liability to International Marine under the MTCA, and the Policy necessarily provided that coverage. We disagree. Even assuming *arguendo* that the MSC required Linear to secure that coverage, that would not determine whether Linear actually secured the coverage in this Policy. We must look to the Policy's language, and we agree with the district court that it does not cover Apache's contractual liability to International Marine here.

Applying the Louisiana law concerning insurance contract construction, the district court noted that the Policy excludes coverage for contractual liability *except* for "insured contracts," and it concluded that the MTCA at issue here—the source of Apache's contractual liability—is not an "insured contract" under the plain language of the Policy. The district court reasoned that because the Policy defines "you" and "your" to include only Named Insureds, the definition of "insured contract" under the Policy does not include the MTCA. Under the district court's reading, the definition of "insured contract" could be rephrased as "[t]hat part of any other contract or agreement pertaining to [a Named Insured's] business . . . under which [a Named Insured] assume[s] the tort liability of another party to pay for 'bodily injury' . . . to a third person."

On de novo review, applying Louisiana law and the same Rule 56 summary judgment standards as the district court, we agree with the district court's interpretation. Thus, Apache is entitled to coverage for its contractual liability to International Marine under the MTCA only if Apache is a Named Insured under the Policy. We agree with the district court that it is not.

Apache was only listed as an additional insured under the Policy, not a Named Insured. Indeed, the endorsement page adding Apache is carefully written to add the endorsee only as an additional insured, not a Named Insured. Apache argues that the Policy incorporated by reference the full MSC and all of its obligations in an endorsement for "Blanket as per written contract," but that endorsement is found on the same type of form that added Apache, which limits the endorsement to additional insured coverage. Apache has pointed to no apposite case law that would allow us expand the Policy's coverage for an additional insured beyond the plain language of the Policy itself, and we can find none.

In sum, we agree with the district court that Apache is only an additional insured under the Policy, and Apache is not entitled to coverage under the Policy for its contractual liability to International Marine under the MTCA.***

In re Deepwater Horizon, 470 S.W. 3d 452 (Tex. 2014)

Justice Guzman delivered the opinion of the Court.

This is an insurance-coverage dispute arising from the April 2010 explosion and sinking of the *Deepwater Horizon* oil-drilling rig, which claimed eleven lives and resulted in subsurface discharge of oil into the Gulf of Mexico at alarming rates for nearly three consecutive months. The ensuing damage spawned a spate of state and federal litigation, but the issue presented to this Court concerns only the extent of insurance coverage afforded to the oil-field developer, BP, as an additional insured under primary- and excess-insurance policies procured by the drilling-rig owner, Transocean. At issue is the interplay between the subject insurance policies and provisions in a drilling contract giving rise to Transocean's obligation to name BP as an additional insured. Regarding that matter, the U.S. Court of Appeals for the Fifth Circuit has certified the following two questions:

1. Whether *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008), compels a finding that BP is covered for the damages at issue, because the language of the umbrella policies alone determines the extent of BP's coverage as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are "separate and independent"? ***
As to the first question, we hold that (1) the Transocean insurance policies include language that necessitates consulting the drilling contract to determine BP's status as an "additional insured"; (2) under the terms of the drilling contract, BP's status as an additional insured is inextricably intertwined with limitations on the extent of coverage to be afforded under the Transocean policies; (3) the only reasonable construction of the drilling contract's additional-insured provision is that BP's status as an additional insured is limited to the liabilities Transocean assumed in the drilling contract; and (4) BP is not entitled to coverage under the Transocean insurance policies for damages arising from subsurface pollution because BP, not Transocean, assumed liability for such claims. We therefore answer the first certified question in the negative, and based on our analysis of that issue, do not reach the second question.

I. Background

At the time of the events giving rise to the underlying litigation, Transocean owned the *Deepwater Horizon*, a mobile offshore drilling unit operating in the Gulf of Mexico pursuant to a drilling contract between Transocean's predecessor and BP's predecessor (the Drilling Contract). After an explosion, the rig caught fire and fully submersed after burning for more than a day. The incident killed eleven crew members, propagated numerous personal-injury claims, and begat a myriad of claims for environmental and economic damages stemming from the discharge of millions of gallons of oil into the Gulf of Mexico.

Both BP and Transocean sought coverage under Transocean's primary- and excess-insurance policies for claims related to this catastrophic event. Although not disputing that BP is an additional insured under the Transocean policies, Transocean and its insurers dispute that BP is entitled to coverage for liabilities it expressly assumed in the Drilling Contract. Based on the parties' respective assumptions of liability in the Drilling Contract, Transocean and its insurers contend that BP is not entitled to additional-insured coverage for pollution-related liabilities arising from subsurface oil releases in connection with the *Deepwater Horizon* incident.

In the Drilling Contract, BP and Transocean agreed to a "knock-for-knock" allocation of risk that is standard in the oil and gas industry. Among other indemnity provisions, Transocean agreed to indemnify BP for above-surface pollution regardless of fault, and BP agreed to indemnify Transocean for all pollution risk Transocean did not assume, *i.e.*, subsurface pollution.

Without limiting Transocean's indemnity obligations, the Drilling Contract further required Transocean to carry multiple types of insurance at its own expense. Among the required policies, Transocean was obliged to carry comprehensive general liability insurance, including contractual liability insurance for the indemnity agreement, of at least $10 million. Transocean was also charged with naming BP, its affiliates, officers, employees, and a host of other related individuals and entities:

> as additional insureds in each of [Transocean's] policies, except Workers' Compensation *for liabilities assumed by [Transocean] under the terms of [the Drilling] Contract*. (Emphasis added.)

To the extent the terms of the Drilling Contract are incorporated into Transocean's insurance policies, the proper construction of the emphasized portion of the foregoing additional-insured provision becomes central to the resolution of the coverage issue before us. Before reaching that issue, however, we must first consider the insurance-policy terms under which BP claims additional-insured status.

To cover Transocean's worldwide drilling operations, including its obligations under the Drilling Contract with BP, Transocean maintained (1) a $50 million general-liability policy with Ranger Insurance, Ltd. as its primary policy and (2) four layers of excess insurance from a multitude of additional insurers with an additional $700 million in coverage (Ranger and the excess insurers, collectively, are referred to herein as "the Insurers").

Under the operative provisions of the insurance policies, each insurer is obligated to pay for a loss "on behalf of the 'Insured'" for liability:

(a) imposed upon the "Insured" by law or

(b) assumed by the "Insured" under an "Insured Contract."

As the named insured, Transocean is an "Insured" under the policies. BP is not specifically named as an insured in the policies, an endorsement, or a certificate of coverage. However, the policies extend "Insured" status to "[a]ny person or entity to whom the 'Insured' is obliged by oral or written 'Insured Contract' . . . to provide insurance such as afforded by [the] Policy." An "Insured Contract" is defined as "any written or oral contract or agreement entered into by the 'Insured' . . . and pertaining to business under which the 'Insured' assumes the tort liability of another party to pay for 'Bodily Injury' [or] 'Property Damage' . . . to a 'Third Party' or organization."[10] Thus, under the express terms of the policies, additional-insured status hinges on (1) the existence of an oral or written contract, (2) pertaining to the business of an "Insured", and (3) under which an "Insured" assumes the tort-liability of another party and is "obliged" to provide insurance to such other party. The policy further specifies that "where required by written contract, bid or work order, additional insureds are automatically included hereunder . . . ."

After BP made a demand for coverage, the Insurers sought a declaration that BP would not be entitled to additional-insured coverage for subsurface-pollution claims arising from the *Deepwater Horizon* incident because the Drilling Contract limits the additional-insured obligation to "liabilities assumed by [Transocean] under the terms of [the Drilling] Contract." With its interests in a finite sum of insurance imperiled by BP's coverage claim, Transocean intervened in the litigation and aligned itself with the Insurers.

There is no dispute that (1) BP is an additional insured under the Transocean policies for some purposes, (2) the Drilling Contract is an Insured Contract as defined by the insurance policies, and (3) the Insurers are not parties to the Drilling Contract. The parties, however, join issue regarding whether and to what extent the policies incorporate provisions in the Drilling Contract that may limit

[10] "Tort liability" is defined as "a liability that would be imposed by law in the absence of any contract or agreement."

BP's status as an additional insured. The federal district court resolved that issue adversely to BP and, considering the insurance policies in connection with the terms of the Drilling Contract, determined that BP is not an "Insured" for subsurface pollution liabilities deriving from the *Deepwater Horizon* incident. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010,* MDL No. 2179, 2011 U.S. Dist. LEXIS 131693, 2011 WL 5547259, at *2 (E.D. La. Nov. 15, 2011). The court therefore granted summary judgment in the Insurers' favor. *Id.*

On appeal, the Fifth Circuit reversed, holding that *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008), along with its state and federal progeny, requires that the coverage dispute be ascertained solely from the four corners of the insurance policies. 710 F.3d 338, 344-49 (5th Cir. 2013), *withdrawn by* 728 F.3d 491, 493 (5th Cir. 2013). Applying that principle, the court concluded that the Transocean insurance policies "impose[] no relevant limitations upon the extent to which BP is covered." *Id.* at 341; *see id.* at 350. On rehearing, however, the Fifth Circuit withdrew its prior opinion and certified the above questions to this Court. 728 F.3d 491, 493, 500 (5th Cir. 2013).

II. Discussion

The key points of contention among the parties are (1) whether the language employed in the insurance policies refers to, and thus incorporates, coverage limitations in the Drilling Contract from which BP's additional-insured status derives; (2) whether the Drilling Contract actually imposes any limitation on the extent of additional-insured coverage under the primary and excess-insurance policies; and (3) who gets the benefit of the doubt if there is any ambiguity.

BP argues that *ATOFINA* requires the existence and extent of coverage to be ascertained exclusively from the four corners of the Transocean insurance policies. 256 S.W.3d 660 (Tex. 2008). Although acknowledging that we must give effect to language in an insurance policy incorporating the terms of another contract by reference, BP contends that no such circumstances are presented here. In BP's view, the language in the Transocean insurance policies is materially indistinct from policy language we and other courts have found to be insufficient to import external limitations into an insurance policy. In addition to *ATOFINA*, BP relies on *Aubris Resources LP v. St. Paul Fire & Marine Insurance Co.*, 566 F.3d 483 (5th Cir. 2009), and *Pasadena Refining System, Inc. v. McCraven*, Nos. 14-10-00837-CV, 14-10-00860-CV, 2012 Tex. App. LEXIS 3823, 2012 WL 1693697 (Tex. App.—Houston [14th Dist.] May 15, 2012*, pet. dism'd by agr.)*, as supporting a construction of the insurance policies that does not permit consideration of the Drilling Contract. In sum, BP contends that its worldwide operations are automatically covered for all "liability imposed by law," including subsurface pollution from the *Deepwater Horizon* incident, because it is undisputed that (1) the Drilling Contract is an "Insured Contract," (2) the Drilling Contract obligates

Transocean to provide additional-insured coverage, (3) BP is thereby an "Insured" as that term is specially defined in the insurance policies, and (4) no limitations on the scope of coverage are expressly included in the policies.[11]

In Transocean and the Insurers' view, BP's analysis glosses over the inconvenient reality that BP is an "Insured" only by virtue of the status conferred to it under the Drilling Contract, to which the policies necessarily refer by predicating additional-insured status on the existence of an oral or written "Insured Contract" requiring such coverage. They rely on *Urrutia v. Decker*, 992 S.W.2d 440 (Tex. 1999), for the proposition that "Texas law has long provided that a separate contract can be incorporated into an insurance policy by an explicit reference clearly indicating the parties' intention to include that contract as part of their agreement." *Id.* at 442. Applying this exception to *Evanston*'s four-corners analysis, they contend that the Drilling Contract is incorporated into the Transocean insurance policies by virtue of policy language limiting additional-insured status to "where required" and as "obliged" by an oral or written contract. Because BP's status as an "Insured" cannot be ascertained without consulting the additional-insured provision in the Drilling Contract, Transocean and the Insurers further assert that we must give decisive weight to language in that provision limiting the scope of additional-insured coverage to "liabilities assumed by [Transocean] under the terms of [the Drilling] Contract." Under their contract-construction theory, the Drilling Contract requires Transocean to name BP as an additional insured only for the above-surface pollution risk that Transocean assumed and, as a result, BP lacks additional-insured status for subsurface pollution risks.

A. Applicable Policy-Construction Principles

Determining whether BP's additional-insured coverage is coextensive with Transocean's coverage necessarily begins with the four corners of the policies. *See ATOFINA*, 256 S.W.3d at 664. As the parties acknowledge, Transocean's insurance policies contain no language explicitly limiting the scope of additional-insured coverage.

However, we have long held insurance policies can incorporate limitations on coverage encompassed in extrinsic documents by reference to those documents. *See id.* at 667 (addressing a "following form" excess-insurance policy that

[11] Because the policies also extend coverage to an "Insured" for liability "assumed by the 'Insured" under an 'Insured Contract,'" BP's construction of the policy would result in the extension of additional-insured coverage to a potentially unlimited number of "other person[s] or entit[ies] to whom [BP as an] 'Insured' is obliged by any oral or written 'Insured Contract' . . . to provide insurance . . . ." Under BP's interpretation, those other persons or entities would also meet the definition of an "Insured," with the potential for an endless chain of "Insureds" created by contracts that each in turn has with someone else. The validity of a construction of the policy that would permit such a scenario is facially suspect.

restricted coverage by reference to scope of underlying liability policy); *Urrutia*, 992 S.W.2d at 441, 443 (rental agreement was effectively "written into" insurance policy by virtue of endorsement language extending additional-insured status to insured's customers "to the extent and for the limits of liability agreed to under [the rental agreement]"). We do not require "magic" words to incorporate a restriction from another contract into an insurance policy; rather, it is enough that the policy clearly manifests an intent to include the contract as part of the policy. *See Urrutia*, 992 S.W.2d at 442-43 (finding insurance policy's reference to rental agreement "explicit" enough to clearly indicate parties' intent to include agreement as part of insurance policy); *see also Owen v. Hendricks,* 433 S.W.2d 164, 166 (Tex. 1968) (for purposes of incorporation by reference "[t]he language used is not important provided the [contract] plainly refers to another writing").

Thus, while our inquiry must begin with the language in an insurance policy, it does not necessarily end there. In other words, we determine the scope of coverage from the language employed in the insurance policy, and if the policy directs us elsewhere, we will refer to an incorporated document to the extent required by the policy. Unless obligated to do so by the terms of the policy, however, we do not consider coverage limitations in underlying transactional documents. Our application of these foundational principles in *Urrutia* and *ATOFINA* guides our analysis of the policies and Drilling Contract at issue here.

In *Urrutia*, we construed an insurance policy that referred to another document to identify who was an additional insured and the extent of coverage under the policy. 992 S.W.2d at 441 & n.1. The issue was whether a vehicle rental agreement was effective to limit an additional insured's liability insurance to $20,000 instead of the $1 million policy limits available under the leasing company's commercial-business automobile policy. *Id.* at 441. The policy covered "[b]oth lessees and rentees of covered autos as insureds, but only to the extent and for the limits of liability agreed to under contractual agreement with the named insured." *Id.*

Given the language in the policy, a customer's status as an additional insured depended on the existence of a rental agreement, and coverage was expressly limited to the amount specified in such agreement. *See id.* at 443. We therefore held that the insurance policy incorporated the rental agreement and that the rental agreement, in turn, limited the customer's liability protection to *$20,000. Id.* at 443-44 ("An insurer may validly agree to add as an additional insured 'any person or organization to which the named insured is obligated by virtue of a written contract to provide insurance.' Such an endorsement also 'may provide lower coverage limits to the additional insured than to the named insured.'" (quoting 21 DORSANEO, TEXAS LITIGATION GUIDE § 341.07[2][H] at 341-57-58) (July 1998))).

As *Urrutia* demonstrates, an insurance policy may incorporate an external limit on additional-insured coverage. In such cases, the external limit is, in effect, an endorsement to the insurance policy that "suppl[ies] the limits of coverage and extend[s] those benefits to the customer identified therein as accepting the [insured's] offer of insurance." *Id.* at 443. By tying additional-insured coverage to the terms of an underlying agreement, the parties procure only the coverage the insured is contractually obligated to provide, thereby minimizing the insurer's exposure under the policy and the named insured's premiums. *See id.* ("The endorsement . . . allowed [the insured] to determine in the rental contracts themselves which customers would be insured and the amount of their respective coverage.").

ATOFINA, on the other hand, recognizes that a named insured may gratuitously choose to secure more coverage for an additional insured than it is contractually required to provide. This occurs when the language of an insurance policy does not link coverage to the terms of an agreement to provide additional-insured coverage. In that event, only coverage restrictions embodied in the policy will be given effect. As discussed below, *ATOFINA* involved one coverage provision that was tied to the terms of another agreement and one coverage provision that was limited only by the terms of the policy itself.

In *ATOFINA*, Triple S Industrial Corp. contracted to perform maintenance and construction work at an ATOFINA refinery under a service contract that contained separate indemnity and insurance provisions. 256 S.W.3d at 662. Triple S agreed to indemnify ATOFINA for personal-injury and property loss that was not due to ATOFINA's concurrent or sole negligence, misconduct, or strict liability. *Id.* Triple S also agreed to carry $500,000 of commercial general liability (CGL) insurance, "'[i]ncluding coverage for contractual liability insuring the indemnity agreement,'" and $500,000 in excess insurance that followed the form of the CGL policy. *Id.* at 662-63. Triple S was also obligated to furnish certificates of insurance naming ATOFINA as an additional insured. *Id.* at 663. Triple S complied with its service-contract obligations by securing a $1 million CGL policy and a $9 million excess policy and furnishing the required certificates. *Id.* When a Triple S employee drowned at the refinery, his survivors sued Triple S and ATOFINA. *Id.* Triple S's CGL insurer tendered its $1 million limit to settle the suit, but the excess insurer denied ATOFINA coverage. *Id.*

In determining the existence and extent of coverage, we considered two independent coverage provisions in the excess-insurance policy. *Id.* The first provision (section III.B.6) extended coverage to "[a] person or organization for whom [the insured has] agreed to provide insurance as is afforded by this policy; but that person or organization is an insured only with respect to operations performed by you or on your behalf, or facilities owned or used by you." *Id.* at 664. The insurer asserted that the accident did not respect Triple S's operations because ATOFINA's sole negligence caused the accident. *Id.* We disagreed. In doing so, we distinguished between Triple S's indemnity obligation under the contract and the insurer's indemnity obligation under the terms of the excess policy because the insurer's obligation depended on what it contracted to do, not what the insured contracted with another person to do.

Although the underlying service contract did not require Triple S to indemnify ATOFINA for ATOFINA's negligence, we concluded that the insurance policy neither included nor incorporated a similar limitation. *Id.* at 663, 666-67. Rather, the only restriction on the scope of additional-insured coverage under section III.B.6 was the requirement that the claims involve Triple S's operations or facilities. *Id.* Because the accident was related to Triple S's operations, the claim for which ATOFINA sought coverage was within the scope of the coverage afforded under section III.B.6 of the policy without regard to ATOFINA's culpability. *Id.*

The existence of a certificate of insurance naming ATOFINA as an additional insured meant that, unlike *Urrutia* and the present case, there was no need to look to the underlying service contract to ascertain ATOFINA's status as "[a] person or organization for whom you have agreed to provide insurance as is afforded by this policy." *See id.* at 663. Here, at a minimum, the Transocean insurance policies require reference to the underlying Drilling Contract to determine BP's status as an additional insured. Moreover, section III.B.6 of the policy in *ATOFINA* made no reference to the service contract in determining the scope of additional-insured coverage, while the Transocean policies refer to an "Insured Contract" that requires Transocean to provide the insurance as a predicate to status as an "Insured."

The significance of these distinctions is supported by our analysis of a second insurance provision at issue in *ATOFINA*. That provision (section III.B.5) defined an insured as "[a]ny other person or organization who is insured under a policy of 'underlying insurance'" but stated that "[t]he coverage afforded such insureds under this policy will be no broader than the 'underlying insurance' except for this policy's Limit of Insurance." *Id.* at 667. We concluded that III.B.5 encompassed a narrower extension of coverage because it expressly incorporated limits on coverage by reference to the underlying CGL policy. We enforced section III.B.5 as written, and because the underlying CGL policy excluded losses caused by ATOFINA's sole negligence, we held that limitation also applied to the excess policy. *Id.* at 667 & n.24. Our analysis of this second provision affirms the principle from *Urrutia* that an insurance policy may refer to another document to determine the extent to which an additional insured is covered.

ATOFINA embodies several principles that are pertinent to the matter at hand. First, it is possible for a named insured to purchase a greater amount of coverage for an additional insured than an underlying service contract requires. Second, the scope of indemnity and insurance clauses in service contracts are not necessarily congruent. Third, and most importantly, we rely on the policy's language in determining the extent to which, if any, we must look to an underlying service contract to ascertain the existence and scope of additional-insured coverage.***

Contrary to any suggestion otherwise, the foregoing authority cannot be interpreted as excluding from consideration restrictions on the scope of additional-insured coverage contained in a contract that has been incorporated into the terms of an insurance policy. Rather, this authority affirms the principle that we must consider the terms of an underlying contract to the extent the policy language directs us to do so. *See, e.g., Urrutia*, 992 S.W.2d at 442.

B. Application

1. Incorporation by Reference

The next order of business is to determine whether the Transocean insurance policies incorporate any limitations in the Drilling Contract with respect to the extent of BP's status as an additional insured. In making this determination, we construe the policies as we would any other contract. *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010). Our primary objective in doing so is to ascertain and give effect to the parties' intent as expressed by the words they chose to effectuate their agreement. *Id*. To that end, we give the words in the policy their ordinary and generally accepted meaning unless the policy indicates that the parties intended the language to impart a technical or different meaning. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 158 (Tex. 2003). We must examine the policy as a whole, seeking to harmonize all provisions and render none meaningless. *Gilbert*, 327 S.W.3d at 126. If an insurance contract uses unambiguous language, we will construe it as a matter of law and enforce it as written. *State Farm Lloyds v. Page*, 315 S.W.3d 525, 527-28 (Tex. 2010). Whether a contract is ambiguous is a question of law for the court to decide by looking at the policy as a whole in light of the circumstances present when the contract was entered. *Kelley—Coppedge, Inc. v. Highland Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998). Disagreement about a policy's meaning does not create an ambiguity if there is only one reasonable interpretation. *Id*. With these principles in mind, we turn now to the policy language at issue.

BP is not named in any of the insurance policies nor is there any claim or evidence that it is expressly included as an additional insured in an endorsement or certificate of insurance; thus, if the coverage inquiry were constrained to the language in the insurance policy, BP would have no coverage at all. But that is not the case. Instead, the policies confer coverage by reference to the Drilling Contract in which (1) Transocean assumed some liability for pollution that might otherwise be imposed on BP (making that contract an "Insured Contract") and (2) Transocean is "obliged" to procure insurance coverage for BP as an additional insured (making BP an "Insured"). Moreover, additional insureds are automatically included under the policy only "where required by written contract, bid or work order." The language in the insurance policies providing additional-insured coverage "where required" and as "obliged" requires us to consult the Drilling Contract's additional-insured clause to determine whether the stated conditions exist. As explained more fully below, when we do so, it becomes apparent that the only reasonable interpretation of that clause is that the parties did not intend for BP to be named as an additional insured for the subsurface pollution liabilities BP expressly assumed in the Drilling Contract.

2. Contractual Limitations on Additional-Insured Status

The additional-insured provision is contained in Exhibit C to the Drilling Contract, which obligates Transocean to acquire various types and minimum limits of insurance, including CGL, workers' compensation, and employer's liability insurance. Subsection 3 of Exhibit C states in its entirety:

> [BP], its subsidiaries and affiliated companies, co-owners, and joint venturers, if any, and their employees, officers, and agents shall be named as additional insureds in each of [Transocean's] policies, *except Workers' Compensation for liabilities assumed by [Transocean] under the terms of this contract*. (Emphasis added.)

It is immediately apparent from the plain language of this provision that BP's status as an insured is inexorably linked, at least in some respect, to the extent of Transocean's indemnity obligations. What is in dispute is the intended breadth of the limiting language in the emphasized portion of the provision.

BP reads the emphasized language as a narrow and specific exception to the general obligation to name it as an additional insured, applying only to workers' compensation policies covering Transocean's employees since that would be the only indemnity obligation implicated under BP's construction. Transocean and the Insurers read the language as (1) excepting only workers' compensation policies from the general additional-insured obligation and (2) imposing a limitation on the general insurance obligation that is coterminous with all of Transocean's contractual indemnity obligations. BP asserts that such an interpretation is unreasonable because there is a comma before, but not after, the phrase "except Workers' Compensation" and further contends that a comma cannot be inserted where it does not exist when it would alter the plain meaning of the contract.

In construing the additional-insured provision, we give effect only to reasonable interpretations of the contract's terms. As construed by BP, Transocean was obligated to name BP as an additional insured under every type of insurance policy specified in Exhibit C, including workers' compensation polices for liabilities assumed by BP, but not workers' compensation policies for liabilities assumed by Transocean. BP's construction of the contract is not reasonable because it is either inconsistent with other provisions in the Drilling Contract or renders the words "liabilities assumed by [Transocean] under the terms of this contract" meaningless.***

Our inquiry does not end there, however, as we can only credit Transocean and the Insurers' alternative construction if it is reasonable. We conclude that it is. Transocean and the Insurers' construction is in harmony with the allocation of liabilities in the contract, gives meaning to all the language the parties employed, and is consistent with the standard use of such language and the purpose of such clauses. Additional-insured provisions are often phrased in terms of extending coverage to all policies except workers' compensation policies, which quintessentially involve an employer insuring its own employees. Moreover, a manifest purpose of an additional-insured clause is to provide supplemental protection when the additional insured may be sued for conduct within the contractor's scope of risk. Applying the only reasonable construction of the additional-insured provision, we conclude that BP is an additional insured only as to liabilities assumed by Transocean under the Drilling Contract and no others. Because Transocean did not assume liability for subsurface pollution, Transocean was not "obliged" to name BP as an additional insured as to that risk. Because there is no obligation to provide insurance for that risk, BP lacks status as an "Insured" for the same.***

In sum, we answer the first certified question in the negative because BP is not covered for the damages at issue by virtue of the limitations on the scope of its additional-insured status imposed in the Drilling Contract and incorporated into the Transocean insurance policies by reference.***

III. Conclusion

Texas law has long allowed insurance policies to incorporate other documents by reference, and policy language dictates the extent to which another document is so incorporated. The policies here provide additional-insured coverage automatically where required and as obligated by written contract in which an insured has agreed to assume the tort liability of another party. Because BP is not named as an insured in the Transocean policies or any certificates of insurance, the insurance policies direct us to the additional-insured provision in the Drilling Contract to determine the existence and scope of coverage. Applying the only reasonable construction of that provision, we conclude that, as it pertains to the damages at issue, BP is an additional insured under the Transocean policies only to the extent of the liability Transocean assumed for above-surface pollution. We therefore answer the first certified question in the negative . . . .

Chapter 15 Subrogation

Equitable and Contractual Subrogation

Global International Marine, *Inc. v. US United Ocean Services*, *LLC*, 2011 AMC 1568 (E.D. La. 2011)

Fallon, District Judge:

BACKGROUND AND PROCEDURAL HISTORY

These consolidated cases arise out of a collision between the M/V TITAN and the T/B NICOLE C, on the one hand, and the M/V NAIDA RAMIL and the T/B PEGGY PALMER, on the other, on September 21, 2008. The collision between these vessels occurred in the Mississippi River near Mile 113 above Head of Passes. At all relevant times, Plaintiff Global International Marine, Inc. (hereinafter "Global") owned and operated the M/V TITAN and the T/B NICOLE C, and Plaintiffs National Union Fire Insurance Company of Pittsburgh, Pa., and Continental Insurance Co. (collectively "the Underwriters") were the subrogated hull insurers and the collision liability insurers of Global. In addition, at all relevant times, Defendants U.S. United Ocean Services LLC and United Maritime Group LLC (collectively "United") owned and operated the M/V NAIDA RAMIL and the T/B PEGGY PALMER.

On September 10, 2009, Global filed suit against United, and on September 22, 2009, the Underwriters did the same. In its Complaint, Global alleged that United is liable to it for the uninsured losses that Global sustained. Meanwhile, the Underwriters averred that United is liable to them, as the subrogated hull insurers of Global, for the amount remitted by the Underwriters to Global for property damages caused by the collision. In response, United denied liability and filed counterclaims against both Global and the Underwriters. In particular, United identified the Underwriters as the collision liability insurers of Global and alleged that they are liable to it for the damages that it sustained as a result of the collision. On October 2, 2009, the Court entered an order consolidating the two cases.

Shortly before trial, the parties were able to reach an agreement regarding the essential facts surrounding the collision, which they set forth in the proposed pre-trial order. However, Global and the Underwriters were unable to come to an agreement on whether the Underwriters could enforce their subrogation rights under the circumstances at issue. The parties agreed to submit the matter to the Court and file, along with the stipulated facts in the proposed pre-trial order, memoranda addressing the subrogation dispute. The Court has carefully reviewed the memoranda, the stipulated facts, and the record. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court hereby enters the following findings of fact and conclusions of law. To the extent that any findings of fact may be construed as conclusions of law, the Court hereby adopts them as such. To the extent that any conclusions of law constitute findings of fact, the Court adopts them as such.

II. FINDINGS OF FACT

1. Global International Marine, Inc. (hereinafter "Global") is a limited liability company organized under the laws of Louisiana, and its principal place of business is in Houma, Louisiana. At all relevant times, it was the owner and operator of the M/V TITAN and the T/B NICOLE C.

2. U.S. United Ocean Services, LLC and United Maritime Group, LLC (collectively "United") are limited liability companies organized under the laws of Florida, and they have their principal place of business in Tampa, Florida. At all relevant times, United was the owner and operator of the M/V NAIDA RAMIL and T/B PEGGY PALMER.

3. National Union Fire Insurance Co. of Pittsburgh, Pa., is a limited liability insurance company that is organized under the laws of New York and that has its principal of business in New York, New York. Continental Insurance Company is a limited liability insurance company that is organized under the laws of Pennsylvania and that has its principal place of business in Chicago, Illinois.

4. At all relevant times, National Union and Continental (collectively "the Underwriters") provided, as part of an insurance package, various forms of insurance to Global in respect of the M/V TITAN and the T/B NICOLE C. The insurance broker was McGriff, Seibels & Williams of Missouri, Inc., which has its principal place of business in St. Louis, Missouri.

5. The insurance policy includes hull insurance, which covers physical damage to the vessels, but not loss of use. The hull of the T/B NICOLE C was valued at and insured for $2,440,000. The insurance policy also contains collision liability insurance. Under that provision, the Underwriters are to assume the liability of Global for damages sustained by others as a result of collisions with the insured vessels.

6. The insurance policy provides for a single deductible of $25,000 in the aggregate for all claims that arise out of one occurrence. It also provides that the Underwriters "shall be subrogated to all the rights which the Assured may have against any other person . . . in respect to any payment made under this policy, to the extent of such payment . . . ."

7. On September 21, 2008, a collision occurred in the Mississippi River near Mile 113 above Head of Passes in the area known as "Kenner Bend" between the T/B PEGGY PALMER, then under tow of United's tug M/V NAIDA RAMIL, and the T/B NICOLE C, then under tow of Global's tug M/V TITAN.

8. As a consequence of the collision, United sustained damages in the amount of $651,138.50, and Global sustained damages in the amount of $260,209.23. The damages sustained by Global consists of $172,429.23 in property damages and $87,780.00 in loss of use.

9. Following the incident, the Underwriters paid $147,429.23 to Global under the hull insurance provision of the policy. This represents the amount of property damages sustained less the $25,000 deductible.

10. The proportional fault of the M/V TITAN, owned and operated by Global, in causing the collision and the ensuing damages is 63 percent. The proportional fault of the M/V NAIDA RAMIL, owned and operated by United, in causing the collision and the ensuing damages is 37 percent.

III. CONCLUSIONS OF LAW***

B. Apportionment of Liability and the Subrogation Dispute

In *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975), the Supreme Court discarded the rule of divided damages in maritime collision cases and held that when more than one vessel is at fault in a collision, "liability for [the] damages is to be allocated among the parties proportionately to the comparative degree of their fault," *id.* at 411; *see also* 2 Thomas J. Schoenbaum, Admiralty and Maritime Law § 14-4 (4th ed. 2004) ("[J]udgments are [to be] rendered between the parties so that the net amount of damage borne by each party will be in exact proportion to the degree of fault."). Applying this rule onto the facts set forth above — and assuming at this time that the Underwriters are out of the picture — the Court concludes that United is liable for 37 percent of the damages sustained by Global. Thus, United is liable for $63,798.82 of Global's property damages and $32,478.60 of Global's loss-of-use damages. In turn, Global is liable for 63 percent of the damages sustained by United — or $408,611.97.

The parties do not disagree, and the Court concludes, that under the collision liability insurance provision of the insurance policy entered between the Underwriters and Global, the Underwriters are to assume Global's liability for the damages sustained by United as a result of the collision. As noted above, this amounts to $408,611.97. In addition, the Court concludes that Global is entitled to $32,478.60 in loss-of-use damages. Having not insured Global for such damages, and thus having not paid any sum to compensate Global for such losses, the Underwriters have not asserted any subrogation claim over that sum. Global may therefore properly recover $32,478.60 in loss-of-use damages. [3]

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[3] The Underwriters have suggested that the Court must enter a "net" judgment reflecting only one sum to which United is entitled and that, as a result, neither Global nor the Underwriters are entitled to recover anything. The Underwriters have made this observation apparently because they believe that under *The North Star*, 106 U.S. 17, 1 S. Ct. 41, 27 L. Ed. 91 (1882), claims in a collision case merge with one another. This is incorrect. In a typical collision case, such as *The North Star*, the rules of liability apportionment do yield a judgment that, in effect, provides a net recovery to a party. In this sense, there may be a "single liability." The claims and counterclaims do not merge, however: each must be

Global and the Underwriters disagree as to the allocation of the last sum of $63,798.82, which, as noted above, constitutes United's liability for Global's property damages. On the one hand, the Underwriters point to the fact that in accordance with the hull insurance provision of the insurance policy, they have paid Global all of its property damages less the deductible — which, as noted above, amounts to $147,429.23. The Underwriters argue that having made that payment and satisfied all of their obligations under the insurance policy, they are entitled to exercise their subrogation rights with respect to the sum of $63,798.82. The Underwriters stress that it would be improper to allow Global to obtain more than the amount to which it is entitled in light of its comparative fault.

On the other hand, Global rejects the notion that the Underwriters may pursue their subrogation claim. According to Global, Louisiana law entitles it to be "made whole" and to obtain full compensation for all of its losses before the Underwriters may step in. As noted above, Global has sustained losses totaling $260,209.23 as a result of the collision. Toward this, the Underwriters have remitted $147,429.23 to cover the property damages, and Global is entitled to recover $32,478.60 for its loss-of-use damages. This leaves a gap of $80,301.40. Global contends that under Louisiana law, it is entitled to recover the sum of $63,798.82 in order to cover that gap. Beyond this subrogation dispute, the parties have otherwise agreed that recovery in this case should be without interests and without costs.***

D. What Law Is Applicable to the Subrogation Dispute

In *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955), the Supreme Court concluded that "the regulation of marine insurance is, in most instances, [a matter] properly left with the states." *Albany Ins. Co. v. Anh Thi Kieu,* 927 F.2d 882, 886 (5th Cir. 1991) (citing *Wilburn Boat*, 348 U.S. at 320). This general principle requires a court that is presented with a dispute over marine insurance to begin its analysis by making a choice-of-law determination. *See* 2 Schoenbaum, *supra*, § 19-9 (noting that "[u]nder *Wilburn Boat*, no question of marine insurance can be determined without first engaging in a choice-of-law analysis"). In this regard, federal maritime choice-of-law rules, rather than the choice-of-law rules of the forum state, are those that are applicable.

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adjudicated. *See* 2 Schoenbaum, *supra*, § 14-4 (noting that in a collision case, "judgments are rendered between the parties . . . .").

Had the Underwriters recognized that this is the case, they would have readily acknowledged that Global may recover loss-of-use damages and that the Underwriters have made no competing claim over those damages. Indeed, in their Complaint, the Underwriters have limited their subrogation claim to the amount that they paid to compensate for Global's property damages. To the extent that the Underwriters seek to extend their subrogation claim to include Global's loss-of-use damages, that attempt must be rejected: the Underwriters did not pay any amount under their policy to compensate Global for its loss-of-use damages. As a result, the Underwriters are not entitled to subrogation over that sum.

Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc., 585 F.3d 236, 241-42 (5th Cir. 2009).

The Fifth Circuit has held that if the parties to a marine insurance policy have chosen a particular state as providing the applicable law, a court must generally recognize that choice as "valid and enforceable." *Id.* at 242; *see also Stoot v. Fluor Drilling Servs., Inc.,* 851 F.2d 1514, 1517 (5th Cir. 1988). Such a choice is to be set aside only if it is "unreasonable or unjust," *Great Lakes Reinsurance,* 585 F.3d at 244 — that is, if "the state [whose law is chosen] has no substantial relationship to the parties or the transaction or [if] the state's law conflicts with the fundamental purpose of maritime law," *Stoot*, 851 F.2d at 1517; *accord Restatement (Second) of Conflict of Laws* § 187(2) (1971).

If the parties to a marine insurance policy have not made a choice of law, however, the analysis is different. In such a case, the Fifth Circuit has indicated, a court must ascertain which state has "the 'most significant relationship' to the substantive issue in question." *Albany Ins. Co.,* 927 F.2d at 891 (quoting *Restatement (Second) of Conflict of Laws* § 188(1) (1971)). To do so, a court should consider factors such as the place where the policy was negotiated and formulated, the place where the policy was issued and delivered, the domicile and place of incorporation of the parties, the location of the subject matter of the policy, and the location of the loss. *See id.*; *Truehart v. Blandon,* 884 F.2d 223, 226 (5th Cir. 1989); *Transco Exploration Co. v. Pac. Emp'rs Ins. Co.,* 869 F.2d 862, 863 (5th Cir. 1989); *see also* Restatement (Second) of Conflict of Laws § 188(2).

After identifying the state that has "the greatest interest in the resolution of the issues," *Truehart*, 884 F.2d at 226, a court must then determine whether it ought to adopt the rule of decision supplied by the law of that state or instead apply federal maritime law. *See Wilburn Boat,* 348 U.S. at 320. The Fifth Circuit has identified three factors that are relevant in this analysis: a court must consider "(i) whether [there is a] federal maritime rule [that] constitutes 'entrenched federal precedent' . . . , (ii) whether the state has a substantial and legitimate interest in having its law applied, and (iii) whether the state rule is materially different from the federal rule." *5801 Assocs., Ltd. v. Continental Ins. Co.,* 983 F.2d 662, 665 (5th Cir. 1993) (citing *Albany Ins.,* 927 F.2d at 886). Of these factors, the first is decisive: "[a]bsent a specific and controlling federal rule, cases involving marine insurance contracts are governed by state law." *N. Am. Specialty Ins. Co. v. Debis Fin. Servs., Inc.*, 513 F.3d 466, 470 (5th Cir. 2007).

In this case, the insurance policy does not contain a choice-of-law clause. As a result, the Court must ascertain which state has "the 'most significant relationship' to the substantive issue in question." *Albany Ins. Co.,* 927 F.2d at 891 (quoting *Restatement (Second) of Conflict of Laws* § 188(1)). A review of the relevant factors indicates that of the various states potentially implicated in this dispute, Louisiana is the state that has "the greatest interest in the resolution of the issue[]." *Truehart*, 884 F.2d at 226. Indeed, Louisiana is the state where the insured, Global, is organized and has its principal place of business. The insurance policy was issued and delivered to Louisiana. In addition, the loss occurred in Louisiana.

The only nexus between New York and this controversy is that National Union is organized under its laws and has its place of business there. Similarly, Pennsylvania and Illinois are connected to this dispute only because Continental is organized under Pennsylvania law and has its principal place of business in Illinois. Finally, Missouri may be more strongly implicated in this dispute, but this is so only because the insurance broker is based in that state. Thus, the connection between this dispute and New York, Pennsylvania, Illinois, and Missouri is far less substantial than that which exists with respect to Louisiana. In light of this, and given that the Underwriters have not suggested anything to the contrary, the Court finds that Louisiana is the state that, in relative terms, has "the 'most significant relationship' to the substantive issue in question." *Albany Ins. Co.,* 927 F.2d at 891 (quoting *Restatement (Second) of Conflict of Laws* § 188(1)).

The remaining question is whether it is Louisiana law or federal maritime law that must be applied to resolve the subrogation dispute. As previously noted, the Court must consider whether there is a set of "specific and controlling federal admiralty rules" on the subject in question. *N. Am. Specialty Ins.*, 513 F.3d at 470. The answer to this question is no. The field of subrogation is "extensive and complicated," 16 Couch on Insurance § 222:4 (3d ed. 2010), and as the Fifth Circuit has acknowledged, there are at least two possible approaches to determining priority in recovery as between a subrogated insurer and the insured, *see New Orleans Assets, LLC v. Woodward*, 363 F.3d 372, 374 (5th Cir. 2004). One the one hand, a rule might accord priority to the insured by requiring that an insured be made whole before the insurer can enforce its subrogation rights. *See id.* On the other hand, a rule might provide priority to the insurer by allowing the insurer to enforce its subrogation rights in all circumstances. *See id.*

The "made whole" rule raises two sets of subsidiary questions. First, a court must determine what constitutes the loss for which the insured needs to be "made whole" before the insurer can enforce its subrogation rights. This, in turn, raises two further questions. First, a court must decide whether the inquiry must be focused on the element of damages covered by the insurance policy or whether the inquiry must consider all elements of damages. On the one hand, a court might insist that "the test of wholeness depends upon whether the insured has been completely compensated for all the elements of damages, not merely those damages for which the insurer has indemnified the insured." *E.g., Rimes v. State Farm Mut. Auto Ins. Co., 106 Wis.* 2d 263, 316 N.W.2d 348, 355 (Wis. 1982). On the other hand, a court might conclude that the insured is "made whole" once it is compensated for the element of damages that is covered by the insurance policy and that is thus the subject of the insurer's subrogation claim. *See, e.g., Ludwig v. Farm Bureau Mut. Ins. Co.*, 393 N.W.2d 143, 145 (Iowa 1986).

Second, there is the additional question of whether an insured's contributory negligence is relevant in determining the loss for which the insured is entitled to be "made whole." That is, a court must determine whether the insured is "made whole" for the purpose of subrogation when it receives all of the damages that it seeks or whether the insured is "made whole" when it receives all of the damages to which it is legally entitled. *See, e.g., Sorge v. Nat'l Car Rental Sys., Inc.*, 182 Wis. 2d 52, 512 N.W.2d 505, 509 (Wis. 1994) (holding that in determining the loss for which the insured is entitled to be made whole, contributory negligence must be taken into account). As these questions illustrate, "defining the term 'made whole' [can be] difficult." Jeffrey A. Greenblatt, Comment, *Insurance and Subrogation: When the Pie Isn't Big Enough, Who Eats Last?*, 64 U. Chi. L. Rev. 1337, 1360 (1997).

The second set of subsidiary questions raised by the "made whole" rule concerns whether the parties may contract around the "made whole" rule to afford the insurer priority in obtaining recovery from a third-party tortfeasor. One the one hand, a rule could provide that parties cannot contract around the "made whole" rule. *See, e.g., Franklin v. Healthsource of Ark.*, 328 Ark. 163, 942 S.W.2d 837, 840 (Ark. 1997). On the other hand, a court could allow an insurer and an insured to contract around this rule and thereby give effect to the "insurer priority" principle. *See, e.g., Peterson v. Ohio Farmers Ins. Co.*, 175 Ohio St. 34, 191 N.E.2d 157, 159 (Ohio 1963). Even then, a court might adopt something akin to a clear statement rule and require that the insurer's priority be set forth in a sufficiently explicit manner in the policy before the parties can be deemed to have contracted around the "made whole" rule. *See, e.g., Thiringer v. Am. Motors Ins. Co.*, 91 Wn.2d 215, 588 P.2d 191, 194 (Wash. 1978).

Shortly after the Supreme Court held that marine insurance policies are maritime contracts and thus fall within the federal courts' admiralty jurisdiction, *see New Eng. Mutual Marine Ins. Co. v. Dunham,* 78 U.S. (11 Wall.) 1, 20 L. Ed. 90 (1870), the Court also recognized a marine insurer's right to subrogation, *see, e.g., The Potomac*, 105 U.S. 630, 634, 26 L. Ed. 1194 (1881). But perhaps because of "a strong tendency to settle" marine insurance cases, Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 2-2 (2d ed. 1957), even "the most important and obvious [questions] in marine insurance law are rarely litigated," *id.* § 2-8. A review of the relevant case law indicates that as a consequence, the Supreme Court, prior to *Wilburn Boat*, did not appear to have the occasion to articulate a full set of rules governing the priority between a subrogated marine insurer and its insured in obtaining recovery from a third-party tortfeasor. The scarcity of relevant case law has led one court to conclude that for the purpose of *Wilburn Boat*, "there is no judicially established federal admiralty rule addressing [the] subject." *Tampa Port Auth. v. M/V Duchess*, 65 F. Supp. 2d 1299, 1300-01 n.2 (M.D. Fla. 1997).

The Supreme Court case that appears to provide the most recent and the fullest treatment of the question appears to be *Aetna Insurance Co. v. United Fruit Co.,* 304 U.S. 430, 58 S. Ct. 959, 82 L. Ed. 1443 (1938). In that case, after the marine insurers had paid all of the amount due under the insurance policies, the insured obtained recovery from the third-party tortfeasor in an amount that was substantially greater than that paid by the insurers, and the insurers sought to enforce their subrogation rights to that greater amount. *Id.* at 432-33. The Supreme Court rejected that claim, observing that if accepted, the insurers' argument would "deprive the insured of indemnity" and mark "a radical departure from the principle on which subrogation is founded." *Id.* at 436. The Court thus took note of, and gave effect to, "the rule that the insurer is entitled to subrogation only after the insured is appropriately indemnified." *Id.* at 438.

Although the Supreme Court has thus suggested that the "made whole" rule is applicable in the context of marine insurance, the contours of the rule under federal maritime law have not been fully delineated. The parties have not cited, and additional research has not uncovered, a case that conclusively resolves, under federal maritime law, the question of how to determine the loss for which the insured is entitled to be made "whole" before the marine insurer can exercise its subrogation rights. And the parties have not pointed to, and research has not revealed, a case that squarely addresses, under federal maritime law, whether a marine insurer and its insured may contract around the "made whole" rule. In sum, there appears to be no established federal maritime rule on these "precise subrogation issue[s]." *Continental Cas. Co. v. Canadian Universal Ins. Co.,* 605 F.2d 1340, 1345 (5th Cir. 1979).

Ordinarily, this Court would further develop what appears to remain an inchoate area of federal maritime law by "look[ing] to state statutory law and to precepts of the common law," 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 4-1 (4th ed. 2004), and by considering English law on this question, *see Queen Ins. Co. of Am. v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493, 44 S. Ct. 175, 68 L. Ed. 402 (1924) ("There are special reasons for keeping in harmony with the marine insurance laws of England."). But it is doubtful that this Court may do so in light of the Supreme Court's decision in *Wilburn Boat*. As noted above, the Court of Appeals has read *Wilburn Boat* to require the application of state law in the absence of "specific and controlling federal admiralty rules," *N. Am. Specialty Ins.*, 513 F.3d at 470, or of "[e]ntrenched federal precedent," *Thanh Long P'ship v. Highlands Ins. Co.*, 32 F.3d 189, 193 (5th Cir. 1994).

This reading of *Wilburn Boat* in effect freezes judge-made federal maritime law in the field of marine insurance as it stood in 1955 and forecloses any further development of that body of law. In fact, as a logical matter, it even indicates that cases such as *Aetna Insurance* are now obsolete. Indeed, if one were to assume that the state that has "the greatest interest in the resolution of the issues," *Truehart*, 884 F.2d at 226, happens to have adopted the "insurer priority" rule, then this Court cannot simultaneously adhere to the "made whole" principle recognized in *Aetna Insurance* and look for specific rules governing the aforementioned subsidiary questions in the law of that state. Indeed, those rules would be nowhere to be found. Thus, if *Wilburn Boat* does preclude the courts from fashioning any additional federal rules of decision -- even ones that supplement an existing general principle -- it must also be understood to, in effect, render obsolete Supreme Court decisions, such as *Aetna Insurance*, that do articulate a basic rule of decision, but do not fully address all of the subsidiary questions raised by it.

The Supreme Court's decision in *Wilburn Boat* does not have to be read in this manner. The Court in that case was not confronted with the fact that one of its cases had, in fact, recognized in the context of maritime law a general principle. *See Wilburn Boat*, 348 U.S. at 314 (noting that the only Supreme Court case potentially relevant was one that concerned general commercial law, and not maritime law). Instead, with respect to its own jurisprudence, it was facing a completely blank canvas. *See id.* It was in that context that the Supreme Court declined to fashion a federal rule of decision. *See id.* at 320. The Supreme Court's decision in *Wilburn Boat* thus does not necessarily compel the conclusion that federal courts may not further the development of marine insurance principles that the Supreme Court had recognized and applied prior to *Wilburn Boat*.

The Fifth Circuit has, however, interpreted *Wilburn Boat* to require the application of state law where there are no "specific and controlling federal admiralty rules," *N. Am. Specialty Ins.*, 513 F.3d at 470, or "[e]ntrenched federal precedent[s]," *Thanh Long P'ship*, 32 F.3d at 193. This logically requires the application of state law whenever there is the absence of a full set of rules of decision addressing a marine insurance subject. As noted above, prior to *Wilburn Boat*, the Supreme Court did not have the opportunity to fashion a complete set of rules governing the priority in recovery as between a subrogated insurer and its insured. The absence of "specific and controlling federal admiralty rules" on the subject thus compels the conclusion that the law of Louisiana is applicable to this case. *N. Am. Specialty Ins.*, 513 F.3d at 470.

E. Resolution of the Subrogation Dispute***

As noted above, the "made whole" rule raises questions as to what constitutes the loss for which the insured is entitled to be made whole. First, there is the question of whether, for the purpose of subrogation, the loss extends only to the element of damages that is covered by the insurance policy and over which an insurer seeks to assert its subrogation rights or whether the loss encompasses all of the elements of damages that an insured might have sustained. Second, there is also the question of whether an insured is made whole, for the purpose of subrogation, when it receives the damages that it seeks or when it obtains the damages to which it is legally entitled. As indicated above, all of these questions demonstrate that the "[a]pplication of the 'made whole' rule [can be] notoriously complex." Restatement (Third) of Restitution and Unjust Enrichment § 57 reporter's note to cmt. h (Tentative Draft No. 6, 2008).

The Civil Code itself appears to be silent as to these critical questions. Article 1826(B) enigmatically refers to "[a]n original obligee who has been paid only in part." *Id.* art. 1826(B). It leaves unanswered the question, "in part of what?" Neither does the former version of Article 1826(B) shed any further light, for it similarly identifies as its object an obligee who "has been paid but in part" without specifying what it is that constitutes the whole. La. Civ. Code art. 2162 (1870). Finally, the parties have not suggested, and a review of the jurisprudence does not reveal, a "constant stream of uniform and homogeneous rulings" on what constitutes the whole for the purpose of Article 1826(B). *Doerr,* 774 So.2d at 128 (quoting *Dennis, supra,* at 15). There is, in other words, no *jurisprudence constante* regarding the meaning of the term "in part."

For instance, it should be noted that on the question of whether an insured's contributory negligence is relevant, the decisions of the Louisiana Supreme Court provide conflicting signals. In *Southern Farm Bureau Casualty Insurance Co. v. Sonnier,* 406 So.2d 178 (La. 1981), which remains the leading case on the "made whole" rule under Louisiana law, the court spoke of "the damages to which the insured is entitled from a tortfeasor." *Id.* at 180. This formulation clearly contemplates that an insured's contributory negligence factors into the determination as to whether, for the purpose of subrogation, the insured has been made whole. In *Egros v. Pempton,* 606 So.2d 780 (La. 1991), however, the court simply referred to "the total amount of damages." *Id.* at 784. This formulation does not distinguish between damages sought by the insured and damages to which the insured is entitled. These different intonations underline the fact that the Louisiana Supreme Court has not had the occasion to squarely confront the question.

Article 10 of the Louisiana Civil Code instructs that "[w]hen the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law." La. Civ. Code art. 10. Accordingly, the Court will examine the purposes that underlie the subrogation articles of the Civil Code. This inquiry, it bears noting, need not be narrowly confined. Indeed, the law of subrogation in Louisiana, and its counterpart in the common-law jurisdictions, share common roots. *See Aetna Life Ins. Co. of Hartford v. Town of Middleport,* 124 U.S. 534, 551, 8 S. Ct. 625, 31 L. Ed. 537 (1888) (noting that the Louisiana Civil Code "is in the main founded on the civil law from which [the] right of subrogation has been adopted by the chancery in this country"); *Rachal v. Smith*, 101 F. 159, 164 (5th Cir. 1900) ("[T]he equitable doctrine of subrogation was ingrafted on the English equity jurisprudence from the civil law.").

Subrogation finds its origins in the context of sureties. *See Greenblatt, supra,* at 1339; *Litvinoff, supra*, at 1149-50. There, in order to induce a creditor to make a loan, the surety guarantees the repayment of the loan on the part of the debtor. If the debtor defaults, then the surety makes payment to the creditor. "The debtor is called the primary obligor, the creditor is called the obligee, and the surety is called the secondary obligor." *Greenblatt, supra,* at 1345. The law recognizes, however, that "[a]s between the [primary] obligor and the secondary obligor, it is the [primary] obligor that has the duty to perform or bear the cost of performance." Restatement (Third) of Suretyship and Guaranty § 18 cmt. a (1996). Thus, when the secondary obligor pays the underlying debt, the primary obligor becomes unjustly enriched. *Id.* § 26 cmt. a. By allowing the secondary obligor to then obtain recourse against the primary obligor as if it were the obligee, subrogation helps to preclude unjust enrichment. *See id.*

The concept of subrogation did not become tied to insurance until later. But it is not surprising that subrogation became relevant in the insurance context as well: preventing windfalls is also of central concern in the realm of insurance. For one, "the basis and foundation of all insurance law is 'indemnity,'" the goal of which is "to put an insured in the same (but not better) position the insured would have occupied had no loss occurred." 1 Appleman on Insurance § 3.1 (2d ed. 1996). Under the indemnity principle, "insurance should not provide a party with the means of realizing a net profit when an insured event occurs." *Id.* It is possible, however, that an insured may be able to do so — by first obtaining insurance proceeds from the insurer and then securing damages from the tortfeasor. *See*16 Couch on Insurance § 222:8 (3d ed. 2010). Thus, "subrogation is needed to preserve the principle of indemnity." 22 Appleman on Insurance § 141.1 (2d ed. 1996).

Like the insured, the third-party tortfeasor might also be unjustly enriched. *See* 16 Couch, *supra*, § 222:8. Having received insurance proceeds, an insured might not pursue an action against the tortfeasor, and the tortfeasor might therefore be relieved of the obligation that the law would otherwise impose on him — to pay for the loss that he, in fact, caused. *See id.* (noting that "in the absence of . . . double recovery by the insured, the third party would go free notwithstanding the fact that he or she has a legal obligation in connection with the damage."). As in the surety context, subrogation in the realm of insurance "compel[s] the eventual satisfaction of an obligation by the one who ought to pay it." Restatement (Third) of Surety and Guarantee § 27 cmt. *a*. It "ensures that the person who in good conscience ought to pay a loss (the tortfeasor) does in fact pay the loss." 22 Appleman, *supra*, § 141.1.

The notion that one of subrogation's objective is to preclude double recovery on the part of the insured might seem to be in conflict with the collateral source rule, which contemplates the possibility that an insured might retain both its insurance proceeds and damages from the tortfeasor. *See generally Davis v. Odeco, Inc.*, 18 F.3d 1237, 1243 (5th Cir. 1994) (explaining the rule under maritime law); *Bozeman v. State*, 879 So.2d 692, 697-701 (La. 2004) (explaining the rule under Louisiana law). This inconsistency is largely illusory, however. Like subrogation, the collateral source rule is aimed at ensuring that third-party tortfeasors "bear[] the costs of their own conduct." *Davis,* 18 F.3d at 1243 n.21; *see also Bozeman*, 879

So.2d at 700-01. It does so by insisting that the overall amount of damages for which the third-party tortfeasor is liable may not be reduced by the amount of insurance proceeds that an insured has received in connection with the tort. *See Davis*, 18 F.3d at 1243; *Bozeman*, 879 So.2d at 698.

As noted above, it is possible that under this rule, an insured might retain both its insurance proceeds and damages from the tortfeasor. It has been widely recognized, however, that "[a]lthough the [collateral source] rule appears to allow a double recovery, . . . typically, the collateral source rule will have a lien or subrogation right that prevents such a double recovery." *E.g., Wills v. Foster*, 229 Ill. 2d 393, 892 N.E.2d 1018, 1022, 323 Ill. Dec. 26 (Ill. 2008); *accord Metoyer v. Auto Club Family Ins. Co.*, 536 F. Supp. 2d 664, 670-71 (E.D. La. 2008). Thus, subrogation is the mechanism by which the possibility of double recovery under the collateral source rule is reduced and even eliminated. In fact, it has been said that one purpose of the collateral source rule is to preserve an insurer's right to subrogation. *E.g.*, Dan B. Dobbs, *Law of Remedies* 268 (2d ed. 1993). The collateral source rule and subrogation work in tandem to force third-party tortfeasors to pay for their conduct. *See, e.g.*, Kyle D. Logue, *Coordinating Sanctions in Tort*, 31 Cardozo L. Rev. 2313, 2320 n.13 (2010) ("Double recovery is avoided, and causal responsibility properly assigned, through the interplay of the subrogation doctrine and the collateral source rule.").

In sum, subrogation "facilitates an adjustment of rights to avoid unjust enrichment." 1 Appleman, *supra*, § 3.1. By doing so, subrogation not only helps to satisfy a basic sense of fairness, but also works to achieve important societal goals. In the surety context, it is evident that subrogation helps facilitate the extension of credit on the part of creditors and thus plays an important part in fostering economic activity. In the insurance context, meanwhile, the elimination of windfalls helps to encourage the exercise of care and thus the prevention of loss. If "the insured were to receive more than the amount of his loss," it has been said, the insured "might be encouraged to incur losses." 22 Appleman, *supra*, § 141.1. In other words, permitting double recovery might create a moral hazard by giving the insured an incentive "to use less than reasonable care in preventing or avoiding a covered insurance loss." 1 Appleman, *supra*, § 3.6. A loss-prevention rationale also underlies the insistence that a third-party tortfeasor ought to pay for the loss that it causes. Forcing the third-party tortfeasor to bear the burden of the loss might "deter[] injurious behavior" and might, as a result, encourage that party to exercise reasonable care in the future. *Greenblatt, supra*, at 1341.

The underlying purposes of subrogation help to resolve the debate in which Global and the Underwriters have implicitly engaged. As noted above, the Underwriters have stressed that a distinction must be made between property damages and loss-of-use damages given that it insured only property damages. The Underwriters have also argued that it would be improper for Global to obtain more damages than the amount to which it is entitled in light of its comparative fault. Meanwhile, Global contends that it is entitled to full compensation for all of the losses that it has sustained as a result of the collision, without regard to its comparative fault. The two parties have therefore taken conflicting positions on two of the subsidiary questions raised by the "made whole" rule: first, whether the focus of the "made whole" inquiry should be on the element of damages covered by the insurance policy; and second, whether the key factor is the amount of damages sought by the insured or the amount of damages to which it is entitled.

In light of the purposes that underlie subrogation, the answer to the first question is in the affirmative: the inquiry as to whether the insured has been "made whole" must be focused on the element of damages that is covered by the insurance policy and over which the insurer seeks to enforce its subrogation rights. *Accord Ludwig*, 393 N.W.2d at 145-47. As noted above, the aim of subrogation in the context of insurance is to guard against double recovery and protect the indemnity principle. Oftentimes, however, an insurer may not cover all of the different elements of damages that might be sustained as a result of an incident. *See id.* at 146. In light of this basic reality, the indemnity principle cannot be meaningfully protected without distinguishing between those elements of damages that are covered by the policy and those that are not.

In response to this recognition, an insured might seek to re-characterize an amount due for one element of its damages as one that is due for another element of its damages. In fact, this is what Global, in effect, has attempted to do in arguing that it is entitled to use the sum of $63,798.82, which is attributable as property damages, to cover the gap of $80,301.40, which consists, in large part, of its loss-of-use damages. Such an effort must be rejected, however. As the Supreme Court of Iowa has observed, to allow an insured to appropriate a sum that is attributable to an insured loss in order to cover an uninsured loss would be to force an insurer to become "an insurer against [uninsured] losses as well." *Id.* at 147. Clearly, this would provide "a windfall for [the] insured who has not paid for" such protection. *Id.*

The fundamental purposes that underlie subrogation also provide a clear answer as to the second question in dispute: the key factor cannot, as Global contends, be the amount of damages sought by the insured. Rather, the focus of the "made whole" inquiry must be on the amount of damages to which the insured is legally entitled. *Accord Sorge*, 512 N.W.2d at 509. To enable an insured to recover all of the damages that it sought — without regard to any contributory negligence on its part — would be to undermine the loss-prevention rationale that underlies not only subrogation, but also the doctrine of comparative fault. Indeed, it would eliminate the incentive provided by the doctrine of comparative fault for parties to exercise reasonable care in conducting their affairs.

Global's suggestion that being "made whole" means receiving full compensation for all of the losses that the insured has sustained is therefore not consistent with the purposes of subrogation. It is not, however, without some foundation. Indeed, in the surety context, the amount sought by the creditor may be the amount with respect to which it must be "made whole" before subrogation can take place. There is, however, never a question as to whether the creditor is at fault or whether the surety may, by satisfying its duty, remit to the creditor an amount greater than that to which the creditor is legally entitled. In the surety context, the amount sought by the creditor and the amount to which it is legally entitled are one and the same. In light of the above, however, it is clear that while it may be the case that in the surety context, "the whole" for which the original obligee is entitled to recover is simply the amount that it seeks, importing such a notion into the context of insurance may defeat the very purposes that underlie subrogation. *Cf. Winkelmann v. Excelsior Ins. Co.*, 85 N.Y.2d 577, 650 N.E.2d 841, 844, 626 N.Y.S.2d 994 (N.Y. 1995) (noting that in the context of subrogation, "the rights of sureties and insurers must be distinguished").

In sum, in light of the purposes underlying subrogation, the "whole" to which Article 1826(B) of the Louisiana Civil Code refers must be understood to denote the amount that an insured is legally entitled to recover with respect to the element of damages over which the insurer has provided insurance and over which it, consequently, has asserted a subrogation claim. Under this definition, an insurer that pays to the insured an amount that exceeds that which the insured is legally entitled to recover with respect to that particular element of the insured's damages may exercise its subrogation rights and proceed against a third-party tortfeasor. Such an insurer may step into the shoes of the insured and recover the amount that the insured itself would be legally entitled to recover. Such an understanding of the "made whole" rule under Article 1826(B) "best conforms to the purpose of the [subrogation] law." La. Civ. Code art. 10.

This understanding of the "made whole" rule does not violate the fundamental principle that "[s]ubrogation cannot injure the insured." *Sonnier*, 406 So.2d at 179. Under this rule, if an insurer pays an amount that is less than the amount to which the insured is legally entitled with respect to the element of damages that is covered by the insurance policy, the insured can recover the remaining amount in preference over the insurer. Thus, this rule is consistent with the notion that subrogation should not "in fact hinder or jeopardize the satisfaction of [the original obligee's] remaining claim against [the original obligor]." Restatement (Third) of Restitution and Unjust Enrichment § 57 cmt. h. It is only when an insured has received from its insurer an amount that is more than the sum to which it is entitled to recover under the law with respect to the specific element of damages that the insurer may enforce its subrogation rights.

Applying the foregoing to this case, the Court concludes that the Underwriters may enforce their subrogation rights over the amount that is in dispute — $63,798.82 in property damages. As noted above, Global sustained $172,429.23 in property damages as a result of the collision, but because it is 63 percent at fault for the collision and the ensuing damages, it is entitled only to recover 37 percent of its property damages — or $63,798.82. Following the collision, however, the Underwriters remitted the full amount due to Global under the hull insurance provision of the insurance policy — $147,429.23. This amount exceeds that to which Global is legally entitled to recover for its property damages in light of its comparative fault. Accordingly, the Underwriters may enforce their subrogation rights and recover the amount of property damages that Global itself could have recovered. This amounts to $63,798.82.***

In summary, the dispute as to whether the Underwriters may enforce their subrogation rights must be resolved in order for this Court to adjudicate the Underwriters' claim for relief. Under the Supreme Court's decision in *Wilburn Boat,* Louisiana law applies to the dispute. And in light of the purposes that underlie the subrogation articles of the Civil Code, the inquiry as to whether an insured has been made whole for the purposes of subrogation must be focused on the element of damages covered by the insurance policy and on the amount that the insured is legally entitled to recover. Thus, an insurer that has paid to an insured an amount that exceeds that which the insured is legally entitled to recover may exercise its subrogation rights and proceed against a third-party tortfeasor. In this case, the Underwriters have, by discharging their obligation under the hull insurance policy, remitted to Global a sum of $147,429.23 for Global's property damages. Because this exceeds the sum to which Global is entitled to recover for its property damages, the Underwriters may enforce their subrogation rights and recover $63,798.82 from United.[8]

***Fortin Benefits v. Cantu*, 234 S.W.3d 642 (Tex. 2007)**

Justice Willett delivered the opinion of the Court.

The issue in this insurance subrogation case is whether the equitable "made whole" doctrine--the rule that an insurer is not entitled to subrogation of medical benefits unless the insured has been "made whole"--trumps an insurer's contract-based subrogation right.

After respondent Vanessa Cantu sued multiple parties for severe injuries she sustained in an auto accident, her medical insurer, petitioner Fortis Benefits, intervened, claiming a subrogation right under the policy. The various defendants settled with Cantu, and Fortis looked only to Cantu for its recovery. A divided court of appeals upheld a trial court finding that because Cantu's medical expenses exceeded the settlement amount plus the benefits Fortis had paid, Fortis's subrogation claim was barred by the equitable "made whole" doctrine. We hold

[8] In light of the above, it is not necessary for this Court to determine the extent to which, under Louisiana law, an insurer and an insured may contract around the "made whole" rule.***

that the "made whole" doctrine must yield to Fortis's right to contractual subrogation under the plain terms of the insurance policy.

I. Background

Cantu suffered severe injuries in a car wreck and later sued the driver of the vehicle in which she was riding, his employer, the vehicle seller, and the vehicle manufacturer (Ford). Fortis intervened and asserted contractual subrogation and reimbursement rights to recoup from Cantu's tort recovery the amount of medical benefits it had paid under the policy. At a pretrial conference, Fortis agreed with all parties on the record that Fortis was excused from participating in the pretrial and trial proceedings and that Fortis at the post-verdict phase would look only to Cantu to resolve its subrogation and reimbursement claims.

Cantu settled her claims with the defendants before trial for $ 1.445 million. Cantu and Fortis disputed what portion of the settlement proceeds, if any, should go to Fortis, and Cantu moved for summary judgment, arguing she had not been "made whole" by the settlement. Cantu's past medical expenses totaled $ 378,500 (of which Fortis claimed to have paid $ 247,534.14), and her summary judgment evidence included two "life care plans" estimating her future medical expenses at roughly $ 1.7 million and $ 5.3 million. She argued that her past and future medical expenses, exclusive of other amounts like pain and suffering, exceeded the amount of the settlement plus what Fortis had already paid. Cantu argued that the "made whole" doctrine precluded Fortis's contractual claims of subrogation and reimbursement. The trial court granted summary judgment in favor of Cantu, and a divided court of appeals affirmed.

II. Subrogation and the "Made Whole" Doctrine

This Court recognized the "made whole" doctrine twenty-seven years ago in *Ortiz v. Great Southern Fire & Casualty Insurance Co*. [597 S.W.2d 342 (Tex. 1980)]. The Ortiz family had a fire insurance policy from Great Southern on their home, but not the contents. A fire caused damages of $ 4,000 to the home and $ 11,614 to personal property, and Great Southern paid $ 4,000 for home repairs. The Ortizes then sued Stacy-Mason, Inc., alleging that one of its employees negligently started the fire. Great Southern intervened, claiming a right of equitable subrogation. After the Ortizes settled with Stacy-Mason for $ 10,000, the trial court awarded, and the court of appeals affirmed, $ 4,000 of that settlement to Great Southern.

We reversed, holding, "An insurer is not entitled to subrogation if the insured's loss is in excess of the amounts recovered from the insurer and the third party causing the loss." We reasoned that one justification for equitable subrogation is to prevent the insured from receiving a double recovery, first from the insurer, then from the third party. We also recognized, however, that if the insured's total recovery is less than his or her losses, equity cuts the other way: "when 'either the insurer or the insured must to some extent go unpaid, the loss should be borne by the insurer for that is a risk the insured has paid it to assume.'" Because the settlement in *Ortiz* encompassed both covered and noncovered items, we remanded for a determination of how much of the $ 10,000 related to house damage.

Ortiz would govern if Fortis were merely asserting a claim for *equitable* subrogation. But Fortis is not citing principles of equity to recover its money; its policy with Cantu conferred on Fortis two separate *contractual* rights of recovery, one styled "subrogation" and one styled "reimbursement."[11] Fortis argues that these provisions authorize recovery from Cantu's $ 1.445 million settlement with the defendants, and that neither provision is displaced by the "made whole" doctrine. We agree.

A. Equitable Subrogation v. Contractual Subrogation

Our *Ortiz* decision addressed the "made whole" doctrine in the context of equitable subrogation, but it did not discuss how the doctrine applies, if at all, to contractual subrogation. Other courts, however, have discussed whether the doctrine applies in the face of a contract that grants the insurer greater subrogation rights. For example, in *Oss v. United Services Automobile Ass'n*, [807 F.2d 457 (5th Cir. 1987)] the Fifth Circuit, applying Texas law in a diversity case, was confronted with facts similar to those in this case. The insured was not made whole by the

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[11] The policy states:

> **Subrogation Right**. Upon payment of benefits, *We will be subrogated to all rights of recovery a Covered Person may have against any person or organization*. This includes but is not limited to recoveries against such third party, against any liability coverage for such third party or against automobile insurance in the event a claim is made under the uninsured or underinsured motorist coverages. Such right extends to the proceeds of any settlement or judgment; but is limited to the amount of benefits We have paid. You must 1) do nothing to prejudice any right of recovery; 2) execute and deliver any required instruments or papers; and 3) do whatever else is necessary to secure such rights.
>
> If We are precluded from exercising Our Subrogation Right, We may exercise Our Right of Reimbursement.
>
> **Right of Reimbursement**. If benefits are paid under this plan, and any Covered Person recovers against any person or organization by settlement, judgment or otherwise, *We have a right to recover from that Covered Person an amount equal to the amount We have paid*. This includes but is not limited to recoveries against such third party, against any liability coverage for such third party or against automobile insurance in the event a claim is made under the uninsured or underinsured motorist coverages.

(emphases added).

settlement following a car wreck, yet insurer USAA sought enforcement of its contractual subrogation rights under the policy. Like Fortis, USAA urged the Fifth Circuit to reject the "made whole" doctrine by distinguishing *Ortiz* as involving equitable rather than contractual subrogation. The Fifth Circuit, relying on the El Paso Court of Appeals' decision in *Means v. United Fidelity Life Insurance Co.*, refused because it believed that, in Texas, "the same principles govern both equitable and contractual subrogation."

In *Means*, the insureds had challenged the validity of United Fidelity's contractual subrogation right to foreclose on their 200-acre property. The court noted, "Whether we have a purely equitable subrogation or, as here, a purely contractual one where both Mr. and Mrs. Means agreed to the subrogation, the principles are the same, and the rights of United Fidelity Life Insurance Company after the payment were superior to the homestead rights of Mr. and Mrs. Means." Read in context, the court's discussion in *Means* does little more than affirm a subrogee's basic rights, whether they arise via contract or equity. Moreover, *Means* no where addressed the "made whole" doctrine that we first articulated in *Ortiz*, nor could it have, since *Ortiz* was decided three years later. When the El Paso Court of Appeals declared in *Means* that "the principles are the same" in contractual and equitable subrogation, it did so against a legal landscape that did not yet include the "made whole" doctrine. For this reason, *Means* is not particularly instructive, nor is *Oss*, which relies predominantly on *Means*.

Other Texas courts of appeals have addressed the difference between equitable and contractual subrogation. For example, the Austin Court of Appeals in *Lexington Insurance Co. v. Gray* recognized the distinction between "legal" and "conventional" subrogation [775 S.W.2d 679, 683 (Tex.App.—Austin 1989, writ denied)]. The former is governed by equity; the latter by contract. The court (1) observed that Texas courts have given "substance to the distinction," (2) noted the "unusually 'hospitable' treatment that the right of subrogation has historically received in Texas," especially express subrogation agreements, which are given "considerable weight" and are governed by general contract law principles, and (3) cited several cases holding that a subrogee invoking contractual subrogation can "recover without regard to the relative equities of the parties." *Lexington* did not specifically involve the "made whole" doctrine we had adopted a decade earlier in *Ortiz*, but it suggested that this equitable defense would not apply in the face of an express agreement whereby the parties agree in advance that the matter will be governed by contract principles rather than equitable principles. Where the policy's terms govern subrogation, the court added, "there is no reason for the equitable principles usually found in subrogation cases to come into play."

A few years later, however, in *Esparza v. Scott & White Health Plan* [909 S.W.2d 548 (Tex. App.—Austin 1995, writ denied)], the Austin Court of Appeals backed away from this interpretation. The Esparzas settled for an amount that did not make them whole, and Scott and White sought subrogation under an express provision in the parties' insurance contract, citing *Lexington* as holding that the "made whole" doctrine should apply only to equitable subrogation and not to contractual subrogation. The court of appeals disagreed, stating:

> The distinction we drew between legal and conventional subrogation in *Lexington* simply means that under conventional subrogation no balancing of equities is necessary to determine whether the subrogee has a right to recover at all. While an insurance contract providing expressly for subrogation may remove from the realm of equity the question of *whether* the insurer has a right to subrogation, it cannot answer the question of *when* the insurer is actually entitled to subrogation or *how much* it should receive. . . .

. . . To avoid injustice, the equities must still be balanced in deciding what amount, if any, the subrogee is entitled to receive in a given case.

The court adopted the reasoning from *Oss* that a boiler-plate subrogation provision does not automatically negate an insurance policy's fundamental purpose, which is to protect the insured by shifting the risk of loss to the insurer. If anyone is to go unpaid, the court reasoned, it should be the insurance company. The court concluded that contracts "'confirm, but [do] not expand, the equitable subrogation rights of insurers,'" and the equities must still be balanced to achieve justice.

We do not disagree that equitable and contractual subrogation rest upon common principles, but contract rights generally arise from contract language; they do not derive their validity from principles of equity but directly from the parties' agreement. The policy declares the parties' rights and obligations, which are not generally supplanted by court-fashioned equitable rules that might apply, as a default gap-filler, in the absence of a valid contract. If subrogation arises independent of any contract, then an express subrogation agreement would be superfluous and serve only to acknowledge this preexisting right, a position we reject. [29]

Contractual subrogation clauses express the parties' intent that reimbursement should be controlled by agreed contract terms rather than external rules imposed by the courts. The United States Supreme Court addressed this very point in a subrogation case decided shortly after we granted the instant case. In *Sereboff v. Mid Atlantic Medical Services, Inc.* [547 U.S. 356 (2006)], insurer Mid Atlantic was an ERISA plan fiduciary for the Sereboffs. When the Sereboffs were injured in an auto accident, MidAtlantic paid the couple's expenses pursuant to the plan. When the Sereboffs settled the tort claims that arose from the accident, Mid

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[29] Even if the "Subrogation Right" provision merely confirmed the preexisting right of equitable subrogation and nothing more, the policy's separate and broader "Right of Reimbursement" provision affords Fortis an alternative basis to recover from Cantu the medical benefits it paid.

Atlantic filed suit under ERISA to collect the medical expenses it had paid. Mid Atlantic sought reimbursement under an "Acts of Third Parties" provision in the plan. The Sereboffs argued that the equitable defense of the "made whole" doctrine should apply, even though language in the plan document was to the contrary.[34] The Court disagreed, comparing an action under the "Acts of Third Parties" provision to an action to enforce an equitable lien established by agreement. The Court refused to apply the "made whole" doctrine, deeming the Sereboffs' equitable defenses "beside the point" because Mid Atlantic's subrogation claims arose by written agreement. ***

The three varieties of subrogation--equitable, contractual, and statutory--represent three separate and distinct rights that, while related, are independent of each other. Independent, however, does not mean co-equal. We generally adhere to the maxim that "equity follows the law," which requires equitable doctrines to conform to contractual and statutory mandates, not the other way around. Where a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy. This Court has "long recognized a strong public policy in favor of preserving the freedom of contract."[41] And in *Texas Ass'n of Counties County Government Risk Management Pool v. Matagorda County,* we emphasized that insurers are well equipped to evaluate and reduce risk by, for example, "drafting policies to specifically provide for reimbursement."[42] Fortis did exactly that, drafting two separate recovery provisions that replaced equitable rights with specific contractual rights. Neither subrogation nor reibursement clauses violate Texas public policy. As we have stated, "the State's public policy is reflected in its statutes,'"[44] and Texas workers' compensation law specifically embraces an insurer's first-money right of subrogation, thus indicating no blanket legislative disfavor of such provisions. [45] It is indeed difficult to declare something contrary to public policy when state law, both statutory and regulatory, actually suggests

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[34] *Id.* at 1877.

[41] *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 553 (Tex. 2001) (citing *Wood Motor Co. v. Nebel*, 150 Tex. 86, 238 S.W.2d 181, 185 (Tex. 1951)). As a rule, a court should not by judicial fait insert non-existent language into statutes or into parties' agreed-to contracts, or delete existent language from them either. Our confined duty is to construe the contract as is, and holding that equitable considerations trump contrary contract terms would render contractual subrogations a nullity.

[42] 52 S.W.3d 128, 136 (Tex. 2000). As we noted, "the presence of absence of a reimbursement clause in the insurance contract could affect the premium charged," so such provisions cannot be deemed illusory. *Id.* at 131 n.4.

[44] *Town of Flower Mound v. Stafford Estates Ltd. P'ship,* 135 S.W.3d 620, 628 (Tex. 2004)(quoting *Texas Commerce Bank, N.A. v. Grizzle,* 96 S.W.3d 240, 250 (Tex. 2002)).

[45] *See* TEX. LABOR CODE §§ 417.001-004 (authorizing subrogation in Texas workers' compensation law).

approval. In a subrogation case arising under the Labor Code, the Amarillo Court of Appeals distinguished statutory subrogation from equitable and contractual subrogation.[47] The court looked only at the statute's plain language in affirming the trial court's refusal to invoke its equitable powers to deny subrogation. We agree with this modest, text-based approach.

Given this insurance policy's plain language, we are loathe to judicially rewrite the parties' contract by engrafting extra-contractual standards that neither the Legislature nor the Texas Department of Insurance has thus far decided to promulgate. As we have said before, balancing dueling policy concerns is generally for non-judicial bodies, and it remains the "better policy for the contracts of insurance to be changed by the public body charged with their supervision, the State Board of Insurance, or by the Legislature, rather than for this Court" to contravene the express language of insurance contracts with equitable arguments. The contrary, however--replacing equitable protections with specific contract language-is not unknown in Texas law. [50] Parties are thus free to negate the "made whole" doctrine contractually, and to do so before an event occurs that triggers medical benefits under the policy.

Leading insurance law treatises likewise recognize that specific policy terms can override equitable principles and that many jurisdictions, though not all, apply the "made whole" doctrine only in the absence of contrary reimbursement language in the contract. We agree with those courts holding that contract-based subrogation rights should be governed by the parties' express agreement and not invalidated by equitable considerations that might control by default in the absence of an agreement. [53]

B. Subrogation Under Cantu's Insurance Contract With Fortis

We turn now to the specific language of the policy in issue, which defines the

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[47] *Tex. Workers' Comp. Ins. Fund v. Knight,* 61 S.W.3d 91, 93 (Tex. App.--Amarillo 2001, no pet.).

[50] *See, e.g., Zapata v. Torres*, 464 S.W.2d 926, 930 (Tex. Civ. App.-- Dallas 1971, no writ) (stating it is "reasonable to suppose" that the parties' express agreement was intended to replace implied equitable rights) (citations omitted).

[53] Cantu attempts to avoid the policy's express language by arguing that insurance contracts "are contracts of adhesion in which the insured has little, if any, negotiating room," and that contractual abrogation of the "made whole" doctrine is thus unconscionable and unenforceable. Even taking as true the contention that insurance contracts are contracts of adhesion that reflect unequal bargaining power," adhesion contracts are not automatically unconscionable or void." *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex. 1999). Nor is it per se unconscionable that an insurer would seek to reduce its risk and boost its solvency by including a subrogation and/or reimbursement clause. In any event, Cantu has produced no evidence of duress or unconscionability.

parties' rights and obligations. It contains a section called "Recovery," which includes a "Subrogation Right" provision and a separate (and broader) "Right of Reimbursement" provision. The former establishes a right of subrogation: "Upon payment of benefits, We [Fortis] will be subrogated to *all* rights of recovery a Covered Person [Cantu] may have against *any* person or organization." The provision continues: "Such right extends to the proceeds of *any* settlement or judgment; but is limited to the amount of benefits We have paid." Fortis thus retained an unfettered right to recover the proceeds from the settlement of the underlying suit, the only limitation being the *amount* of recovery--what Fortis had paid under the contract. Nowhere does this provision suggest that Cantu must first be "made whole" for Fortis to recover. This provision does not use the modifier "first money," but its meaning is not imprecise or ambiguous. The contract's specific language controls Fortis's right to subrogation, and the equitable defense of the "made whole" doctrine must give way.

Accordingly, we hold that Fortis is contractually entitled to recover from the $ 1.445 million settlement the total amount of benefits it paid to Cantu.[56] ***

Longshore & Harbor Workers' Compensation Act

Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980)

Justice Marshall delivered the opinion of the Court.

Under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901 *et seq.*, a longshoreman is entitled to receive compensation payments from his stevedore for disability or death resulting from an injury occurring on the navigable waters of the United States. If the longshoreman believes that his injuries warrant a recovery in excess of the compensation provided under the Act, he may also bring a negligence action against the owner of the vessel on which the injury occurred. The longshoreman's recovery from the shipowner is subject to the stevedore's lien in the amount of the compensation payment. The question for decision is whether the stevedore's lien must be reduced by a proportionate share of the longshoreman's expenses in obtaining recovery from the shipowner, or whether the stevedore is instead entitled to be reimbursed for the full amount of the compensation payment.

I

Petitioner William E. Bloomer, Jr., was injured during the course of his employment on board the vessel S. S. *Pacific Breeze*. He received $ 17,152.83 in

[56] Because we enforce the contract's "all rights of recovery" subrogation provision, we need not reach the separate "Right of Reimbursement" provision, which by its terms only applies if Fortis is denied subrogation. Nor need we consider whether the trial court erred in computing past and future medical expenses in relation to Cantu's total damages.

compensation from respondent Liberty Mutual Insurance Co., the designated carrier of workers' compensation for petitioner's employer, Connecticut Terminal Co. Thereafter petitioner brought this diversity action against the owner of the vessel. He alleged that the shipowner had negligently created hazardous conditions on board the vessel, that the ship's deck was slippery and dangerous, and that as a result he had fallen and incurred severe injuries.

During settlement negotiations, petitioner's counsel gave respondent notice of the pending action and requested it to reduce its lien by a share of the costs of recovery. That share would be computed as an amount bearing the same ratio to the total cost of recovery as the compensation payments bear to the total recovery. Respondent refused petitioner's request, asserted its right to full reimbursement, and successfully moved to intervene in the action. Soon thereafter petitioner settled with the shipowner for $ 60,000. He moved for summary judgment directing that respondent's lien on the recovery be reduced by an amount representing its proportionate share of the expenses of the suit against the shipowner. Petitioner claimed that since the recovery from the shipowner would benefit respondent, equity required that respondent bear a portion of the expenses of obtaining that recovery.

The District Court denied petitioner's motion,[2] and the United States Court of

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[2] The District Court's distribution was as follows:

Recovery

$ 60,000.00

less expenses

(202.80)

balance for distribution

59,797.20

less attorney's fee of one-third

(19,932.40)

balance

39,864.80

less lien of respondent

(17,152.83)

net to petitioner

22,711.97***

Petitioner sought to have the fund distributed in the following manner:

Recovery

$ 60,000.00

less expenses

(202.80)

Appeals for the Second Circuit affirmed. *Bloomer v. Tong*, 586 F.2d 908 (1978). The Court of Appeals concluded that a stevedore should not be required to pay a share of the longshoreman's legal expenses in a suit brought against the shipowner. We granted certiorari to resolve this recurring question, on which the Courts of Appeals have been divided. 441 U.S. 942 (1979). We affirm.

II

Petitioner's argument amounts to an appeal to the equitable principle that when a third person benefits from litigation instituted by another, that person may be required to bear a portion of the expenses of suit. He invokes cases establishing that in certain circumstances, courts should exercise their equitable powers to charge beneficiaries with a share of the expenses of obtaining a "common fund" through litigation. . . . .When measured against the language, structure, and history of the Longshoremen's and Harbor Workers' Compensation Act, however, petitioner's argument must fail.

The Act provides a comprehensive scheme governing an injured longshoreman's rights against the stevedore and shipowner. The longshoreman is not required to make an election between the receipt of compensation and a damages action against a third person, 33 U.S.C. § 933 (a). After receiving a compensation award from the stevedore, the longshoreman is given six months within which to bring suit against the third party. 33 U. S. C. § 933 (b). If he fails to seek relief within that period, the acceptance of the compensation award operates as an assignment to the stevedore of the longshoreman's rights against the third party. The Act makes explicit provision for the distribution of any amount obtained by the stevedore in a suit brought pursuant to that assignment. The stevedore is entitled to

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balance for distribution
59,797.20
less attorney's fee of one-third
(19,932.40)
balance
39,864.80
lien of respondent
17,152.83
less proportionate share of fees and
expenses (.3355866 X $ 17,152.83)
(5,756.26)
11,396.57
(11,396.57)
net to petitioner
28,468.23

reimbursement of all compensation benefits paid the employee, and its costs, including attorney's fees. Of the remainder, four-fifths is distributed to the longshoreman, and one-fifth "shall belong to the employer." 33 U.S.C. § 933 (e).[4]

The Act does not expressly provide for the distribution of amounts recovered in a suit brought by the longshoreman. The unambiguous provision that the stevedore shall be reimbursed for all of his legal expenses if he obtains the recovery does, however, speak with considerable force against requiring him to bear a part of the longshoreman's costs when the longshoreman recovers on his own. There is no reason to believe that Congress intended a different distribution of the expenses of suit merely because the longshoreman has brought the action. Petitioner asserts, however, that in the absence of an explicit statutory resolution, the recovery against the shipowner represents a common fund for whose creation the stevedore may properly be charged. To evaluate this argument we turn to the history of the relevant provisions of the Act.

III

As originally enacted in 1927, the Act required a longshoreman to choose between the receipt of a compensation award from his employer and a damages suit against the third party. Act of Mar. 4, 1927, § 33, 44 Stat. 1440. If the longshoreman elected to receive compensation, his right of action was automatically assigned to his employer. In 1938, however, Congress provided that in cases in which compensation was not made pursuant to an award by a deputy commissioner (appointed by the Secretary of Labor, *see* 33 U.S.C. § 940), the longshoreman would not be required to choose between the compensation award and an action for damages. Under the 1938 amendments, no election was required unless

[4] That section provides:

> "Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> "(1) The employer shall retain an amount equal to --
>
> "(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);
>
> "(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;
>
> "(C) all amounts paid as compensation;
>
> "(D) the present value of all amounts thereafter payable as compensation, . . . and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title . . . ; and
>
> "(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer."

compensation was paid pursuant to such an award. See Act of June 25, 1938, ch. 685, §§ 12, 13, 52 Stat. 1168.

Like the present version, the Act as amended in 1938 did not make provision for the distribution of amounts recovered from the third party in a suit brought by the longshoreman. The lower courts, however, interpreted the Act to require that the stevedore be reimbursed for his compensation payment out of the sum recovered from the third party. Congress was understood not to contemplate double recovery on the longshoreman's part, and the stevedore did not, therefore, lose the right to reimbursement for its compensation payment. . . .

Under the 1938 legislation the lower courts also decided that the stevedore should not be required to bear a proportionate share of the longshoreman's legal expenses. To force the stevedore to do so, it was observed, would guarantee the longshoreman a total recovery in excess of the amount he received in his third-party action. Solely by virtue of the compensation scheme, then, the longshoreman would receive a greater sum than would be possible in an ordinary suit for damages. At the same time the stevedore would be prevented from recovering the full amount of its compensation payment. The courts concluded that these results would violate legislative purposes made manifest by the express provision that the employer may recover its legal expenses from the fund created by its own suit against the third party. See *Davis v. United States Lines Co.,* 253 F.2d 262 (CA3 1958); *Oleszczuk v. Calmar S. S. Corp.*, 163 F.Supp. 370 (Md. 1958); *Fontana v. Pennsylvania R. Co., supra*, at 463-464.***

In 1972, Congress enacted more extensive Amendments to the Act, see *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262 (1979), and it is these Amendments that according to petitioner, justify a change in the rule with respect to attorney's fees. Concerned that compensation benefits had been far too low, Congress altered the benefit structure of the Act so as to increase both maximum and minimum benefits substantially. These increases were linked to two provisions designed to reduce litigation and to ensure that stevedores would have sufficient funds to pay the additional compensation. First, Congress abolished the unseaworthiness remedy for longshoremen, recognized in *Seas Shipping Co*. v. *Sieracki*, 328 U.S. 85 (1946), and limited the longshoreman's action against the shipowner to one based on negligence. Second, Congress eliminated the third-party action by the shipowner against the stevedore, recognized in *Ryan Stevedoring Co*. v. *Pan-Atlantic S. S. Corp*., 350 U.S. 124 (1956). In that case the Court held that a shipowner could obtain damages from the stevedore when it showed that the stevedore had breached its warranty to the shipowner of workmanlike service. As the House Report notes, the consequence was that "a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel," with the result "that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs." H. R. Rep. No. 92-1441,

p. 5 (1972); see S. Rep. No. 92-1125, p. 9 (1972). Indeed, there was considerable testimony during the hearings that third-party actions had resulted in congested courts and that the primary beneficiaries had been lawyers, not injured longshoremen. The Senate Report stated that "[the] social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers." *Id.*, at 4. The elimination of the shipowner's cause of action against the stevedore was intended to reduce litigation, immunize stevedores and their insurers from liability in third-party actions, and assure conservation of stevedore resources for compensation awards to longshoremen.

Witnesses also brought to the attention of Congress the longstanding rule that an employer could recover the full amount of its compensation award from the longshoreman's recovery against the shipowner. Congress did not, however, enact any legislation concerning that rule.

Petitioner argues that the 1972 Amendments so altered the equities as to compel a holding that a stevedore must pay a proportionate share of the longshoreman's expenses in a third-party action brought againstthe shipowner. He observes that before the Amendments, the longshoreman and the stevedore had adverse interests in the third-party action: if the longshoreman were successful in that suit, the shipowner frequently would attempt to require the stevedore to make payment of amounts due the longshoreman. With the abolition of the shipowner's cause of action, the stevedore and the longshoreman had a common interest in the longshoreman's recovery against the shipowner. Petitioner concludes that the common-fund doctrine should be available to permit the employee to recover from the stevedore a proportionate share of the expenses of suit.

In light of the Act and its legislative history, however, we are unable to accept petitioner's argument. It is of course true that the stevedore and longshoreman now have a common interest in the longshoreman's recovery against the shipowner, but it does not follow that the stevedore should be required to pay a share of the longshoreman's legal expenses. Congress has not modified 33 U.S.C. § 933 (e), providing that the stevedore is not required to pay its legal expenses in cases in which it has recovered against the shipowner pursuant to an assignment from the longshoreman. Moreover, in 1972 Congress was informed of, but did not alter, the uniform rule that the longshoreman's legal fees would be paid by the longshoreman alone. In these circumstances we are reluctant to take steps to change that rule on our own. ***

Finally, we return to the original basis for the rule that a stevedore would not be required to pay a portion of the longshoremen's expenses in his suit against the shipowner. The compensation award was intended to be an immediate and readily available payment to the injured longshoreman. By receiving this payment, the longshoreman was not foreclosed from pursuing an action against the shipowner.

At the same time, he was not entitled to double recovery, and the stevedore would be reimbursed in full for his compensation payment. The result we reach enables the longshoreman to recover an amount no less than that which he would receive through an ordinary negligence action, and also immunizes the stevedore from liability in connection with the third-party action. If we were to accept petitioner's view, an injured longshoreman would ultimately receive a sum equal to the full amount of his recovery against the shipowner and, in addition, a supplement consisting of the stevedore's contribution to the longshoreman's legal expenses. This supplement would represent a windfall in excess of the amount the longshoreman received as compensation for the injuries he has suffered. The stevedore would not obtain reimbursement for the full amount of its compensation payment, but would instead have that amount reduced by a possibly substantial legal fee. This result would be contrary to the allocation of attorney's fees expressly provided by Congress for suits brought by the stevedore pursuant to an assignment from the longshoreman. In these circumstances we do not believe that the Act and its legislative history can fairly be read to support the distribution proposed by petitioner. ***

Peters v. North River Insurance Co., **764 F.2d 306 (5th Cir. 1985)**

Randall, Circuit Judge:

This appeal presents the question whether an injured worker covered by the Longshoremen's and Harbor Workers' Compensation Act and a third-party tortfeasor may settle their dispute independently of the employer's subrogation claim for reimbursement of the amount of compensation benefits paid to the worker pursuant to the Act. We hold that, while the worker and the third party may allocate responsibility for reimbursement between themselves, settlement of the worker's claim necessarily settles the employer's subrogation claim and entitles the employer to reimbursement to the extent of the funds that the third party has agreed to pay in settlement. Accordingly, the judgment of the district court is reversed, and the case is remanded with instructions.

I.

BACKGROUND

On February 17, 1982, Terrence Peters (Peters) suffered an on-the-job eye injury when a spray gun that he was cleaning escaped his grasp and struck him in the face. At the time of the accident, Peters worked for Bergeron Shipyards, Inc. (Bergeron) at its shipyard in Plaquemines Parish, Louisiana. Following the accident, Bergeron's insurance carrier, North River Insurance Company (North River), voluntarily began, without a formal compensation award, to pay Peters benefits to which he was entitled under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or the Act), 33 U.S.C. §§ 901 *et seq*. North River ultimately paid approximately $30,000 in medical bills and compensation payments.

Approximately one year after the accident, Peters commenced this diversity lawsuit against Speeflo Manufacturing Corporation (Speeflo), the manufacturer of the spray gun, in which he asserts negligence and product liability claims under Louisiana law. North River and Bergeron intervened and alleged that, to the extent of compensation benefits paid to Peters pursuant to the Act, they are subrogated to his rights against third parties. The complaint in intervention alleges that the subrogation claim "take[s] precedence over all of the claims of Terrence Peters" and should be paid first out of any recovery obtained by Peters from Speeflo.

Peters and Speeflo settled their dispute on the day before the scheduled trial date. Intervenors, however, did not participate in the settlement negotiations and did not reach a settlement agreement with either Peters or Speeflo. The settlement agreement between Peters and Speeflo was not written down. The agreement's terms came to light, however, during proceedings on Peters' motion to enforce the settlement. The district court received evidence of the negotiations and found that Peters and Speeflo settled the case on the following terms: "Plaintiff, [Peters,] was to receive $60,000, and in addition defendant, [Speeflo,] was obligated either to settle or litigate the intervenors' claim [for reimbursement of compensation benefits paid to Peters]." ***

Following the settlement, Intervenors moved for recognition that their right to recoup the compensation benefits paid to Peters constitutes a lien that attached automatically as soon as Speeflo and Peters agreed to the compromise. Intervenors did not specify whether the lien should be satisfied from the $60,000 paid to Peters or from funds retained by Speeflo. The thrust of their position was apparently that an agreement between the settlors to allocate responsibility for the compensation lien does not change the rule that the lien attaches to a judgment or settlement fund *automatically* and that the employer or its compensation carrier is entitled to recover the compensation benefits paid without independently proving the liability of the third party against whom the worker has asserted a cause of action.

The district court denied Intervenors' request for recognition of their compensation lien and set the intervention for trial. Intervenors moved for reconsideration of that ruling and, in the alternative, for summary judgment. The district court acknowledged that Intervenors' position would be correct if Peters and Speeflo had settled the case without mentioning the compensation lien. The district court denied the motions, however, on the theory that, because the settlement agreement between Peters and Speeflo expressly does not compromise the reimbursement claim, Intervenors must either themselves settle with Speeflo or must establish their right to reimbursement at trial by "proving the alleged tortfeasor's negligence." ***

The intervention was tried on April 11, 1984. Intervenors persisted in the view that, because of settlement for an amount in excess of the compensation benefits paid to Peters, they were entitled to automatic reimbursement in full without having to prove Speeflo's liability for Peters' injuries. Accordingly, Intervenors simply presented evidence of the amount of compensation benefits that they had paid on account of Peters' injuries and prayed for judgment in that amount against either Peters or Speeflo. The district court, on the other hand, persisted in the view that, because Peters and Speeflo expressly excluded the intervention from the scope of the settlement, Intervenors could not recover unless they established Speeflo's liability for Peters' injuries. Accordingly, the district court dismissed the intervention, and this appeal followed. The only issue on appeal is whether a worker and a third-party tortfeasor may settle their dispute independently of the employer's compensation lien. ***

2. *Distribution of Recovery when Third-Party Claim is Prosecuted by the Worker*

If, because a statutory assignment has not occurred or because an assigned claim has reverted to the worker, the worker himself prosecutes the third-party claim and obtains a judgment, the LHWCA provides that the employer's liability for compensation under the Act shall be reduced by the worker's net recovery (i.e., "the actual amount recovered less the expenses reasonably incurred . . . in respect to such proceedings (including reasonable attorneys' fees)"). Although an employer to whom a worker's claim has been assigned has exclusive control over settlement decisions, *see* 33 U.S.C. § 933(d), the Act does not afford the same degree of control to a worker asserting an unassigned claim. The Act makes no provision for a situation in which the worker desires to settle the claim for *more* than the total compensation owed by the employer; presumably, the worker is free to do so and, under section 33(f), 33 U.S.C. § 933(f), the employer's liability for any unpaid benefits would be extinguished. If, on the other hand, the worker desires to settle the claim for *less* than the total compensation owed by the employer, the worker must obtain the written approval of both the employer and its insurance carrier. *See id.* § 933(g)(1). If such approval is obtained, the net amount of the settlement reduces the employer's liability to the same extent that a judgment would. *Id.* If such approval is not obtained, "all rights to compensation and medical benefits under [the LHWCA] shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." *Id.* § 933(g)(2).

These provisions of the Act only benefit the employer if, at the time the worker obtains a judgment or settlement, the employer has not fully discharged its compensation obligation. The LHWCA does not expressly provide for reimbursement from a judgment or settlement obtained by the worker from a third party of compensation benefits that an employer has already paid. Thus, if the employer has satisfied its entire compensation obligation or if the settlement or judgment exceeds the amount of the obligation still outstanding, the Act itself does not provide the employer with a means of recouping from the worker's recovery the compensation benefits it has already paid. *See Bloomer v. Liberty Mutual*

Insurance Co., 445 U.S. 74, 79, 100 S. Ct. 925, 928, 63 L. Ed. 2d 215 (1980) ("the present version [of] the Act . . .[does] not make provision for the distribution of amounts recovered from the third party in a suit brought by the longshoreman"). The courts, at least since *the Etna*, 138 F.2d 37 (3d Cir. 1943), have uniformly held, however, that the employer has a subrogation right to be reimbursed from the worker's net recovery from a third party for the full amount of compensation benefits already paid. *See, e.g., Allen v. Texaco, Inc.,* 510 F.2d 977, 979-80 (5th Cir. 1975). Moreover, the employer may intervene in the worker's suit and assert a lien on the worker's recovery to the extent of the compensation benefits it has paid. *Id*. Although Congress has not explicitly recognized the right to reimbursement in the statute, the legislative history of various amendments to the LHWCA makes it clear beyond question that Congress is aware that the courts have recognized a compensation lien on third-party recoveries and, indeed, intends for the lien to "remain[] inviolable, consistent with *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 [100 S. Ct. 925, 63 L. Ed. 2d 215] (1980)." H.R.Rep. No. 1027, 98th Cong., 2d Sess. 36, *reprinted in* 1984 U.S. Code Cong. & Ad. News 2734, 2771, 2786. *Bloomer* recognizes that the compensation lien attaches to funds obtained by settlement or by judgment. Moreover, the lien recognized in *Bloomer* does not depend upon proof that the third party breached a duty to the *employer* or upon an agreement between the *employer* and the third party to settle a dispute between themselves. Rather, the right to reimbursement attaches to the proceeds of a judgment based upon the third party's breach of duty to the *worker* or to the proceeds of a compromise agreement between the *worker* and the third party, at least where the agreement is silent with respect to the employer's right to reimbursement. *Bloomer* also establishes that the employer is entitled to recoup from a third-party recovery the entire amount of the benefits paid without a reduction for its proportionate share of the litigation expenses and attorneys' fees incurred by the worker.***

III.

THE DISTRICT COURT'S OPINION

The fundamental premise of the district court's decision is that, when a worker has been injured by a third party and the employer has paid compensation under the LHWCA, two separate claims against the alleged tortfeasor result: "(1) a claim for reimbursement on behalf of the employer . . . and (2) a claim for tortious injuring on behalf of the employee." According to the district court, "either claim can be settled by the respective claimant at any figure deemed by him to be advantageous, provided the other claim is unaffected thereby." 586 F. Supp. at 1395.

The district court recognized that, if the settlement between Speeflo and Peters had not mentioned the compensation lien, Intervenors would have been automatically entitled to reimbursement without having to prove Speeflo's liability. *See Bloomer*, 445 U.S. at 74, 100 S. Ct. at 925. The court identified several grounds for rejecting that outcome, however, when a settlement agreement expressly excludes the compensation lien from its scope. First, the court noted that the employer's right to reimbursement of compensation benefits exists to prevent the injured worker from obtaining a double recovery -- common law damages from a third party in addition to compensation benefits, which are a statutory substitute for those same common law damages. Because of the terms of this specific settlement agreement, the court found no danger of double recovery in this case: "the money paid by the defendant tortfeasor to the plaintiff employee did not include an amount for benefits already paid by intervenors." 586 F. Supp. at 1392. Second, the district court found that Intervenors' position would effectively give the employer control of the settlement process in derogation of the policy that "settlements are favored in the law." *Id.* at 1393. Finally, the district court concluded that, because the settlement expressly reserved Intervenors' claims against Speeflo, "intervenors have no justifiable complaint that the settlement at issue prejudiced them in any way." *Id.* at 1395. The court reached this conclusion because Intervenors are in "exactly the position" they would have occupied if Peters had chosen not to sue Speeflo: "Instead of a right of intervention in their employee's suit, the sole remedy of the employer and its insurer would have been a direct suit against the third party, with success dependent on proof of negligence of that third party." *Id.* at 1395. ***

Peters and Speeflo . . . have not directed our attention to any authority under the LHWCA that adopts their position, and the district court cited no such authority. We note at the outset, however, that the position is not entirely novel; there are state workers' compensation acts under which, although an employer has a subrogation lien, the worker and a third party have been allowed to "settle around" the employer's right to reimbursement. *See generally* 2A A. Larson, The Law of Workmen's Compensation § 74.17(g) (1983). In the jurisdictions that follow the approach taken by the district court, the compensation acts have been construed to allow the splitting of the worker's third-party cause of action into two claims for settlement purposes. *See, e.g., St. Paul Fire & Marine Insurance Co. v. Wood,* 242 Ark. 879, 416 S.W.2d 322, 324 (1967). We are convinced, however, by the structure of the LHWCA and prior interpretations of it that, although the employer may have independent rights against third parties wholly apart from its subrogation rights, those subrogation rights do not constitute a claim separate from the worker's third-party cause of action. Because the district court proceeded from the opposite premise, its decision is fundamentally flawed.

As our description in part II, *supra*, of the LHWCA's compensation scheme makes clear, two distinct third-party causes of action may well arise when a worker covered by the Act is injured through the fault of someone other than his employer: (1) the *worker's* cause of action for injury to himself, *see* 33 U.S.C. § 933(a), and (2) the *employer's* independent cause of action for injury to itself, *see Burnside*, 394 U.S. at 418, 89 S. Ct. at 1152. The district court held that the first of these -- the worker's third-party cause of action -- is, in reality, two distinct causes of action: (1) the *employer's* cause of action for breach of duty to the worker, which presumably exists to the extent of compensation benefits paid by the employer, and (2) the *worker's* cause of action for breach of the same duty, which presumably exists to the extent of any recovery that exceeds the amount of compensation benefits paid to the employer. Because they are distinct claims, the district court concluded that they may be settled separately.

The district court's analysis flies in the face of the structure of the Act and prior interpretations of it. To be sure, the employer has an interest in the worker's cause of action and, in certain circumstances, may itself prosecute the claim. There is nothing in the Act or in the decisions construing the employer's subrogation interest in the worker's third-party recovery, however, to indicate that, in order to allow the employer to recoup compensation payments, Congress intended to split the worker's cause of action into two separate claims. In fact, it is already settled, either by express provisions of the Act or by prior interpretations by which we are bound, that the worker's cause of action should be treated as a single, unitary cause of action for almost every purpose: (1) commencing prosecution of the lawsuit; (2) the availability of defenses to the cause of action; (3) settlement of the cause of action, at least where the employer's interest lies in obtaining a credit for compensation liability that has not yet accrued; (4) distribution of the proceeds of a judgment obtained by the worker from a third party; and (5) payment of the costs incurred in asserting the cause of action. The narrow exception carved out by the district court -- that, for purposes of settling a suit commenced by the worker, when the employer's interest lies in reimbursement of compensation benefits already paid, the cause of action may be split in two -- is entirely inconsistent with the rest of the LHWCA's compensation scheme.

The "mandatory and unequivocal" language, *Rodriguez*, 451 U.S. at 602, 101 S. Ct. at 1950, of section 33(b) of the Act, 33 U.S.C. § 933(b), leaves little room for doubt: for purposes of prosecuting the claim, the worker's cause of action, although the employer has an interest in the outcome, remains a single, unitary cause of action which, depending on the circumstances, may be asserted by either the worker or the employer, but not by both. Congress, of course, could have, as some state legislatures have done, given the worker and the employer concurrent rights to assert the worker's third-party cause of action or made the assignment of the worker's cause of action to the employer a partial one. *See* 2A A. Larson, The Law of Workmen's Compensation §§ 74.13, 75.42 (1983). In fact, some courts have construed the LHWCA in this manner. *See, e.g., Potomac Electric Power Company v. Wynn*, 120 U.S. App. D.C. 13, 343 F.2d 295, 298 (D.C. Cir. 1964) ("the employer may bring suit against a third party whenever it is evident that the employer-assignee, for whatever reason, does not intend to bring suit"). In *Rodriguez*, however, the Supreme Court rejected that construction of the Act. Rather, the Court held that, prior to the statutory assignment of the worker's cause of action, "exclusive control of the action" remains with the worker; after the statutory assignment, "exclusive control" is vested in the employer. *Rodriguez*, 451 U.S. at 600-01, 101 S. Ct. at 1949. In *Rodriguez*, the Court noted that the statutory assignment contemplates the transfer of "all rights" of the worker. "These words preclude the possibility that the assignment is only a partial one that does not entirely divest the employee of his right to sue, or that the employee and the employer possess concurrent rights to sue in the post-assignment period." *Id.* at 603, 101 S. Ct. at 1950. Moreover, in *Pallas Shipping*, 103 S. Ct. at 1991, the Court held that the statutory assignment does not occur until a formal compensation order has been entered following administrative proceedings. *Id.* at 1996. Until that time, the employer is powerless to assert the worker's cause of action. Congress has, therefore, through the assignment provisions of the Act, demonstrated an intent to accomplish subrogation without splitting the worker's cause of action. The fact that the cause of action cannot be split at its inception, to us, is strong evidence that we should not allow it to be split at the settlement stage.

Moreover, it is also clear that, for purposes of determining what defenses are available to a third-party claim, the worker's cause of action cannot be viewed as two distinct claims. The availability of defenses to a worker's third-party suit "turns most frequently on the underlying issue of the extent to which the subrogee's action is deemed to be derivative from and identified with the employer's cause of action." 2A A. Larson, The Law of Workmen's Compensation § 75.10 (1983). When the subrogated employer and the worker are viewed as having a single cause of action, the employer's concurrent negligence is no defense to the assertion of that cause of action. *Id.* The Supreme Court has held under the LHWCA that, when the worker brings the suit, the employer's concurrent negligence is not a defense that is available to the third-party tortfeasor. *See Edmonds v. Compagnie Transatlantique*, 443 U.S. 256, 260, 99 S. Ct. 2753, 2756, 61 L. Ed. 2d 521 (1979); *see also Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884 (5th Cir. 1978), *cert. denied*, 443 U.S. 915, 99 S. Ct. 3106, 61 L. Ed. 2d 878 (1979). Moreover, in *Albert v. Paulo*, 552 F.2d 1139, 1140 (5th Cir. 1977), we held, in circumstances identical to those in this case, that the employer's concurrent negligence will not preclude the employer from asserting its compensation lien on the proceeds of a settlement between the worker and a third party. The theoretical underpinning of these decisions disappears if the worker's third-party cause of action is, in reality, two distinct claims -- one belonging to the worker and the other belonging to the employer. ***

Perhaps the strongest indication that the district court's view is unsound comes from the Act itself. As noted in part II, *supra*, the LHWCA provides, in effect, that a worker who has asserted an unassigned third-party claim cannot settle that claim independently of the worker's right to a credit towards compensation benefits that will accrue in the future. When the worker brings a third-party suit, the Act expressly provides that the employer shall receive a credit, to the extent of the worker's recovery, on benefits that will accrue in the future. The worker forfeits his right to future benefits, however, if he settles the claim without the written consent of his employer and its insurance carrier. In effect, therefore, the Act recognizes that, for purposes of determining the employer's liability for future benefits, the worker's third-party cause of action is not, as viewed by the district court, two separate claims that may be settled independently of one another. If the worker attempts to settle independently, he forfeits his right to future compensation under the Act. Given this statutory authority with respect to future benefits, it would indeed be anomalous, in our view, to consider the worker's third-party cause of action as two separate claims for settlement purposes simply because, at the time of settlement, the employer has already satisfied its compensation obligations.

For all of these reasons, we are convinced that the district court's analysis is unsound. In short, we think that the structure and history of the Act make clear that the worker's third-party cause of action cannot be viewed as two separate claims. ***

As the preceding analysis demonstrates, the district court's conclusion that the worker's third-party cause of action is a distinct claim from the employer's right to reimbursement is simply wrong. The effect of the district court's decision, therefore, is to allow the worker and the third party, by simple agreement, to defeat the compensation lien. The district court justifies the result because, in its view, the employer is not prejudiced thereby and because the double recovery rationale for the compensation lien no longer exists when the third party agrees to pay the compensation lien.

We have concluded that a worker and a third-party tortfeasor may not settle their dispute independently of the employer's compensation lien. The only question remaining in this case is whether the compensation lien should be satisfied from the $60,000 paid by Speeflo to Peters or from funds retained by Speeflo. Counsel for Speeflo conceded at oral argument that, under the terms of the agreement in this case, Speeflo is obligated to pay the compensation lien even if, in the event we reverse the district court's decision, it is determined that Intervenors are entitled to recoup the entire amount of their lien without proving Speeflo's liability. We see no reason why a third-party tortfeasor and a worker cannot agree among themselves that, rather than paying the amount of the lien to the worker, the third party will pay it directly to the employer. Accordingly, on remand, judgment should be entered for Intervenors against Speeflo in the full amount of the compensation benefits that they have paid to Peters . . . .

Ochoa v. Employers National Insurance Co., 754 F.2d 1196 (5th Cir. 1985)

Reavley, Circuit Judge:

Our prior judgment in this case, *Ochoa v. Employers National Insurance*, 724 F.2d 1171 (5th Cir. 1984), has been vacated by the Supreme Court, and the case remanded "for further consideration in light of Pub. L. 98-426." *Employers National Insurance v. Ochoa,* 469 U.S. 1082, 105 S. Ct. 583, 83 L. Ed. 2d 694 (1984).

In our prior decision we made two holdings to apply in the case where the recovery from a negligent shipowner is insufficient to reimburse the stevedore employer or compensation carrier and to pay the injured longshoreman's attorney a reasonable fee.

First, the costs of litigation include reasonable attorneys' fees as assessed by the district court. Those costs are to be subtracted from the gross recovery, leaving the net for satisfaction of the compensation carrier's lien. In the different case where all of these costs and the full compensation lien could be satisfied out of the recovery from the tortfeasor, the court may not shift to the compensation carrier any part of the longshoreman's attorney fee. *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 100 S. Ct. 925, 63 L. Ed. 2d 215 (1980).

Second, after allocating the net recovery to the compensation carrier, the district court should then review the fairness of the positions of the injured longshoreman and his attorney and may make an equitable adjustment of the recovery award between them.

Following our decision Congress enacted the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. 98 Stat. 1639. Section 21(c) of this Act amends the statute to read:

> If the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this section the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the *net* amount recovered against such third person. *Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).*

33 U.S.C. § 933(f) (amendments emphasized).

Section 28 of the 1984 Act made the amendment effective on September 28, 1984 as to claims then pending. We believe the amended law is applicable, prescribing the extent of the compensation the employer is required to pay or recoup while that very issue is the subject of the pending appeal. *See Crowe v. Lucas*, 595 F.2d 985, 993-94 (5th Cir.1979); *Turner v. United States*, 410 F.2d 837, 842 (5th Cir. 1969). However, we believe the same disposition of the present case is proper under either the 1972 or the 1984 Acts.

The amended statute now expressly directs a disposition of the compensation lien in accord with the disposition of our first holding in the prior decision. In light of the Supreme Court's writing in *Bloomer* we have read the 1972 statute to this effect. Now the statute is explicit.

Furthermore, we find the following paragraphs in the Joint Explanatory Statement of the Committee of Conference on the 1984 amendment:

> The Senate bill and the House amendment both alter the priority for distribution of proceeds in a recovery by judgment or settlement where the employee brings an action against a third party. The Senate bill gives priority to the employer's lien on compensation and medical benefits paid, with the employee retaining any excess first for payment of attorney fees and costs. In a recovery by judgment only, the House amendment guarantees the employee 15 percent of any recovery remaining after reduction for attorney fees and costs, before exercise by the employer of its subrogation lien rights.

* * *

> The Conference substitute establishes the following priority for distribution of proceeds in a recovery by an employee: First, the litigation expenses, including reasonable attorney fees, are satisfied. This may require that the court exercise its discretion to adjust the attorney fee to assure equity for both the employee and his attorney. The compensation lien on the net recovery remains inviolable, consistent with *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980).

H. R. Rep. No. 1027, 98th Cong., 2d Sess. 36, *reprinted in* 1984 U.S. Code Cong. & Ad. News 2734, 2771, 2786.

The committee says that allocation to the compensation lien from the net recovery (after subtraction of attorney fees and other costs) is consistent with *Bloomer*, as we decided in our prior opinion. It also states an accord with our second holding, permitting an adjustment of the attorney fee to assure equity between the employee and the attorney.

Further explanation of the legislative intent is found in the following statement made by Senator Hatch, a sponsor of the senate bill and a manager on the part of the senate in the committee of conference, prior to the senate's adoption of the conference committee report:

> THIRD PARTY ACTIONS BY EMPLOYEES
>
> The Senate bill amended section 33(f) to establish that compensation paid by an employer shall be a first lien on any proceeds obtained by an employee in a tort suit against a third party. Implicit in this proposal was that the legal expenses of the employee, including attorney fees, would be totally subordinated to the compensation lien. The House amendment essentially reversed the order of priority. It would have permitted the employee to pay his attorney fees and litigation expenses first, before satisfaction of the compensation lien.

> This would be important where an employer's lien equaled or exceeded the amount recovered in the third party action. The House committee was concerned that an employee might conceivably be worse financially after incurring the expense of a suit than if he never had brought an action at all. In addition, the House committee believed that the employee was entitled to shelter a portion of recovery [15 percent] from any compensation lien. That committee viewed the 15 percent set-aside as comparable to the employer's right under section 33(e)(2) to retain 20 percent of any recovery in excess of litigation expense and compensation liability.
>
> The conference agreement adopts a middle ground. First, it rejects the 15 percent set-aside in the House amendment and modifies current law by eliminating the employer's 20-percent set-aside in section 33(e)(2). Second, it requires that the employee's litigation expenses including reasonable attorney fees, be paid out of any recovery prior to the satisfaction of the compensation lien. It should be stressed though how this rule has special application in the cases where the aggregate of the litigation expenses, the employee's legal fees, and the compensation lien leave the employee with little, if any, recovery. In such circumstances, the conferees found merit in the approach articulated by the court in *Ochoa v. Employers National Insurance Company*, 724 F.2d 1171 (5th Cir. 1984). That case held that where an employee's third party recovery was insufficient to cover both his attorney fee and the compensation lien, the lien was payable out of the net recovery, after costs of litigation, including reasonable attorney fees, were subtracted. The court of appeals emphasized that only reasonable attorney fees were allowed. Thus, where the recovery is insufficient to cover both the attorney fees and the compensation lien, leaving the employee with nothing, the court must evaluate the reasonableness of the fees and make an equitable adjustment as between the employee and his attorney. As noted in *Ochoa*, this approach attempts to do justice to the employee while upholding *Bloomer v. Liberty Mutual Life Insurance Company,* 445 U.S. 74 (1980), which forecloses an adjustment of an employer's lien in order to underwrite the attorney fees of the employee.

130 Cong. Rec. S11,626 (daily ed. Sept. 20, 1984) (remarks of Sen. Hatch).

Believing that we are confirmed by the action of Congress, we reinstate our former judgment. The judgment of the district court is reversed and the case remanded for reconsideration and reallocation of the original recovery consistent with our opinions.***

Bartholomew v. CNG Producing Co., 862 F.2d 555 (5th Cir. 1989)

Garza, Circuit Judge:

This case calls upon us to perform the task of statutory interpretation. Specifically, we are called upon to interpret the 1984 amendments to the Longshore and Harbor Workers' Compensation Act ("LHWCA") 33 U.S.C. § 901, *et seq*. (1984), as they relate to the apportionment of attorney's fees in tort suits under the LHWCA. We today hold that under § 933(f) of the LHWCA, a compensation carrier is not required to bear a portion of a successful longshoreman's attorney's fees. Therefore, the district court's judgment, 682 F. Supp. 32, is AFFIRMED.

I. *Background*

Mr. Bartholomew was injured while working as a roughneck on an offshore fixed drilling platform situated on the Outer Continental Shelf off the coast of Louisiana. Mr. Bartholomew's Longshore and Harbor Workers' Compensation carrier, Liberty Mutual Insurance Co., paid him approximately $ 79,000 in compensation and benefits as a result of his injuries.

After receiving the benefits, Mr. Bartholomew filed a tort action against the owner of the offshore fixed drilling platform, CNG Producing Co., in United States District Court for the Western District of Louisiana. The suit was filed September 19, 1985, and went to trial on January 26, 1987. The jury rendered a verdict in favor of Mr. Bartholomew, finding CNG 30% at fault and Booker Drilling 70% at fault for causing Mr. Bartholomew's injuries. The judgment was affirmed by the Fifth Circuit on appeal in *Bartholomew v. CNG Producing Co.*, 832 F.2d 326 (5th Cir. 1987).

Four days before trial in the District Court, appellee Liberty Mutual Insurance Co., who had already paid Mr. Bartholomew about $ 79,000 in Longshore and Harbor Workers' Compensation, intervened in the suit against CNG, to recover the amount already paid to Mr. Bartholomew. Including interest, Mr. Bartholomew recovered about $ 398,000, out of which Liberty Mutual recovered its $ 79,000 in benefits already paid. Mr. Bartholomew paid approximately $ 110,000 in attorney's fees out of his $ 319,000 net recovery left after satisfying the lien of Liberty Mutual.

Liberty Mutual filed its motion to intervene six days before trial, and it was granted four days before trial. Liberty Mutual then filed a three page complaint in intervention and a stipulation as to the amount of benefits already received by Mr. Bartholomew. For its efforts, Liberty Mutual eventually recovered $ 79,000 out of Mr. Bartholomew's recovery, which was in full restitution of the benefits Liberty Mutual previously paid. Mr. Bartholomew now seeks to apportion a share of his attorney's fees to Liberty Mutual, claiming that by intervening shortly before trial and receiving the full amount of its lien, Liberty Mutual essentially got a free ride.

Deciding the merits of this argument will require a two pronged analysis. First, this court will have to determine whether federal law or Louisiana law applies to the apportionment of attorney's fees. Second, this court will have to determine the content of the applicable law. We now turn to the task of deciding whether federal or Louisiana law applies.

II. *Federal Law Governs this Dispute*

The Outer Continental Shelf Lands Act ("OCSLA") applies to this action, and prescribes that the governing law is federal law, supplemented by state law:

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent state, . . . are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, . . .

43 U.S.C. § 1333(a)(2)(A) (1978). Thus, federal law governs actions under OCSLA to the extent that there is applicable federal law; however, if there is a gap in the federal law, the law of the adjacent state is used as a gap-filler and becomes surrogate federal law. *See Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973), *cert. denied* 414 U.S. 1071, 94 S. Ct. 584, 38 L. Ed. 2d 477. In this case, if there were no federal law on the issue of apportionment of attorney's fees, then Louisiana law would govern as surrogate federal law.

Our research has led us to the conclusion that there is applicable federal law which governs the issue presented before us. Specifically, the issue of apportionment of attorney's fees in suits under the LHWCA was addressed by the Supreme Court in *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74, 100 S. Ct. 925, 63 L. Ed. 2d 215 (1980) and by the 1984 amendments to § 33(f) of the LHWCA, 33 U.S.C. § 933(f) (1984). The next section will more fully explore the content of the above sources, and therefore that discussion is applicable to and will reinforce our conclusion that there is applicable federal law. We now turn to a more detailed discussion of the federal law which we find applicable and its effect on the resolution of this case.

III. *Federal Law Regarding Apportionment*

In 1980, the Supreme Court with its ruling in *Bloomer* reconciled a split in the circuits. In that case, a longshoreman was injured in the course of his employment aboard a vessel and received compensation from his employer's insurance carrier. The longshoreman then brought a diversity action against the shipowner alleging negligence. The employer's insurance carrier successfully moved to intervene in the suit, and ultimately satisfied its lien, which was equal to the amount of benefits already paid to the longshoreman, from the settlement received by the longshoreman. The longshoreman sought to attribute part of his legal expenses to the insurance carrier.

The Supreme Court held in *Bloomer* that the insurance carrier was not required to bear a portion of the legal expenses of the longshoreman. The court, in reaching its decision, relied on the provisions of the LHWCA itself and the legislative history of the act. However, in 1984, four years after the *Bloomer* decision, Congress amended the LHWCA to read as follows:

> **(f) Institution of proceedings by person entitled to compensation**
>
> If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the *net* amount recovered against such third person. *Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorney's fees)*.

(emphasized portions were added by amendments). Thus, the core issue before this court is whether the 1984 amendments to the LHWCA modified the *Bloomer* rule in a way which will allow the apportionment in this case of legal expenses between Mr. Bartholomew and Liberty Mutual. Under the analysis below, we hold that the 1984 amendments have not modified *Bloomer* in such a way as to allow apportionment of legal expenses in this case. In fact, the effect of the 1984 amendments is to reinforce the holding in *Bloomer*, rather than to undermine it.
To support our view that non-apportionment is the most persuasive construction of § 933(f), we now will "walk through" the statute as we apply it to this case. First one must determine the net amount of recovery, which is defined under the statute as the total recovery by Mr. Bartholomew, minus his legal expenses incurred in effecting that recovery. The net amount of recovery is then compared to the amount which was due as compensation to Mr. Bartholomew, as determined by the Secretary of Labor. If the net amount of recovery exceeds the amount of compensation due to the employee, as is the case here, the employer is not required to pay anything to the employee, and any previous payments by the employer (or its compensation carrier) would have to be refunded by the employee from his recovery in accordance with § 933(e). *See Peters v. North River Ins. Co.,* 764 F.2d 306, 312 (5th Cir. 1985)[4]

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[4] On the other hand, if the net recovery is less than the compensation due the employee or leaves the employee with a small recovery, the court may adjust the attorney's fee, but not reduce the compensation carrier's lien.***

Thus, the effect of the 1984 amendments to the LHWCA was to affirm the principle in *Bloomer* that the compensation carrier's lien is inviolate. However, where there is little or nothing left for the injured employee after the compensation carrier's lien and attorney's fees have been deducted from the recovery, the court may adjust attorney's fees in order to obtain a sufficient recovery for the injured worker, who the LHWCA is designed to benefit.

Our construction of the "plain meaning" of § 933(f) is consistent with and influenced by our interpretation of Congress' intent in passing the 1984 amendments to the LHWCA. A joint explanatory statement of the Committee of Conference regarding the intended effect of the 1984 amendment to § 933(f) states:

> the Conference substitute established the following priority for distribution of proceeds in a recovery by an employee; first, the litigation expenses, including reasonable attorney fees, are satisfied. This may require that the Court exercise its discretion to adjust the attorney fee to assume equity for both the employee and his attorney. The compensation lien remains inviolable, consistent with *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980).

1984 U.S.Code Cong. and Adm.News at 2786.

This court sympathizes with appellant's argument that it is unfair for Liberty Mutual, and other compensation carriers similarly situated, to get a free ride on the backs of injured longshoremen by intervening shortly before trial, doing little in the way of helping the longshoreman's case, and yet getting a large share of the recovery. However, there is little this court can do to remedy this situation. Congress' intent that the compensation carrier's lien remain inviolate, as shown by the meaning we accord the statute and our interpretation of the legislative history, seems to us to be clear. Congress, which presumably took into account the various competing interests, has decided the question, and only Congress can change its decision by further amendments. The only option which remains open to the longshoremen seeking to impose a fair share of the litigation expenses on the compensation carrier is to attempt to enter into an expense-sharing agreement with the compensation carrier before suit is filed. Yet, a pre-litigation agreement can only be a partial solution due to the disparities in bargaining position between an injured longshoreman and a large insurance company. Perhaps the longshoremen would best be advised to press their views in Congress.

However, this case is not presented here, as Mr. Bartholomew had an adequate recovery even after attorney's fees and the compensation carrier's lien were deducted.

Speaks v. Trikora Lloyd P.T., 838 F.2d 1436 (5th Cir. 1988)

Clark, Chief Judge:

This case concerns the right of the compensation carrier, Texas Employers' Insurance Association (TEIA), to recover from a third-party defendant, Trikora Lloyd, P.T. (Trikora Lloyd), the part of its compensation lien which exceeds the amount paid by Trikora Lloyd to an injured worker pursuant to a settlement agreement. Trikora Lloyd asserts that absent a showing by TEIA that Trikora Lloyd was negligent, the compensation carrier cannot recover an amount that exceeds an injured worker's net recovery. We disagree and affirm.

I.

Speaks sustained an injury while working for Carlson Stevedores aboard the M/V PADANG, a vessel owned by Trikora Lloyd. TEIA was the worker's compensation carrier for Carlson Stevedores at the time of Speaks' accident. TEIA paid Speaks $27,918.65 pursuant to its obligations under the compensation policy and the Longshoremen and Harbor Worker's Compensation Act (LHWCA). Speaks subsequently filed a third party action against Trikora Lloyd, alleging that, as vessel owner, it was negligent. TEIA intervened to recover its compensation lien, asserting its right to be reimbursed from the worker's recovery for compensation benefits paid.

Shortly before the trial, Speaks and Trikora Lloyd entered into a settlement agreement. Under the agreement, Trikora Lloyd guaranteed Speaks that he would receive $ 20,000 exclusive of the compensation lien. Trikora Lloyd admitted that it agreed to "take care of the worker's compensation intervention interest" asserted by TEIA. TEIA was not a party to the settlement agreement.

The district court subsequently dismissed Speaks' action against Trikora Lloyd, leaving only TEIA's claim against Trikora Lloyd unresolved. The district court granted TEIA's motion for summary judgment and awarded TEIA the full amount of its compensation lien, $ 27,918.68. On appeal Trikora Lloyd contends alternatively that either TEIA's recovery cannot exceed the entire amount paid to the injured worker or it cannot exceed the amount of Speaks' net recovery after litigation costs are subtracted. We affirm.

II.

The Longshoremen's and Harbor Worker's Compensation Act (LHWCA) allocates the costs of industrial accidents between employees and employers. Injured workers receive "prompt and certain" compensation benefits, even if the employer is not to blame for the accident. *Louviere v. Shell Oil Co.,* 509 F.2d 278, 283 (5th Cir. 1975). Although these benefits are the employer's exclusive liability for the longshoreman's injuries, 33 U.S.C. § 905(a), the LHWCA does allow injured workers to recover damages from negligent third parties. 33 U.S.C. § 933(a). When an injured worker recovers from a negligent third party, the employer (or the employer's compensation carrier) has a subrogation right to be reimbursed in the amount of the compensation payments from the worker's recovery. *Peters v. North River Insurance Company of Morristown, N.J.,* 764 F.2d 306, 312 (5th Cir. 1985). It is usual for an employer or the carrier to intervene in the worker's suit and assert a lien on the worker's recovery. *Allen v. Texaco, Inc.,* 510 F.2d 977, 979-80 (5th Cir. 1975).

An employer's subrogation right is derived from the worker's claim against the third party. *Peters*, 764 F.2d at 316. The employer's subrogation rights and the worker's third party action thus forms a unitary cause of action. *Peters*, 764 F.2d at 316-17. The employer may, however, assert a separate cause of action for injury to itself that is caused by a third party's negligence. *Federal Marine Terminals, Inc. v. Burnside Shipping Co.,* 394 U.S. 404, 89 S. Ct. 1144, 22 L. Ed. 2d 371 (1969). This "*Burnside*" cause of action is based on an independent wrong to the employer by the third party and not on any wrong committed against the worker. Whereas the employer's subrogation rights stem from a cause of action belonging to the worker, the "*Burnside*" cause of action belongs to the employer. *Burnside*, 89 S. Ct. at 1152.

Speaks filed a third party suit in this case against Trikora Lloyd. TEIA then intervened, pursuant to its subrogation rights implicit in the LHWCA, in order to receive reimbursement for compensation benefits paid. The subrogation rights asserted by TEIA do not constitute a cause of action separate from Speaks' claim against Trikora Lloyd. TEIA did not state a cause of action under *Burnside* for an independent wrong against the employer.

An injured worker and the defendant third party may allocate between themselves responsibility for paying off the compensation lien. *Peters,* 764 F.2d at 321. The injured worker and the alleged third party tortfeasor may also confect any settlement that does not violate the LHWCA or public policy. They may not, however, barter away the compensation lien rights of the compensation carrier without the carrier's knowing consent or participation.

Absent any agreement, in cases where a worker's recovery from a third party exceeds the amount of the compensation lien and the worker's litigation costs (including attorney fees) combined, the compensation insurer is entitled to recover the full amount of its payments from the worker. *Bloomer v. Liberty Mutual Insurance Co.,* 445 U.S. 74, 100 S. Ct. 925, 63 L. Ed. 2d 215 (1980). If, however, an injured worker's jury award is insufficient to cover both the attorney fees and the compensation lien, payment of the worker's attorney's fee takes priority over the payment of the compensation lien. *Ochoa v. Employers National Insurance Co.,* 724 F.2d 1171 (5th Cir. 1984), *vacated*, 469 U.S. 1082, 105 S. Ct. 583, 83 L. Ed. 2d 694, *adhered to on remand*, 754 F.2d 1196 (5th Cir. 1985). This court's holding in *Ochoa* does not, however, limit the amount of the compensation lien to the amount received by an injured worker in cases where the worker and the third party make a settlement agreement.

The district court properly granted TEIA's motion for summary judgment based on the undisputed settlement terms between Speaks and Trikora Lloyd. Pursuant to Rule 56(c) a district court should grant summary judgment when it appears from the record that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Trikora Lloyd argues that a correct interpretation of the law mandates a reduction in the amount of TEIA's compensation lien to the amount of the worker's recovery. At the same time, however, Trikora Lloyd argues that the amount they agreed to pay under the settlement agreement is a question of fact inappropriate for summary judgment. According to Trikora Lloyd, either the law requires a reduction in the lien, or a factual inquiry is needed to reveal that they only promised to pay the amount required under its own interpretation of the law. This "heads I win, tails you lose" approach by Trikora Lloyd is disingenuous. The amount of Trikora Lloyd's liability depends not on factual inquiry into what were settlement terms, but rather the legal nature of the compensation lien. The parties jointly moved the trial court to stay the action pending resolution of *Peters*, agreed *Peters* would control the outcome in this action and jointly stated that their competing positions were "legal in nature."

Under the settlement, Trikora Lloyd clearly agreed to pay whatever was legally determined to be its obligation. Speaks and Trikora Lloyd negotiated a settlement to which TEIA was not a party. The settlement agreement between Trikora Lloyd and Speaks had three components (1) a payment of $ 20,000 to Speaks and his counsel, (2) indemnity to Speaks against any claim by TEIA on account of its intervention claim for compensation payments made to Speaks, and (3) a promise to "take care of the worker's compensation intervention interest." These settlement terms do not merely obligate Trikora Lloyd to reimburse the carrier a sum equal to the net amount paid the injured worker by Trikora Lloyd, the terms also constituted an undertaking by the allegedly negligent vessel owner to pay the compensation lien. Since a worker and a third party tortfeasor cannot reduce the amount of the lien without the acquiescence of the lienholder, TEIA is entitled to recover from Trikora Lloyd $ 27,918.68.***

Allen v. Texaco, Inc., 510 F.2d 977 (5th Cir. 1975)

Roney, Circuit Judge:

This is a case of first impression. An employee was injured on the job and received compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act. The compensation carrier had waived rights of subrogation as to any claim the employee might have against a third party who caused the injury. The employee sued the third party and a settlement was reached. Does the waiver of subrogation rights by the compensation carrier bar a lien against and participation in the proceeds of the settlement between the employee and the third party, to which the carrier would otherwise be legally entitled? The district court held there to be a bar and dismissed the carrier's claim. The compensation carrier argues that the waiver only bars it from filing a suit against the third party as subrogee of the employee's claim, but does not bar its lien against the suit proceeds or settlement proceeds where the employee pursues the claim against the third party and receives a settlement or judgment. We decide the workmen's compensation carrier waived any claim to the settlement between the third party and the employee. We affirm the district court.

In 1972, Texaco, Inc. and American Casing Crews, Inc. entered into a miscellaneous work agreement whereby American, as an independent contractor, was to furnish labor and equipment to Texaco at the latter's request. American was also required by the specific terms of the agreement to procure from its insurer, North-West Insurance Company, a waiver of subrogation rights against Texaco, or to have Texaco named in its insurance policy as an additional co-assured. American chose the former alternative and, in consideration of an additional premium, obtained from North-West the required waiver of subrogation rights against Texaco.

Jimmy Allen, the original plaintiff in this matter, was employed by American and sustained an accidental injury on August 16, 1972, while working aboard Texaco's movable drilling barge. North-West, as the compensation insurer of American, paid Allen $2,660 in compensation benefits and $230 for medical bills on American's behalf in fulfillment of the employer's responsibility under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 *et seq*. The payments by North-West were made voluntarily, without a formal award of compensation benefits being entered by the Department of Labor.

Allen then brought this action against Texaco for damages. North-West sought and obtained permission from the district court to intervene as plaintiff "in order to assert a claim of subrogation." It asserted a lien on any recovery Allen might obtain for the amount of compensation payments it had advanced and for the medical expenses it had incurred. Texaco, in turn, impleaded American as a third-party defendant seeking indemnity under the provisions of the contract between Texaco and American.

Before trial, Texaco reached a settlement agreement with Allen and with American. Pursuant to that agreement, Texaco paid Allen $15,000, and further agreed to pay him any additional amount which might be owed on the subrogation claim asserted by North-West. American agreed to reimburse Texaco for a portion of the amount which was to be paid to Allen. Thus, the only issue before the district court was whether or not North-West's waiver of subrogation rights against Texaco affected its compensation lien claim. The district court, after reviewing the depositions, stipulations, documents and memoranda submitted, rendered an opinion in which it held that North-West was barred by the specific waiver of subrogation in favor of Texaco in the insurance policy.

In the main policy issued by North-West, under the heading "Conditions", it is stated:

> 12. Subrogation: In the event of any payment under this policy, the company shall be subrogated to all rights of recovery therefor of the insured and any person entitled to the benefits of this policy against any person or organization, and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

This provision was modified by Endorsement No. 13 of the policy which provides:

> In consideration of an additional premium as shown above [$103.00], based on 10% of the premium developed in operations performed by the assured for TEXACO, INC. and subject to a minimum premium of $100.00, it is agreed that the Company hereby waives its rights of subrogation of claims coming under this policy against: TEXACO, INC.

Throughout the course of this litigation, North-West has asserted that the language in Endorsement No. 13, along with the testimony of the underwriter, demonstrates that no waiver of North-West's right to join a lawsuit to protect its compensation lien was requested, nor was such a waiver given. What was given, North-West argues, was a waiver of its right to sue Texaco under 33 U.S.C.A. §§ 933(b) and (h). These sections provide, in effect, that if a compensation carrier makes payments under a formal order and if the claimant does not institute an action against a third party tortfeasor within six months, then the carrier shall have the right to sue the third party. The parties agree on the validity of the waiver but do not agree on whether the rights waived include the right to proceed against a claimant's recovery fund in a suit against Texaco as a third party tortfeasor. ***

North-West argues that it waived only its right to subrogation and not its right to a lien on the plaintiff's recovery fund. It is fundamental, however, that a lien does not exist without a right or obligation to support it. A lien is simply a claim against property for the payment of a debt or the fulfillment of some obligation. At the time North-West made the payments for compensation and for medical expenses in this case, it had already agreed in its contract with American for a premium and for the express benefit of Texaco that its right of subrogation against Texaco would be waived. When North-West waived subrogation, it necessarily waived the lien which it claims to assert bottomed on the right of subrogation.

In its brief North-West has quoted language from several cases to support its contention that the courts have established the compensation lien to prevent double recovery by the plaintiff. *See Nacirema Operating Co. v. Oosting, supra*; *The Etna, supra*; *Fontana v. Pennsylvania R.R., supra*. In circumstances where no waiver has been given, the possibility of double recovery by the plaintiff provides justification for creating an equitable lien in favor of a party making compensation payments to the injured workman. But if the right to subrogation has been waived, there is no debt for which an equitable lien can be created. Having waived its rights to subrogation, North-West has no standing to protest the plaintiff's possible double recovery.

It should be noted that under the terms of the settlement agreement in this case there could be no double recovery by the injured employee. Allen received $15,000 net, regardless of the disposition of the compensation claim. Texaco agreed to pay in addition the claim of North-West if found valid. The nature of the settlement robs the double recovery argument of all vitality. As a practical matter, the waiver of subrogation rights by the compensation insurer permits the third party to achieve the kind of settlement arrived at here and precludes double recovery to the third party's advantage.

The additional premium of $103 paid to North-West for Endorsement No. 13, waiving its subrogation rights against Texaco, deprives North-West of the equity it asserts in claiming an equitable lien on Allen's settlement fund from Texaco. The very purpose of the waiver of subrogation provision in the American-North-West contract was to assure Texaco that, in the event it was sued as a third party, it would not have to pay the elements of damage for which North-West had already compensated the injured employee. The money Texaco paid American for the services of its employees of necessity included consideration of the required additional insurance premiums paid to North-West. Under these circumstances, North-West is not in a position to argue equities.***

Reimbursement of Maintenance and Cure in Jones Act Cases

Bertram v. Freeport McMoran, Inc., 35 F.3d 1008 (5th Cir. 1994)

Barksdale, Circuit Judge:

Primarily in issue are (1) whether an employer's right to be reimbursed by third-party tortfeasors for maintenance and cure paid by the employer to its injured employee is barred by the employee's pre-trial settlements with the third-parties; and, (2) in that the employer was not assigned fault, but the employee was, resulting in the third-party tortfeasors' apportioned fault totalling less than 100%, whether the maintenance and cure should be reimbursed totally by the third-party tortfeasors, or whether, instead, each should reimburse only according to its apportioned fault, resulting in less than full reimbursement.

Energy Catering Services, Inc., paid maintenance and cure for its employee, Hugh Thomas Bertram, as a result of an accident for which no fault was assigned Energy, Bertram was found 60% at fault, and Houma Industries, Inc., and another third-party were each apportioned 20% of the fault. Before trial, Bertram settled with Energy, Houma, and the other tortfeasor. Houma contests having to reimburse Energy for the maintenance and cure, primarily because of a claimed settlement bar which it asserts springs, in part, from the modern trend in admiralty of apportioning fault. And, as one of its alternative bases for challenging the judgment, Houma maintains, again seeking shelter under that trend, that it should not have to reimburse 50% of the maintenance and cure, because it was apportioned only 20% of the fault. We AFFIRM.

I.

Bertram, an Energy employee, was assigned to work aboard a drilling barge owned by Offshore Pipelines, Inc. (OPI). The vessel was anchored next to a fixed oil and gas platform owned by Freeport-McMoran, Inc., and Freeport-McMoran Oil & Gas Co. (collectively, Freeport) and located on the Outer Continental Shelf off the coast of Louisiana. Houma Industries, Inc., was a contractor on the platform. In November 1990, while returning to the barge from the platform, Bertram was injured on the platform by a falling ladder, which Houma's employees had used and had been directed to secure.

Bertram sued under the Jones Act and general maritime law, seeking recovery from Energy for maintenance and cure; and from Energy and OPI for negligence and unseaworthiness. He later added negligence claims against Freeport and Houma. Energy cross-claimed against Houma and Freeport for contribution or indemnity; they did likewise against Energy.

Prior to trial, Bertram settled with all defendants: OPI (shipowner), Freeport (platform owner), Houma (platform contractor), and Energy (employer). Therefore, only the cross-claims remained: Energy's against Houma and Freeport for maintenance and cure reimbursement; theirs against Energy for indemnity or contribution.

In July 1993, the district court ruled in favor of Energy. It found Energy without fault for Bertram's injuries, and apportioned fault as follows: Bertram, 60%; Houma and Freeport, each 20%. But, by an amended judgment, and although Houma and Freeport had each been found only 20% at fault, each was required to reimburse Energy for 50% of the approximately $ 143,000 paid for maintenance and cure. Only Houma appeals.

II.

Maintenance and cure is a seaman's right under general maritime law to receive a "per diem living allowance for food and lodging [maintenance] and ... payment for medical, therapeutic and hospital expenses [cure]". Black's Law Dictionary 954

(6th ed. 1991); *Davis v. Odeco*, 18 F.3d 1237, 1245-46 (5th Cir.), [*cert. denied*, 513 U.S. 819 (1994)]. A shipowner must pay maintenance and cure to any seaman who "becomes ill or suffers an injury while in the service of a vessel", regardless of whether either party was negligent. 1B Ellen M. Flynn et al., Benedict on Admiralty § 42, at 4-5 (7th ed. 1993) (hereinafter cited as Benedict); *see also* Virginia A. McDaniel, *Recognizing Modern Maintenance and Cure as an Admiralty Right*, 14 Fordham Int'l L.J. 669 (1991). The right terminates only when "maximum cure has been obtained". 1B Benedict § 51, at 4-73 (footnote omitted).

Houma asserts that the district court erred (1) by holding that Energy's maintenance and cure reimbursement cross-claim survived Bertram's pre-trial settlements with all defendants; (2) by granting Energy recovery of the total medical costs it paid; (3) by finding Houma at fault; and (4) by requiring Houma to pay 50% of the maintenance and cure, rather than 20% (its apportioned fault). ***

A.

Whether Energy's maintenance and cure reimbursement claim against Houma was barred by Bertram's pre-trial settlements with all defendants is a legal issue, reviewed freely, that touches upon the trend in maritime law of apportioning fault. In essence, Houma contends that Fifth Circuit precedent on maintenance and cure reimbursement, especially *Savoie v. Lafourche Boat Rentals, Inc.,* 627 F.2d 722 (5th Cir. Unit A 1980) (employer without fault), and *Adams v. Texaco, Inc.*, 640 F.2d 618 (5th Cir. 1981) (employer partly at fault), no longer control. This is addressed best by first retracing, in considerable detail, the steps that led to recovery over against a third-party tortfeasor for maintenance and cure.[3]

1.

As reflected in the earlier brief discussion of maintenance and cure, the district court stated correctly that Energy, as Bertram's employer, owed him "an absolute, non-delegable duty" to provide maintenance and cure, regardless of Bertram's being at fault, and Energy being blameless. *E.g.*, *Davis v. Odeco*, 18 F.3d at 1246 (owner of vessel "has a duty to pay maintenance and cure which is unrelated to any duty of care under tort law") (citing *Adams*, 640 F.2d at 620).

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[3] Energy characterizes its claims against Houma and Freeport as for "indemnity and/or contribution"; it seeks "full reimbursement ... for the amounts paid in maintenance and cure, because Energy ... was found free from fault in the accident." Indemnity permits the indemnitee "to shift all the loss onto another tortfeasor", whereas contribution "requires that each tortfeasor pay the proportion of the damages attributable to its actions." *Hardy v. Gulf Oil Co.,* 949 F.2d 826, 830 (5th Cir. 1992) (citations omitted). Because Energy seeks "full reimbursement" from Houma and Freeport (regardless of the fact that Energy's employee's (Bertram's) negligence also contributed to the accident (60% at fault) that necessitated the maintenance and cure), its claim is for indemnity.

A seaman's right to maintenance and cure is implied in the employment contract between the seaman and shipowner. It "in no sense is predicated on the fault or negligence of the shipowner." Thus, an owner of a vessel is almost automatically liable [for maintenance and cure].

Brister v. A.W.I., Inc., 946 F.2d 350, 360 (5th Cir. 1991) (footnote and internal citations omitted; quoting *Aguilar v. Standard Oil Co. of New Jersey,* 318 U.S. 724, 730, 87 L. Ed. 1107, 63 S. Ct. 930 (1943)). In addition, the seaman's right to receive, and the shipowner's duty to pay, maintenance and cure is independent of any other source of recovery for the seaman (*e.g.*, recovery for Jones Act claims). *Brister*, 946 F.2d at 361.

Although a seaman's negligence does not negate a shipowner's duty to pay maintenance and cure, the shipowner may recover those payments from a third-party whose negligence partially or wholly caused the seaman's injury. *E.g.*, *Savoie,* 627 F.2d at 723 (even where seaman was partially responsible, it is "well-established" that employer may recover maintenance and cure costs) (citing *Tri-State Oil Tool Indus., Inc. v. Delta Marine Drilling Co.*, 410 F.2d 178, 186 (5th Cir. 1969)).

Our cases allowing such a recovery follow the holding of the landmark decision in *Jones v. Waterman S.S. Corp.*, 155 F.2d 992, 997-1001 (3d Cir. 1946). There, a seaman employed by Waterman was walking across the pier near his ship and fell into a ditch along a railroad siding owned by Reading. *Id.* at 994. He sued Reading, recovered damages from it, and executed a release in favor of it. *Id.* Thereafter, when the seaman sued Waterman for maintenance, cure, and wages, Waterman impleaded Reading for indemnity for any recovery by the seaman. *Id.* at 995.

The district court held that, the seaman having received a judgment against Reading, he could not maintain the action against Waterman, because a second judgment for the seaman could be a double recovery. *Id.* And, it refused to permit Waterman's cross-claim against Reading, on the theory set out in *The Federal No. 2*, 21 F.2d 313 (2d Cir. 1927) (because maintenance and cure stems from contract between seaman and employer, employer cannot recover over against a third-party tortfeasor, absent a contractual or other legal relationship between employer and tortfeasor). *Id.* The Third Circuit reversed, finding *The Federal*'s reasoning inapposite. *Waterman*, 155 F.2d at 994, 1001.

In holding that the seaman could proceed against Waterman, and that Waterman could seek recovery over against Reading, the Third Circuit distinguished the seaman's claims against Reading for damages (sounding in tort), from his claims against Waterman for maintenance, cure, and lost wages (sounding in contract), stating:

> [The seaman] could not have recovered maintenance and cure and wages from Reading, nor may he recover damages from Waterman. It

> follows that Waterman and Reading were not joint tortfeasors. In fact, Waterman committed no tort. It is not alleged that it did. Under no theory of law can [the seaman's] release to Reading release Waterman.

155 F.2d at 996.

As for Waterman's claim against Reading, the court held:

> It would seem to follow ... as a matter of logic that if the master by virtue of his contract ... with the servant is compelled to maintain and cure his servant ... the master should be permitted to recover these sums from the wrongdoer....

Id. at 999 (footnote omitted). In so holding, *Waterman* relied in part on Pennsylvania law (holding that an employer has a right to recover against a tortfeasor for an act depriving the employer of the employee's services). *Id.* at 1000-01. And, it also described Waterman's right against Reading as being derived from the breach of Reading's implied warranty of maintaining the railroad track "in a safe condition for the benefit of seamen leaving a ship moored to the pier" with which ship it had a contract. *Id.* at 999-1000. ***

Indeed, our court has applied the *Waterman* rule in a number of cases not involving state law claims, and has allowed an employer recovery over against a tortfeasor of maintenance and cure. *E.g.*, *Adams*, 640 F.2d at 620-21; *Savoie,* 627 F.2d at 724; *Tri-State Oil*, 410 F.2d at 182-83. As noted, in *Adams*, the employer was partly at fault; in *Savoie*, as in this case, the employer was without fault ("innocent").

"Indemnification of the innocent employer is based on the commonsense principle that a party whose neglect has caused or contributed to the need for maintenance and cure payments should reimburse the cost of those payments...." *Savoie,* 627 F.2d at 723 (citing and quoting *Tri-State Oil*, 410 F.2d at 186), *cited in Adams*, 640 F.2d at 620-21; *accord*, *Black v. Red Star Towing & Transp. Co., Inc.,* 860 F.2d 30, 32-34 (2d Cir. 1988) (en banc) (overruling *The Federal No. 2*, 21 F.2d 313 (2d Cir. 1927), and citing *Adams* and *Savoie*). *See* 1 Schoenbaum , § 6-35, at 369 & nn.1-2 (citing and discussing, *inter alia*, *Waterman*, *Adams*, and *Savoie*; "employer who pays maintenance and cure to a seaman has a right to complete indemnity from an independent tortfeasor whose fault or negligence was the sole cause of the injury"). "Imposition of liability on the tortfeasor ... is not too 'indirect' a consequence of his negligence to allow recovery. The shipowner's obligation -- imposed by the law itself -- is not so unforeseeable by a tortfeasor as to bar recovery." *Adams*, 640 F.2d at 620 & n.2 (brackets in *Adams*) (citing Grant Gilmore and Charles L. Black, The Law of Admiralty § 6-14 (2d ed. 1975) (hereinafter cited as Gilmore and Black); *Richardson*, 284 F. Supp. at 716).

2.

***At bottom, Houma's contention misapprehends the parties' relationships to one another, and the nature of Energy's cross-claim. Energy's maintenance and cure obligation arises as a matter of law, through its relationship with Bertram and despite its being without fault. *E.g.*, 1B Benedict, § 42, at 4-5 to 4-6 (7th ed. 1993) (neither seaman's nor employer's negligence is to be considered); Gilmore and Black § 6-6, at 281 (comparing shipowner's liability for maintenance and cure to worker's compensation; both are independent of fault and based on employment relationship).

Second, again in contrast to *Hardy*, Energy's claim against Houma is *not* for recovery over for "the amount of *damages* [Energy] owes the plaintiff", *i.e.*, Bertram. *Hardy*, 949 F.2d at 836 (emphasis added). Rather, it is for reimbursement of maintenance and cure; and that claim is "not a derivative right through [Bertram,] but was a separate and distinct cause of action which [vested] in [Energy] when it was ascertained what sum of money was due" from Energy to Bertram. *Waterman,* 155 F.2d at 1001; *accord*, *United States v. Tug Manzanillo,* 310 F.2d 220, 222 (9th Cir. 1962) (employer's right to recover maintenance and cure from tortfeasor accrued "the moment the [employer] paid these sums" to seaman, regardless of release between seaman and tortfeasor).

Nor could the settlements between Bertram and the defendants release one defendant from an independent claim asserted by another. In this regard, Bertram's settlements with Energy and Houma are immaterial; there has been no settlement between Houma and Energy. The Ninth Circuit reached the same result in *Tug Manzanillo*, 310 F.2d at 221, where the tortfeasor contended (as does Houma) that maintenance and cure costs were damages subsumed in its settlement with the plaintiff.

The Ninth Circuit held that a settlement between the injured seaman and the tortfeasor did not bar a claim for indemnity for maintenance and cure by the employer against the tortfeasor:

> To hold that by paying certain sums to [the employee] ... [the tortfeasor] had thereby discharged its then existing liability to the [employer], is a wholly impermissible conclusion. If A is indebted to B he cannot discharge that indebtedness by payment to C.

Tug Manzanillo, 310 F.2d at 222. Similarly, a release between Energy and Bertram, or Houma and Bertram, cannot bar Energy's maintenance and cure reimbursement claim against Houma.***

In sum, we hold, as did the district court, that Energy's claim is not barred by Bertram's pre-trial settlements. *Savoie,* 627 F.2d at 723, 724 (even where employee has "relinquished his other claims" against employer after receiving maintenance and cure, employer may recover for maintenance and cure costs from third-party found to have caused employee's injury . . . . ***

D.

As discussed, consistent with the foregoing apportionment of fault, and relying upon *Adams* (employer partly at fault), the district court entered judgment that Freeport and Houma each reimburse Energy for 20% of the maintenance and cure; but, on Energy's motion, and in reliance on *Savoie* (employer without fault), the judgment was amended to require each to instead reimburse Energy for 50% of the maintenance and cure. Houma asserts alternatively that, consistent with its apportioned fault, it should be required to reimburse Energy for only 20% of the maintenance and cure. This contention turns on our relatively recent adoption, discussed *supra*, of proportional fault. *See McDermott, Inc. v. AmClyde*, 128 L. Ed. 2d 148, 114 S. Ct. 1461 (1994); *Reliable Transfer*, 421 U.S. 397, 44 L. Ed. 2d 251, 95 S. Ct. 1708; *Loose*, 670 F.2d at 500-01; *compare Savoie,* 627 F.2d 722 (not discussing *Reliable Transfer* proportional fault concepts); *see also Coats v. Penrod Drilling Corp.,* 5 F.3d 877, 889-90 (5th Cir. [1993]) (discussing application of joint and several liability to maritime co-defendants in comparative fault system), [*aff'd on reh'g en banc*, 61 F.3d 1113 (5th Cir. 1995) (en banc)]. Our review is *de novo*.

As stated, in requiring the 50% reimbursement, the district court relied on *Savoie,* 627 F.2d 722, 724, which allowed complete indemnity of the employer by a third-party tortfeasor. *Savoie* held:

> Because the employer will have to pay maintenance and cure regardless of the existence or degree of his employee's neglect, a negligent third party who caused or contributed to the employee's injury should reimburse the employer for this inevitable expense, even though the employee was partially to blame. *As between the innocent employer and the partially negligent third party, the latter should bear the burden of such payments* in the same manner a joint tort-feasor is liable to the injured victim of concurrent delicts....
>
> ***
>
> Because [the employer] will have to pay full maintenance and cure to [the seaman, regardless of his negligence], [the tortfeasor] must reimburse [the employer] *for the entire payment made*.

627 F.2d at 724 (emphasis added). The district judge stated that, were this a case of first impression, he would not have required full reimbursement, but that he was bound by controlling precedent -- *Savoie*.

Again trying to wiggle off the hook of binding precedent, Houma maintains that *Savoie* is not controlling, noting that *Savoie*--decided in 1980--did not discuss the earlier extension of proportional fault principles to maritime cases. *Id.*; *see, e.g.*, *Loose,* 670 F.2d 493, 501 (5th Cir. 1982) (discussing Fifth Circuit's adoption of comparative fault system, which "eliminates the doctrine of contributory negligence ... [and] apportions fault among joint tortfeasors in accordance with a precise determination, not merely equally or all-or-none"); *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 981-82 (5th Cir. 1978) (court should consider "the concept of proportional fault" in maritime cases). Thus, we must examine this aspect of *Savoie* in light of *Reliable Transfer* and its progeny.

As noted, in originally ordering each tortfeasor to reimburse maintenance and cure only to the extent of their assigned fault (20% each), the district court relied upon *Adams,* 640 F.2d at 621 (1981). The answer to whether *Savoie* still controls is found in *Adams*. Unlike *Savoie*, it anticipates *Loose*'s more explicit discussion of proportional fault principles. *See Loose*, 670 F.2d at 500-01.

In *Adams*, Eymard contracted with Texaco to service its offshore operations; Adams, an Eymard employee, was injured while working on Eymard's crewboat. 640 F.2d at 619. He sued Eymard and Texaco; both cross-claimed for indemnity and contribution. Prior to trial, Adams settled with Eymard; the jury awarded damages to Adams, with Adams adjudged 70% negligent and Eymard and Texaco each 15%. *Id.* The cross-claims were tried to the court; Texaco was ordered to pay Eymard 15% of its maintenance and cure costs by way of contribution.

In affirming Texaco's contributing 15% to Eymard, our court noted that, even where the seaman is negligent, a "non-negligent shipowner is still entitled to indemnity from a third-party tortfeasor. *Savoie, supra*". *Id.* at 620. It noted that "this court has already held [in *Savoie*] that a tortfeasor is required to *indemnify* the *non-negligent* shipowner for maintenance and cure payments *that result from the tortfeasor's negligence*." *Id.* (emphasis added). But, the court noted that *Adams* presented a different situation, because not only the third-party, but also the shipowner, was negligent. In such a case, the *Adams* court held,

> this rationale [of *Savoie*] equally supports the conclusion that a *concurrently negligent* tortfeasor should *proportionately contribute* to maintenance and cure paid by a negligent shipowner when the latter's negligence only concurrently contributed to the seamen's injury.

Id. at 621 (citing proportional fault cases) (emphasis added). The court held that, because both were concurrently negligent, Texaco was liable to Eymard for the "costs of those [maintenance and cure] payments *to the extent occasioned by its fault*." *Id.* (emphasis added); *accord*, *Black*, 860 F.2d at 32-34 (discussing innocent shipowner's right to indemnification from tortfeasor, versus negligent shipowner's right to contribution from tortfeasor in proportion to that party's negligence; citing *Adams* and *Savoie*).

As noted, in *Adams* both the shipowner and Texaco were found 15% at fault; the seaman, 70%. Our court concluded that Texaco was required to contribute only 15% of the maintenance and cure to the shipowner. Were we to use the same method of apportionment in this case, Houma would be required to contribute only 20% of the maintenance and cure, because this was its percentage of fault. As reflected above, however, what distinguishes this case from *Adams* is that Energy was not at fault. Thus, as the district court held, this case is controlled by *Savoie*, where only the seaman and the third-party were at fault. Although the third-party was not 100% at fault (it shared fault with the seaman), it was nonetheless required to reimburse all of the maintenance and cure to the innocent shipowner. *Savoie*, 627 F.2d at 724.

Read together, *Adams* and *Savoie* seem to advance a policy choice as to which party bears the burden of a seaman's negligence when an employer seeks recovery over for maintenance and cure. When the employer is partially at fault, the seaman's negligence is imputed to the employer. This is consistent with the very basis for the maintenance and cure obligation--the employment relationship. Between a negligent employer and a negligent third-party, the seaman's portion of fault is imputed to the employer. But, when the employer is fault-free, it may recover all of the maintenance and cure from the negligent third-party(ies), even though the third-party shares fault with a negligent seaman. Therefore, Houma and Freeport, each only 20% at fault, must nevertheless totally reimburse the maintenance and cure.

In sum, neither *Adams*, nor subsequent proportional fault cases, including *Loose*, disturb *Savoie*'s holding that an innocent shipowner is entitled to full reimbursement for maintenance and cure from a third-party tortfeasor, even though the employee was also at fault. Accordingly, as did the district court, we must follow *Savoie*.***

Further reading:

Kenneth G. Engerrand, *Primer on Maintenance and Cure*, 18 U. San Francisco Mar. L.J. 41, 128 n.638 (2005-06) (discussing the different conclusions reached by the courts with respect to reimbursement of maintenance and cure)

Chapter 16 Arbitration of Insurance Disputes

American Bankers Insurance Co. of Florida v. Inman, 436 F.3d 490 (11th Cir. 2006)

Stewart, Circuit Judge:

American Bankers Insurance Company of Florida ("American Bankers") appeals the district court's denial of American Bankers' motion to compel arbitration. Because we find the district court properly concluded that MISS. CODE ANN. § 83-11-109 reverse preempts the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*. pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq*., we affirm.

FACTUAL AND PROCEDURAL HISTORY

On March 28, 2003, Appellee Jack Inman was injured when the motorcycle that he was riding was struck from behind by another driver whose liability insurance coverage was only for $ 10,000. Because Inman's injuries were so extensive, he made a demand for $ 100,000 under the Underinsured Motorist Coverage provision of his insurance policy with American Bankers. American Bankers denied Inman's claim because he was not driving the vehicle covered by the policy when the accident occurred.

Inman's policy contained an arbitration provision requiring arbitration of any disputes or claims between the policyholder and the insurer. On October 14, 2003, American Bankers filed a motion to compel arbitration in accordance with the FAA in the district court for the Southern District of Mississippi. The central question before the district court was whether the MISS. CODE ANN. § 83-11-109 pursuant to the McCarran-Ferguson Act reverse preempts the FAA. The district court found that the FAA was reverse preempted and denied American Bankers' motion to compel arbitration, and in conjunction granted Inman's motion to dismiss pursuant to Rule 12(b)(6). American Bankers has since filed this timely appeal.***

DISCUSSION

American Bankers argues that the district court erred in denying its motion to compel arbitration. Specifically, American Bankers contends that § 83-11-109 does not reverse preempt the FAA pursuant to the McCarran-Ferguson Act because the state law is not "regulating the business of insurance" as the Act requires. We disagree, and for the following reasons we affirm the district court's denial of American Bankers' motion to compel arbitration.

Congress enacted the FAA in order to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Co.*, 500 U.S. 20, 24, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991). The FAA permits an aggrieved party to file a motion to compel arbitration when an opposing "party has failed, neglected, or refused to comply with an arbitration agreement." *Id.* at 25; *see also* 9 U.S.C. § 4. With regard to uninsured motorist coverage, § 83-11-109 provides that "no such endorsement or provisions shall contain a provision requiring arbitration of any claim arising under any such endorsement or provisions." Although federal law ordinarily preempts conflicting state law, the McCarran-Ferguson Act provides a narrow exception to this rule for state laws governing the insurance industry. *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998). The McCarran-Ferguson Act provides in pertinent part that "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

Under the McCarran-Ferguson Act, a state law reverse preempts federal law only if: (1) the federal statute does not specifically relate to the "business of insurance;" (2) the state law was enacted for the "purpose of regulating the business of insurance;" and (3) the federal statute operates to "invalidate, impair, or supercede" the state law. *Munich*, 141 F.3d at 590. The district court found that § 83-11-109 reverse preempted the FAA and invalidated the arbitration provision in Inman's insurance policy with American Bankers. We must decide whether § 83-11-109 satisfies the three requirements of the McCarran-Ferguson Act.

This court expressly stated that "there is no question that the FAA does not relate specifically to the business of insurance," *Munich*, 141 F.3d at 590; thus, the first requirement of the McCarran-Ferguson Act is satisfied. Additionally, the application of the FAA to enforce the arbitration provision would invalidate § 83-11-109; accordingly, the third requirement of the Act is also satisfied. American Bankers specifically challenges the district court's conclusion that the state law was enacted to "regulate the business of insurance," the second requirement of the McCarran-Ferguson Act.

The Supreme Court has articulated three factors a court must consider in evaluating whether a state regulates the business of insurance: (1) "whether the practice in question has the effect of transferring or spreading a policyholder's risk;" (2) "whether the practice is an integral part of the policy relationship between the insurer and the insured;" and (3) "whether the practice is limited to entities within the insurance industry." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982). The Supreme Court noted that none of these factors is determinative, but examination of the factors may lead to the conclusion that a state law regulates the "business of insurance." *Id.* American Bankers contends that § 83-11-109 does not regulate the business of insurance because it does not meet the factors specified in Pireno. Therefore, American Bankers argues, § 83-11-109 does not satisfy the requirements of the McCarran-Ferguson and does not reverse preempt the FAA. American Bankers does not dispute that the state law is limited to entities within the insurance industry; accordingly, we address only the first two Pireno factors, i.e., whether the law has the effect of transferring or spreading a policyholder's risk and whether the law is an integral part of the relationship between insurer and insured. 458 U.S. at 129.

American Bankers argues that § 83-11-109 does not have the effect of transferring or spreading a policyholder's risk and therefore does not meet the first Pireno factor. Section 83-11-109 is codified as part of the Mississippi Uninsured Motorist Coverage Act and "'the terms and provisions of the *Mississippi Uninsured Motorist Coverage Act* are written into every automobile liability policy issued in the state.'" *Lawler v. Gov't Employees Ins. Co.*, 569 So.2d 1151, 1153 (Miss. 1990) (citations omitted). Section 83-11-109 prohibits required arbitration of disputes stemming from the uninsured motorist coverage provisions of personal automobile insurance policies. The statute regulates risk by subjecting all policy disputes regarding uninsured/underinsured motorist coverage to the possibility of a jury trial. See *Standard Sec. Life Ins. Co. of New York v. West*, 267 F.3d 821, 824 (8th Cir. 2001)(reasoning that a prohibition on arbitration in insurance contracts spreads risk by introducing the possibility of jury verdicts) (citations omitted); accord *McKnight v. Chicago Title Ins. Co.*, 358 F.3d 854, 858 (11th Cir. 2004). The purpose behind the statute is to protect those injured by uninsured and underinsured motorists. *Lawler*, 569 So. 2d at 1153. Contrary to American Bankers' assertion that it is an arbitrary decision to prohibit arbitration in one type of contract, this is a determination by the Mississippi legislature to control the risks and harms caused by uninsured and underinsured motorists, see Id. We agree with the district court that § 83-11-109 has the effect of transferring or spreading a policyholder's risk and therefore the first Pireno factor weighs in favor of concluding § 83-11-109 regulates the business of insurance.

American Bankers also argues that § 83-11-109 is not an integral part of the insurer-insured relationship and thus fails to meet the second Pireno factor. On the contrary, § 83-11-109 is an integral part of the insurer-insured relationship because it controls how disputes regarding uninsured/underinsured motorist coverage will be resolved. *See West*, 267 F.3d at 823 (holding that a Missouri state law excepting insurance contracts from an arbitration law regulated the business of insurance because it applied to the processing of disputed claims and had a substantial effect on the insurer-insured relationship); accord *McKnight*, 358 F.3d at 858; *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931, 933 (10th Cir. 1992). Section 83-11-109 requires that an injured party be able to recover from the insurance provider "all sums which he shall be legally entitled to recover as damages for bodily injury or death from the owner or operator of an uninsured motor vehicle." *Lawler,* 569 So. 2d at 1154. As such, the statute is an integral part of the policy relationship between the insurer and insured and therefore satisfies the second Pireno factor, weighing in favor of our conclusion that § 83-11-109 regulates the business of insurance. As the district court correctly concluded, § 83-

11-109 regulates the business of insurance and therefore satisfies the requirements of the McCarran-Ferguson Act. Accordingly, § 83-11-109 reverse preempts the FAA. ***

Galilea, LLC v. AGCS Marine Insurance Co., 879 F.3d 1052 (9th Cir. 2018)

Berzon, Circuit Judge:

"The sea, although an agreeable, is a dangerous companion," wrote Plato more than two millennia ago. Our case is about that danger; it concerns "a brave vessel . . . [d]ash'd all to pieces," like the ship Prospero hexed in *The Tempest*. William Shakespeare, *The Tempest* act 1, sc. 2.

Although the background has its drama, the primary legal issues are more mundane: Is an arbitration provision in a maritime insurance policy enforceable despite law in the forum state assertedly precluding its application? In addressing this question, we consider several questions concerning the intersection of the McCarran-Ferguson Act, 15 U.S.C. § 1012, which shields state insurance laws from federal preemption, and the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1-16, which provides for enforcement of arbitration provisions in maritime contracts. After doing so, we conclude that the arbitration clause should be given effect.

I. BACKGROUND

A. Contracting for Yacht Insurance

Montana residents Taunia and Chris Kittler are the sole members of Galilea, LLC ("Galilea"), a Nevada limited liability company. In 2014, Galilea purchased a sixty-foot yacht ("the Yacht"). This case concerns the scope of the insurance coverage Galilea bought for the Yacht.

About a year after purchasing the Yacht, the Kittlers submitted to Pantaenius America Ltd. ("Pantaenius") an online request for an insurance quote. Pantaenius specializes in obtaining and administering yacht insurance policies, acting as an agent for insurance underwriters. Following the quote request, the Kittlers electronically exchanged several documents with Pantaenius. According to Galilea, the Kittlers also spoke with a Pantaenius representative over the phone to discuss the materials needed to complete an insurance application. The Kittlers say they informed the Pantaenius representative on one call that it would be difficult to submit a hand-signed application because the Kittlers were, at the time, sailing the yacht in the Caribbean, en route from Florida to San Diego via the Panama Canal. Pantaenius nonetheless required a hand-signed application, so the Kittlers docked in Puerto Rico to locate the necessary equipment to print and scan a signed application.

The application for insurance listed three different underwriters: AGCS Marine Insurance Company, Liberty Mutual Insurance Company, and Torus National Insurance Company (collectively, "Underwriters"). The application noted that one or more of these Underwriters would "be assigned at the time of binding [insurance] coverage."

The application also included arbitration and choice-oflaw terms. The arbitration term provided, in relevant part:

> Any dispute arising out of or relating to the relationship between Pantaenius America Ltd and/or our participating underwriters and the insured shall be settled by arbitration administered by the American Arbitration Association ["AAA"] in accordance with its Commercial Arbitration Rules. . . . The dispute shall be submitted to one arbitrator. . . . The place of arbitration shall be New York, New York.

The application also provided that the "relationship" and the Agreement "shall be governed by the laws of New York."

A day after Galilea submitted the signed application, Pantaenius issued an insurance binder providing preliminary coverage for up to two weeks from the date of application.[2] The binder set a coverage limit of $1,566,500, based on the "total agreed fixed value" of the Yacht; established a covered "Cruising Area" that extended south to 30.5 degrees north latitude; named the three Underwriters as the issuing insurance companies; incorporated the forthcoming policy's terms and conditions; and attached a document with those anticipated terms.

The formal insurance policy issued a day later. Pantaenius formally signed the insurance policy on behalf of the three Underwriters. The policy provided that it would be "effective only when the insured vessel(s) are within the 'cruising area' specified."

The choice-of-law and forum selection provisions in the policy's terms and conditions were different from those in the application. Both the policy and the application called for arbitration in New York pursuant to AAA rules. But the scope of the choice-of-law provision and arbitration clause differed. The policy provided:

> This insurance policy shall be governed by and construed in accordance with well established and entrenched principles and precedents of substantive United States Federal Maritime Law, but where no such established and entrenched principles and precedents

[2] An insurance binder provides preliminary, temporary coverage, often reflecting the terms of a forthcoming formal insurance policy should one be issued. *See* 16 Williston on Contracts § 49:53 (4th ed. 2017).

> exist, the policy shall be governed and construed in accordance with the substantive laws of the State of New York, without giving effect to its conflict of laws principles, and the parties hereto agree that any and all disputes arising under this policy shall be resolved exclusively by binding arbitration to take place within New York County, in the State of New York, and to be conducted pursuant to the Rules of the American Arbitration Association.

The policy thus differed from the application by (i) identifying federal maritime law and, to fill its gaps, New York law, as the choice of law applicable to the policy, and (ii) including different language concerning the scope of arbitrable disputes—"any and all disputes arising under this policy," not "any dispute arising out of or relating to the relationship."

B. The Parties' Dispute and Procedural History

The Yacht ran ashore near Colón, Panama about a month after the insurance policy issued. Galilea submitted a claim for insurance coverage, but the Underwriters refused to pay it. Pantaenius explained that the Yacht had traveled south of the cruising area set forth in both the application and the policy. Galilea rejoined that the application and policy do not reflect the parties' actual agreement, and that Pantaenius and the Underwriters misrepresented the scope of the written policy. After Galilea requested reconsideration of the coverage denial, the Underwriters initiated arbitration proceedings in New York. Galilea submitted objections and counterclaims in the arbitration proceedings, but also filed a separate action in federal court in the District of Montana, along with a motion to stay the arbitration proceedings.

In its Montana complaint, Galilea asserted twelve causes of action, all of which substantially overlapped with its arbitration counterclaims. The Underwriters responded with a motion to dismiss for failure to state a claim and a motion to compel arbitration. Separately, in federal court in the Southern District of New York, the Underwriters filed a petition to compel arbitration.

The Montana district court issued two orders from which the parties have lodged certified interlocutory cross-appeals. *See* 28 U.S.C. § 1292(b). In those orders, the court held: (1) the arbitration provision in Galilea's original insurance application was not relevant, because it was not included in the Underwriters' demand for arbitration; (2) claims arising under the insurance policy come within admiralty jurisdiction, and under relevant choice-of-law principles, federal maritime law governs the contract; (3) the FAA applies and requires enforcing the policy's arbitration provision; (4) questions relating to the enforceability and scope of the arbitration provision are properly determined by the court, not an arbitrator; and (5) the scope of the policy's arbitration clause did not extend to cover ten of Galilea's twelve claims. The district court thus granted the Underwriters' motion to compel arbitration as to two of Galilea's claims but denied it as to the others.

II. DISCUSSION

This case ultimately presents "gateway" arbitrability questions: whether a valid and enforceable agreement to arbitrate exists, and, if so, whether particular claims fall within the scope of the arbitration provision. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010). But, before we reach those questions, we must decide whether there is an agreement to which the federal law of arbitrability could apply. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 401, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). We conclude the parties' insurance policy is the governing contract and falls within the *Federal Arbitration Act's* scope.

A. The FAA Applies to the Insurance Policy but Not the Insurance Application

The FAA cannot compel a party "to arbitrate the threshold issue of the existence of an agreement to arbitrate" unless there is an overarching agreement to do so within the FAA's scope. *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140-41 (9th Cir. 1991) (emphasis omitted); *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296-97, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010). That is, "[a]lthough challenges to the validity of a contract with an arbitration clause are to be decided by the arbitrator, challenges to the very existence of the contract are, in general, properly directed to the court." *Kum Tat Ltd. v. Linden Ox Pasture, LLC*, 845 F.3d 979, 983 (9th Cir. 2017) (internal citations omitted). Accordingly, we "must first make a threshold finding that the document [evidencing an agreement] at least purports to be . . . a contract." *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 476 (9th Cir. 1991).

1. The Insurance Application Is Not a Contract

As noted, Galilea submitted a signed application for insurance to the Underwriters. Among other terms, the application included choice-of-law and forum selection clauses. . . . The Underwriters suggest the application's arbitration provision should govern this dispute under the FAA; Galilea maintains, to the contrary, that the application does not evidence mutual assent to a contract or to arbitration.

We agree with Galilea on this point. Under the law made applicable by the policy and application, the application was not a contract.

New York state law is made applicable under Galilea's insurance application, and also, if no established substantive principle or precedent of federal maritime law applies, under the insurance policy's choice-of-law provision. We have not uncovered any established federal maritime law rule on this issue, and so we proceed to the law of New York.

Under New York law, language from an application may be incorporated into an insurance policy only if the application was attached to the policy at the time of delivery. *See Smith v. Pruco Life Ins. Co. of N.J.*, 710 F.3d 476, 479-80 (2d Cir. 2013) (per curiam) (citing N.Y. Ins. Law § 3204(a)); *Cutler v. Hartford Life Ins. Co.*, 22 N.Y.2d 245, 250-52, 239 N.E.2d 361, 292 N.Y.S.2d 430 (1968); *Berkshire Life Ins. Co. v. Weinig*, 290 N.Y. 6, 10, 47 N.E.2d 418 (1943); *see also* 16 Williston on Contracts at § 49:41 (4th ed. 2017); 2 Couch on Insurance § 18:6 (3d ed. 2017). The insurance policy "shall contain the entire contract between the parties," and no document may be incorporated by reference into the insurance contract unless a true copy is "endorsed upon or attached to the policy or contract when issued." *Smith*, 710 F.3d at 479-80 (quoting N.Y. Ins. Law § 3204(a)(1)).

Here, it does not appear that the application was attached to the policy when issued. Instead, some of the information provided in the application was reprinted in the policy, but the forum-selection and choice-of-law provisions were not incorporated. Even if attached to the policy, the application is not named in the policy as an incorporated document. Thus, because the application was not a contractual agreement under New York law, the federal law of arbitrability cannot apply to its arbitration clause.[3]

2. The Insurance Policy Is a Contract Subject to the FAA

We now turn to whether the policy is subject to the FAA. Policies that insure maritime interests against maritime risks are contracts subject to admiralty jurisdiction and to federal maritime law. *La Reunion Francaise SA v. Barnes*, 247 F.3d 1022, 1025 (9th Cir. 2001). The insurance policy here is a maritime insurance contract and so would seem to be subject to federal maritime law.

Galilea asserts to the contrary—that under federal maritime law, the FAA does *not* apply to this contract, because Montana public policy overrides its arbitration provision and Montana law, preserved from federal preemption by the federal *McCarran-Ferguson Act*, precludes the FAA's application. We disagree, and hold that the FAA does apply.

a. The Federal Arbitration Act Constitutes Established Federal Maritime Law for "Maritime Transactions"

The Supreme Court long ago established that where an "insurance policy . . . is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction." *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313, 75 S. Ct. 368, 99 L. Ed. 337 (1955). At the same time, *Wilburn Boat* instructed, "it does not follow . . . that every term in every maritime contract can only be

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[3] We do not consider the extent to which other representations made in the application are incorporated into the policy or may otherwise be considered when interpreting or enforcing the policy.

controlled by some federally defined admiralty rule." *Id*. Rather, held *Wilburn Boat*, as insurance is traditionally an area of state regulation, federal maritime law leaves room for state insurance regulation if there is no established federal maritime law rule or need for federal uniformity. *Id*. at 316, 321; *see also id*. at 323-24 (Frankfurter, J., concurring in the judgment).

After *Wilburn Boat*, "the initial inquiry of the courts in interpreting a policy of marine insurance [is] to determine whether there is an established federal maritime law rule." *Certain Underwriters at Lloyds, London v. Inlet Fisheries Inc*., 518 F.3d 645, 649-50 (9th Cir. 2008) (quoting Thomas J. Schoenbaum, Admiralty and Maritime Law § 17-6 (4th ed. 2004)) (internal quotation marks omitted). If so, "federal admiralty law [will] govern[]. . . ." *Suma Fruit Int'l v. Albany Ins. Co*., 122 F.3d 34, 35 (9th Cir. 1997). "[S]tate law will control . . . only in the absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice." *Id*. (internal quotation marks omitted).

Here, there is an established federal maritime law rule concerning the enforcement of arbitration provisions in insurance policies, namely, the *Federal Arbitration Act*. The FAA specifically applies to "maritime transaction[s]." 9 U.S.C. § 2. "Maritime transactions" include, among other types of agreements, "agreements relating to . . . repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction." *Id*. § 1.[4] The parties' insurance policy relates both to collisions and to repairs to the Yacht, and, as *Wilburn Boat* holds, 348 U.S. at 313, a dispute concerning a maritime insurance policy comes within federal admiralty jurisdiction. As the parties' dispute falls within the scope of the FAA and the FAA includes an applicable, specific federal maritime law rule, under *Wilburn Boat*, Montana state law does not govern the validity of the agreement's arbitration provision.

b. Federal Maritime Law Is Not Precluded by Montana Law under the McCarran-Ferguson Act

Galilea first attempts to navigate around *Wilburn Boat* with the *McCarran-Ferguson Act,* 15 U.S.C. § 1011 *et seq*., which precludes the application of federal statutes if (1) a state law is "enacted . . . for the purpose of regulating the business of insurance;" (2) the federal law does not "specifically relat[e] to the business of insurance;" and (3) the federal statute's application would "invalidate, impair, or supersede" state insurance law. *Humana Inc. v. Forsyth*, 525 U.S. 299, 307, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999) (internal quotation marks omitted). Galilea points to Montana's Uniform Arbitration Act, which renders unenforceable arbitration clauses in "insurance polices or annuity contracts except for those contracts

[4] "[C]ontracts of employment of seamen" are excepted from the FAA's coverage. 9 U.S.C. § 1.

between insurance companies," Mont. Code Ann. § 27-5-114(2)(c), and asserts that the *McCarran-Ferguson Act* requires that, notwithstanding *Wilburn Boat*, the Montana rule precluding arbitration of consumer insurance disputes applies here. Galilea also cites to non-maritime insurance cases holding arbitration agreements unenforceable under state anti-arbitration laws saved by the *McCarran-Ferguson Act*. *See Am. Bankers Ins. Co. of Fla. v. Inman*, 436 F.3d 490, 492 (5th Cir. 2006); *McKnight v. Chicago Title Ins. Co.*, 358 F.3d 854, 855 (11th Cir. 2004) (per curiam); *Standard Sec. Life Ins. Co. of N.Y. v. West*, 267 F.3d 821, 823-24 (8th Cir. 2001); *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931, 931-32 (10th Cir. 1992).

This McCarran-Ferguson-based argument sails toofar ahead too fast. Slowing down the analysis, it becomes apparent that there is no route for Montana law to apply as a competitor to the FAA here.

Under *Wilburn Boat*, Galilea's maritime insurance policy is within federal admiralty jurisdiction and governed by applicable maritime law if such law exists. Applying an established federal maritime law rule—such as the provision of the FAA directly mandating the enforcement of arbitration clauses in maritime transactions—thus does not "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Rather, given *Wilburn Boat* and its progeny, any applicable maritime law rule is primary, and state law applies only if maritime law does not. Given the interstitial, contingent nature of state law in this setting, state insurance law is not "invalidate[d], impair[ed], or supersede[d]," *id.*, by applying a maritime law rule when, as here, there is one.

Alternatively, one reaches the same conclusion if one applies established maritime choice-of-law principles to the insurance policy's choice-of-law provisions. The parties here agreed to a choice-of-law term in the insurance policy—federal maritime law and, as needed, New York law. "[W]here the parties specify in their contractual agreement which law will apply, admiralty courts will generally give effect to that choice," *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1296-97 (9th Cir. 1997), absent, as relevant here, "a state which has a materially greater interest than the chosen state . . . and which . . . would be the state of the applicable law in the absence of an effective choice of law," *Flores v. Am. Seafoods Co.*, 335 F.3d 904, 917 (9th Cir. 2003) (quoting *Restatement (Second) of Conflict of Laws* § 187(2) (1991)).

Montana does not have a materially greater interest than federal maritime (or New York) law. There is no question that Montana law has relatively little to do with this dispute. Galilea is a Nevada limited liability corporation, and the Insurers have principal places of business or are incorporated under the laws of Delaware, New Jersey, Illinois, and Massachusetts. Although Galilea's members are Montana residents, they were in Florida, Puerto Rico, and the Caribbean Sea at the time of contracting, and the insured property appears never to have been in Montana. Moreover, landlocked Montana has relatively weak interests in maritime insurance law, particularly as compared to coastal states with more developed maritime law, including New York.

But, again—there *is* a federal maritime law rule here applicable, the FAA. Under the FAA, the arbitration provision is enforceable. The *McCarran-Ferguson Act* thus has no pertinence, as no state's law is applicable in the first instance.

c. Federal Maritime Law Is Not Precluded by Montana Law under **The Bremen**

Galilea also argues that the policy's choice-of-law provision is unenforceable under *M/S Bremen v. Zapata Off-Shore Co. (The Bremen*), 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972). We are not persuaded.

The Bremen held that federal maritime law makes *forum* selection clauses presumptively enforceable. *Id.* at 13-14. At the same time, "[u]nder the directives of the Supreme Court in [*The*] *Bremen*, we will determine a forum selection clause is unenforceable 'if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.'" *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009) (per curiam) (quoting *The Bremen*, 407 U.S. at 15) (emphasis omitted). Galilea points to the strong public policy of Montana against enforcement of arbitration agreements in the context of this dispute, and argues that enforcement of the policy's arbitration agreement would contravene the policy of the state in which Galilea brought suit.

There are two critical problems with Galilea's reliance on *The Bremen*. First, that case did not discuss federal maritime law rules about *choice-of-law clauses*, but rather about forum selection clauses. *See The Bremen,* 407 U.S. at 2, 17-19. By contrast, Galilea and the Underwriters agreed to a kind of forum selection provision—arbitration[5]—and also to a separate choice-of-law provision—federal maritime law, and where that law has gaps, New York law. And as we have already established, here there is no gap in federal maritime law to fill with law from *any* state, Montana included, as the FAA supplies the governing arbitration law for maritime transactions.

Second, and more foundationally, *The Bremen* considered whether the public policy of the forum where suit was brought—there, federal public policy as supplied by federal maritime law—outweighed the application of the law of other countries.

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[5] In the context of international arbitration, the Supreme Court has noted, "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974)*; see also Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 837 (9th Cir. 2010).

Id. at 17-18. In other words, under the rule of *The Bremen* and its progeny, courts consider the application of the laws of otherwise equally situated fora in light of the "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). But here we encounter an unequal, hierarchical relationship between federal maritime law and state law; again, "[s]tate law governs disputes arising under marine insurance contracts only 'in the absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice.'" *Kiernan v. Zurich Cos.,* 150 F.3d 1120, 1121 (9th Cir. 1998) (citations omitted).

It does not make sense to apply the federal maritime choice-of-forum rule of *The Bremen* to invalidate *another* established federal maritime rule specifically addressing the appropriate forum—here, arbitration—because of a conflict with a forum *state's* public policy. Within federal admiralty jurisdiction, conflicting state policy cannot override squarely applicable federal maritime law. Applying *The Bremen* in the way Galilea requests would distort the basic, gap-filling principles underlying federal maritime law's limited recognition of state insurance law. "[S]ince the effect of the application of [state] law here would be to invalidate the contract, this case can hardly be analogized to cases . . . where state law had the effect of supplementing the remedies available in admiralty for the vindication of maritime rights." *Kossick v. United Fruit Co*., 365 U.S. 731, 741-42, 81 S. Ct. 886, 6 L. Ed. 2d 56 (1961) (citations omitted). We thus conclude that Galilea's reliance on Montana law under *The Bremen* is misplaced.

For the foregoing reasons, Montana's law simply does not apply to the dispute here. So it cannot act, through *The Bremen* or any other avenue, to trump the FAA as an established federal maritime law rule.

B. The Parties Have Delegated Arbitrability Issues to an Arbitrator

We conclude by addressing whether arbitrability issues have been delegated to an arbitrator under the parties' agreement. Because the parties here are sophisticated, and because they incorporated AAA rules into their arbitration agreement, they have clearly and unmistakably indicated their intent to submit arbitrability questions to an arbitrator.

Under the FAA, "the usual presumption that exists in favor of the arbitrability of merits-based disputes is replaced by a presumption *against* the arbitrability of arbitrability." *Cape Flattery Ltd. v. Titan Maritime, LLC,* 647 F.3d 914, 920 (9th Cir. 2011) (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)); *see also BG Group PLC v. Republic of Argentina,* 134 S. Ct. 1198, 1206-07, 188 L. Ed. 2d 220 (2014) (summarizing the presumptions that guide "'threshold' questions about arbitration"). Because the question of who should decide arbitrability issues "is rather arcane," ambiguity on this question cuts in favor of deciding the parties did *not* delegate these questions to an arbitrator. *First Options,* 514 U.S. at 945 (citation omitted). Presuming otherwise "might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.* (citation omitted). Accordingly, the court maintains jurisdiction over these gateway arbitrability questions unless there is "'clear and unmistakable' evidence that the parties intended to delegate the arbitrability question to an arbitrator." *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015).

In *Brennan*, we decided that, at least in a contract between sophisticated parties, the "incorporation of the AAA rules [into an arbitration agreement] constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability." *Id.* That is because the American Arbitration Association's rules provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." American Arbitration Association Commercial Arbitration Rule 7; *accord* American Arbitration Association Consumer Arbitration Rule 14.[7]

Here, the policy's arbitration provision states, in relevant part, that "the parties hereto agree that any and all disputes arising under this policy shall be resolved exclusively by binding arbitration . . . conducted pursuant to the Rules of the American Arbitration Association." This policy language is comparable to that in the provision in *Brennan*. *See* 796 F.3d at 1128 (quoting agreement that relevant disputes "'be settled by binding arbitration in accordance with the Rules of the American Arbitration Association'").

As in *Brennan* itself, we need not decide whether the *Brennan* rule applies when one or more party is unsophisticated. Both parties here are sophisticated with respect to contracting for insurance policies. The Underwriters are, obviously, sophisticated parties; they underwrite maritime insurance policies. But so are Galilea and the Kittlers. Although they are Montana residents, Taunia and Chris Kittler formed a limited liability company under Nevada law to own and maintain a yacht worth more than a million dollars. In addition, Chris Kittler owns and operates a financial services company, also incorporated under Nevada law. In light of Galilea's and the Underwriters' sophistication, the agreement to arbitrate according to AAA rules is sufficient to show clear and unmistakable intent to resolve arbitrability questions in arbitration, rather than federal court. The district court therefore erred by declining to send those questions to arbitration and instead construing the scope of the parties' arbitration agreement itself.

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[7] Galilea contends that it is unclear which set of American Arbitration Association rules apply here. But the same result obtains as to arbitrability under either potentially applicable set of rules.

III. CONCLUSION

The Underwriters' argument that the insurance application supplies an enforceable arbitration agreement fails. The parties' insurance *policy*'s arbitration clause concerns a maritime transaction falling under the FAA, and Montana law is inapplicable under both federal maritime law choice-of-law principles and the policy itself, so it does not render the arbitration clause unenforceable. We further agree with the Underwriters that the arbitration agreement shows a clear and unmistakable intent to resolve arbitrability questions in arbitration. We thus affirm the district court's order finding the policy's arbitration clause enforceable, affirm the district court's order granting the Underwriters' motion to compel arbitration as to certain causes of action, reverse the district court's order denying the Underwriters' motion to compel arbitration as to Galilea's remaining causes of action, and remand to the district court with instructions to grant the Underwriters' motion to compel arbitration in its entirety.***

McDonnel Group v. Great Lakes Insurance SE, 2019 U.S. App. LEXIS 14177 (5th Cir. May 13, 2019)

Jolly, Circuit Judge:

In this appeal, relating to arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, we address whether a "conformity to statute" provision2 amends the insurance contract so as to conform with a conflicting, but preempted, state statute forbidding arbitration in insurance contracts.

McDonnel Group, L.L.C. purchased an insurance policy from the defendants that included a written agreement to arbitrate disputes. After the Insurers denied McDonnel's claim, McDonnel initiated this declaratory and breach of contract action in federal district court. The Insurers moved to dismiss based on the policy's arbitration provision. McDonnel responded that the arbitration provision was "amended out" of the contract through the contract's conformity to statute provision because arbitration conflicted with a Louisiana statute. The district court held, however, that the allegedly conflicting Louisiana statute was preempted by the Convention, and therefore dismissed the case in favor of arbitration. We must decide whether the policy's conformity provision negates the agreement to arbitrate. We hold that it does not and thus AFFIRM the district court.

I.

In fall 2015, McDonnel Group, L.L.C. obtained a builder's risk insurance policy from a group of insurers for a construction project on a property located in New Orleans, Louisiana. Two years later, according to McDonnel, the property suffered significant water damage. McDonnel submitted a claim that the Insurers refused to pay.

McDonnel then filed the instant action seeking declaratory relief and damages for breach of contract and breach of the duty of good faith and fair dealing. The Insurers responded by filing a motion to dismiss for lack of subject-matter jurisdiction and improper venue. Fed. R. Civ. P. 12(b)(1), (3). As to both defenses, the Insurers invoked the contract's arbitration provision, which provides:

Any dispute, controversy or claim arising out of, relating to, or in connection with this *Policy*, shall be finally settled by arbitration. The arbitration shall be conducted in accordance with the International Arbitration Rules of the American Arbitration Association in effect at the time of the arbitration. The seat of the arbitration shall be New York, New York, in the United States of America.

The Insurers argued that the arbitration provision should be enforced, and the case dismissed in favor of arbitration pursuant to the Convention.

The policy, however, also contained a "conformity to statute" provision, stating: "In the event any terms of this *Policy* are in conflict with the statutes of the jurisdiction where the *Insured Property* is located, such terms are amended to conform to such statutes." Invoking that provision, McDonnel responded that any obligation to arbitrate under the Convention did not apply to the instant dispute because the policy's arbitration agreement was, as a matter of law, invalid. The arbitration provision was contrary to La. Rev. Stat. Ann. § 22:868(A)(2), which prohibits arbitration agreements in insurance contracts covering property located in the state. Thus, the conformity provision, McDonnel argued, "amended" the arbitration provision out of the contract in order to "conform" with Louisiana law. Consequently, the dispute between McDonnel and the Insurers was not subject to the Convention.

The district court disagreed. Relying on the decision of our en banc court in *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's*, the court held that the Convention superseded La. Rev. Stat. Ann. § 22:868. 587 F.3d 714 (5th Cir. 2009). Because the state statute was preempted by federal law, the court determined that no conflict existed between the policy and state law so as to trigger the conformity provision of the policy. Thus, the arbitration agreement remained valid. The district court, therefore, dismissed the action in favor of arbitration. The parties, accordingly, present a precise issue in this appeal: does the contractual agreement to conform to state statutes apply when the conflicting state statute has been held as a matter of law to have been preempted by the Convention.***

III.

A.

Although quite elemental to say, it is relevant here to point out that under our constitutional system, federal law, including the treaties of the United States, are the "supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. From the Supremacy Clause stems our preemption doctrine: when federal and state law conflict, the state law is nullified. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982). This case presents such a conflict. We thus begin our discussion with a review of the state and federal laws at issue.

First the state law: Louisiana's insurance code. *See* La. Rev. Stat. Ann. § 22:1 *et seq*. Specifically, § 22:868(A)(2) provides that "[n]o insurance contract delivered or issued for delivery in [Louisiana] and covering subjects located . . . in [Louisiana] . . . shall contain any condition, stipulation, or agreement . . . . [d]epriving the courts of [Louisiana] of the jurisdiction of action against the insurer." Louisiana's state courts have interpreted § 22:868 as rendering void arbitration provisions in insurance contracts. *See, e.g., Doucet v. Dental Health Plans Mgmt. Corp.*, 412 So. 2d 1383, 1384 (La. 1982) ("Classification of the contract at issue as an insurance contract renders the arbitration provisions of that contract unenforceable under [§ 22:868].").

Next the federal law. In 1958, the United States joined and adopted the Convention, an international commercial treaty, to "encourage the recognition . . . of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). The Convention requires signatory states to "recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." Convention art. II(1). When the Convention is applicable, courts of signatory states must "at the request of one of the parties, refer the parties to arbitration, unless it finds that the . . . agreement is null and void, inoperative or incapable of being performed." *Id.* at art. II(3). This court has succinctly described the Convention's trigger as consisting of four elements; a district court must dismiss a case in favor of arbitration "if (1) there is an agreement in writing to arbitrate the dispute, (2) the agreement provides for arbitration in the territory of a Convention signatory, (3) the agreement arises out of a commercial legal relationship, and (4) a party to the agreement is not an American citizen." *Francisco v. STOLT ACHIEVEMENT MT*, 293 F.3d 270, 273 (5th Cir. 2002). Like all treaties, the Convention ordinarily preempts conflicting state laws. *See, e.g., Lim*, 404 F.3d at 904.

But the appeal today presents a twist. The McCarran—Ferguson Act, passed by Congress in 1945, protects state laws regulating the insurance industry from the preemptive effect of federal law. This Act "declares that the continued regulation . . . by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation . . . of such business by the several States." 15 U.S.C. § 1011; *see also* 15 U.S.C. § 1012(a) ("The business of insurance . . . shall be subject to the laws of the several States."). To shield state regulation from unintended federal interference, the Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." *Id.* § 1012(b). In other words, the McCarran—Ferguson Act permits states to reverse-preempt an otherwise applicable "Act of Congress" by enacting their own regulations of the insurance industry.

Against this background, in *Safety National*, our en banc court addressed whether, under the McCarran—Ferguson Act, La. Stat. Rev. § 22:868 reverse-preempted the Convention or its implementing legislation. 587 F.3d at 717. We found that it did not. An "Act of Congress," as referred to in the McCarran-Ferguson Act, does not include a treaty, such as the Convention, which "remains an international agreement or contract negotiated by the Executive Branch and ratified by the Senate, not by Congress." *Id.* at 723 (footnotes omitted). This governing principle is true whether the treaty is self-executing or requires implementing legislation. *Id.* at 723-24. And, importantly, the FAA itself points towards the Convention, stating that "[i]t is *the Convention* [not the congressional legislation] under which legal agreements 'fall.'" *Id.* at 724 (quoting 9 U.S.C. § 202). It is therefore the Convention itself, *i.e.*, the treaty, not the FAA, *i.e.*, the federal statute that codified the treaty, that supersedes Louisiana law. *Id.* at 724-25. Thus, the en banc court held that, because "the Convention, an implemented treaty . . . supersedes state law, the McCarran—Ferguson Act's provision that no 'Act of Congress' shall be construed to supersede state law regulating the business of insurance is inapplicable." *Id.* at 725. To the point: the McCarran—Ferguson Act does not permit state laws to reverse-preempt the Convention. *Id.* at 732. This appeal is not yet resolved, however.

B.

We now turn to the analysis of the precise issue before us, which we break down as follows: whether (1) an agreement to arbitrate (2) provided in an insurance policy (3) is voided by the policy's conformity provision (4) when the conflicting state law prohibiting arbitration (5) has been preempted by the Convention. McDonnel argues that the arbitration provision was amended by deletion from the contract *ab initio* because it conflicts with La. Rev. Stat. Ann. § 22:868. The Insurers respond that there is no conflict between the contract and § 22:868 because the Convention preempts this state law.

This issue, which is only a question of contract interpretation, is of first impression. Although *Safety National* has already decided the more difficult questions regarding preemption and reverse preemption, the insurance contract in that case did not contain a conformity provision. So, what does the contract between McDonnel and the Insurers provide? We focus on two provisions. First, it contains a conformity provision, which amends the terms of the contract to conform to state statutes. But that provision only applies "[i]n the event any terms of [the] *Policy* are in conflict with the statutes of the jurisdiction where the *Insured Property* is located." Second, the policy contains an arbitration provision. It is the arbitration provision of the insurance policy that is said not to conform with La. Rev. Stat. Ann. § 22:868, a statute prohibiting arbitration agreements. This state statute, however, as we held in *Safety National*, is preempted by the Convention. Because the state statute, *i.e.*, La. Rev. Stat. Ann. § 22:868, is preempted by the Convention, the statute does not and cannot apply to McDonnel's policy. And because the statute does not apply to the policy, there is no conflict between the policy and the state statute. With that premise established, the conformity provision is not triggered; its inapplicability leads only to the conclusion that the arbitration provision survives, undiminished by state law.***

***Lexington Insurance Co. v. Exxon Mobil Corp.*, 2017 Tex. App. LEXIS 3819, 2017 WL 1532271 (Tex. App.—Beaumont April 27, 2017, no pet.)**

Justice Horton delivered the opinion of the court.

Company challenges the trial court's denial of its motion to compel arbitration. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.016 (West 2015) (authorizing interlocutory appeals from orders denying arbitration for contracts subject to the *Federal Arbitration Act*); *Id.* § 171.098(a)(1) (West 2011) (authorizing interlocutory appeals from decrees denying applications to compel arbitration for contracts subject to the Texas Arbitration Act). According to Lexington, the trial court should have required Exxon Mobil Corporation and ExxonMobil Oil Corporation (collectively, Exxon) to arbitrate their dispute over whether an umbrella policy issued by Lexington provided Exxon with coverage for a casualty that occurred on its premises in April 2013.

We conclude that a valid arbitration agreement exists, that the scope of the matters to be arbitrated include the disagreement the parties have over whether Lexington's umbrella covers Exxon for the claims Exxon made against Lexington under the policy, and that the trial court was required to grant Lexington's motion. We reverse the trial court's order denying Lexington's motion to compel arbitration, and we instruct the trial court to render an order requiring that all of Exxon's claims against Lexington and all of Lexington's defenses to Exxon's claims proceed in arbitration. We remand the cause to the trial court for further proceedings consistent with the Court's opinion.

Background

The casualty that forms the basis of Exxon's claims arose from a fire that occurred in April 2013 at Exxon's refinery in Beaumont, Texas. Exxon's Second Amended Petition, its live pleading for the purposes of the hearing on Lexington's motion to compel arbitration, indicates that at least ten individuals were injured in or as a result of the fire; of those injured, two of the individuals subsequently died. Three of the individuals injured in the fire were employees of Brock Services, who was performing work at Exxon at the time of the casualty under a written procurement agreement. The written agreement indicates that Exxon hired Brock Services to provide Exxon with scaffolding, painting, and insulation services at Exxon's Beaumont refinery. Under the written agreement, Brock Services was required to name Exxon as an additional insured on all of the liability policies that the agreement required Brock Services to obtain while performing work for Exxon.

After the casualty, Exxon demanded that Lexington recognize that the umbrella policy that Lexington issued to Brock Services provided insurance coverage to Exxon for claims that arose from the casualty. When Lexington failed to respond to Exxon's demand, Exxon sued Lexington, and alleged that Lexington had wrongfully denied Exxon's claim. Lexington responded to Exxon's suit by filing a motion to compel arbitration. On July 26, 2016, the trial court conducted a hearing on Lexington's motion and admitted various exhibits into evidence for the purposes of the hearing on the motion to compel arbitration. However, no witnesses testified during the hearing. At the conclusion of the hearing, the trial court deferred its ruling and asked the parties to present the court with additional arguments, in writing, to support the positions they had taken during the hearing.

Exxon and Lexington complied with the court's request. The last documents the trial court considered before ruling on Lexington's motion to compel arbitration were filed on September 9, 2016. Approximately two weeks later, the trial court denied Lexington's motion. In a letter explaining its ruling, the trial court advised the parties that Lexington's umbrella policy was "clear and unambiguous," and that the court had construed it "by a simple factual analysis requiring no interpretation of the policy itself." The letter indicates that the trial court concluded that one of the policy provisions Lexington relied on to support its argument that the policy did not cover the casualty was not relevant to the dispute. While the trial court's letter does not specifically discuss whether the parties' disagreement over coverage were matters that fell outside those the arbitration agreement required the parties to arbitrate, the court's ruling clearly implies the trial court thought the dispute could be settled as a matter of law based on its construction of the policy.

On appeal, Lexington argues that the trial court erred by denying Lexington's motion to compel because its dispute with Exxon about whether the umbrella policy covered Exxon for the casualty fell inside the scope of the arbitration clause in the arbitration agreement that is in the umbrella policy that it issued to Brock Services. According to Lexington, Exxon failed to raise any valid defenses to its motion to compel arbitration, and its motion should have been granted. In response, Exxon argues that the trial court properly construed the policy in concluding that the policy provided Exxon with coverage for the casualty. According to Exxon, Lexington's policy covers the casualty based on the language found in the policy so no valid disagreement can exist over whether the policy provided Exxon with coverage from the claims that it was required to defend arising from the casualty.

Is Exxon Subject to the Arbitration Agreement?

In its brief, Exxon argues that it is not bound by the arbitration clause in the umbrella policy because Brock Services acquired the policy, it did not negotiate to have a policy that contained an arbitration clause, and it is an additional insured under the agreement. Exxon suggests that a decision to enforce the arbitration clause under circumstances where it did not directly acquire the policy from the carrier would be unconscionable.

However, Exxon cannot seek to recover under the terms of Lexington's policy and at the same time avoid the provisions in the policy that it disfavors. Under the doctrine of direct benefits estoppel, non-signatories to arbitration agreements may be bound to the arbitration clause of a contract when the plaintiff is suing seeking to enforce all of the other terms of a written agreement. *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739-40 (Tex. 2005) (orig. proceeding) (explaining that under the doctrine of direct benefits estoppel, a non-signatory plaintiff seeking to benefit under a contract cannot avoid the contract's arbitration clause). Given that Exxon is suing Lexington on Lexington's policy, we conclude that Exxon cannot avoid the umbrella policy's arbitration clause. *Id.*; *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 755-56 (Tex. 2001) (holding that a non-signatory subjected itself to the contract's terms by suing on the contract, including the contract's arbitration agreement).

Exxon also contends that enforcing the umbrella policy's arbitration provision against additional insureds who were not involved in the negotiations that led to the purchase of the policy would be unconscionable. *See Tex. Civ. Prac. & Rem. Code Ann.* § 171.022 (West 2011) ("A court may not enforce an agreement to arbitrate if the court finds the agreement was unconscionable at the time the agreement was made."). In this case, the trial court did not make a written finding on Exxon's claim of unconscionability. Additionally, Exxon provided no evidence to the trial court in support of its claim that enforcing the arbitration clause would be unconscionable. Finally, in its brief, Exxon did not provide this Court with any citations to any cases in which an appeals court has affirmed a finding of unconscionability where the facts of the case involved the claims of an alleged additional insured.

When the facts that form the basis of the unconscionability claim are undisputed, as here, an appellate court applies a *de novo* standard to review a trial court's decision to deny a motion to compel arbitration. *See Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 499 (Tex. 2015). As the Texas Supreme Court explained in *Lopez*, an arbitration agreement may be either substantively unconscionable, procedurally unconscionable, or both. *Id.* Nevertheless, arbitration agreements in surplus lines insurers' policies are not presumptively unconscionable. *See* Tex. Civ. Prac. & Rem. Code Ann. § 171.001 (West 2011). Additionally, the Supreme Court has explained that "[a]dhesion contracts are not automatically unconscionable, and there is nothing per se unconscionable about arbitration agreements. *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 608 (Tex. 2015) (orig. proceeding). We further note that Chapter 981 of the Texas Insurance Code, the chapter of the Insurance Code regulating surplus lines insurers, does not prohibit surplus lines carriers from including arbitration provisions in their form policies. *See* Tex. Ins. Code Ann. §§ 981.001-.222 (West 2009 & Supp. 2016). And, section 981.005 provides that insurance contracts obtained from eligible surplus lines insurers are "(1) valid and enforceable as to all parties; and (2) recognized in the same manner as a comparable contract issued by an authorized insurer." Tex. Ins. Code Ann. § 981.005.

By enacting a statute that makes written agreements to arbitrate generally enforceable in Texas, the Legislature created a public policy that expressly favors the arbitration of a broad range of disputes. *See* Tex. Civ. Prac. & Rem. Code Ann. § 171.001. We find nothing in the Insurance Code or case law indicating that the policy in Texas favoring the arbitration of disputes does not include such provisions when they are in surplus lines umbrella policies.

In arguing that enforcing arbitration would be unconscionable, Exxon does not expressly use the term "procedural unconscionability." Instead, Exxon identifies several factors that it argues support its claim that enforcing the arbitration agreement would be unfair. For example, Exxon notes that Exxon "did not negotiate" the coverage that Brock Services obtained naming Exxon as an additional insured. However, Exxon cannot both sue to enforce the policy and at the same time avoid the terms of the policy that it does not want enforced. *See Kellogg Brown & Root,* 166 S.W.3d at 739 ("A non-signatory plaintiff may be compelled to arbitrate if it seeks to enforce terms of a contract containing an arbitration provision.").

Exxon also argues the written procurement agreement between it and Brock Services does not contain an arbitration provision. However, Exxon's suit against Lexington is based on the terms that are found in the umbrella policy. Even were we to accept the premise of Exxon's argument that the policy as to Exxon is properly characterized as an adhesion contract, Texas law makes it clear that arbitration agreements, even when they are found in adhesion contracts, do not automatically make the contracts unconscionable. *See AdvancePCS Health L.P.*, 172 S.W.3d at 608.

In this case, the evidence before the trial court showed that Exxon had the right to inspect the policies of insurance that Brock Services acquired for Exxon's benefit. The procurement agreement expressly provides that "[u]pon request by [Exxon], [Brock Services] shall have its insurance carrier(s) furnish to the requestor certified copies of the required insurance policies[.]" There was no evidence before the trial court demonstrating that Lexington or Brock Services refused any requests by Exxon to inspect the policies that Brock Services procured in carrying out its obligations under its agreement with Exxon. Generally, in the absence of fraud, misrepresentation, or deceit, parties are bound by the terms of a contract they have had an opportunity to read regardless of whether they read it or thought it had different terms. *See In re McKinney,* 167 S.W.3d 833, 835 (Tex. 2005). Where, as here, the non-signatory to a contract containing an umbrella policy failed to carry its burden of proving that it did not have an opportunity to read the written agreement containing the arbitration clause, the trial court is required to order the matter to arbitration. *AdvancePCS Health L.P.*, 172 S.W.3d at 608.

When considered in relation to the terms of Exxon's written agreement with Brock Services, the evidence before the trial court failed to demonstrate that the arbitration clause in Lexington's umbrella policy is either substantively or procedurally unconscionable. We conclude that Lexington has the right to enforce the umbrella policy's arbitration agreement given that Exxon's claims against Lexington are based on the policy.

Duty to Arbitrate

Whether an arbitration clause imposes a duty on the parties to arbitrate a dispute is a matter of contract interpretation. *AT & T Techs., Inc. v. Commc'ns Workers of Am.,* 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986); *In re Labatt Food Serv., L.P.,* 279 S.W.3d 640, 642-43 (Tex. 2009); *J.M. Davidson, Inc. v. Webster,* 128 S.W.3d 223, 237 (Tex. 2003). As a matter of contract interpretation, the scope of the duty to arbitrate is a matter that is resolved by a court, not a jury. *Id*. The proper scope of a given arbitration clause is a matter that is reviewed using a *de novo* standard. *Tex. Petrochemicals LP v. ISP Water Mgmt. Servs. LLC,* 301 S.W.3d 879, 884 (Tex. App.—Beaumont 2009, no pet.); *McReynolds v. Elston,* 222 S.W.3d 731, 740 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

Under Texas law, a written agreement to arbitrate is valid and enforceable if an arbitration agreement exists and the claims asserted are within the scope of the agreement. Tex. Civ. Prac. & Rem. Code Ann. §§ 171.001, 171.021 (West 2011). "To determine whether a party's claims fall within an arbitration agreement's scope, we focus on the complaint's factual allegations rather than the legal causes of action asserted." *In re FirstMerit Bank, N.A.*, 52 S.W.3d at 754. Courts should not deny a motion to compel arbitration unless the arbitration clause in the parties' agreement is not susceptible of an interpretation that is sufficiently broad so that it includes the matters at issue in a dispute. *Prudential Sec. Inc. v. Marshall,* 909 S.W.2d 896, 899 (Tex. 1995) (orig. proceeding).

Once the party asking that a court compel the parties to arbitrate a dispute demonstrates that the parties' dispute is subject to a valid arbitration agreement, the burden shifts to the party opposing arbitration to demonstrate that the claims in dispute fall outside the scope of the matters the parties agreed to arbitrate. *Marshall,* 909 S.W.2d at 900 (applying this rule to an agreement that was subject to the *Federal Arbitration Act*); *McReynolds*, 222 S.W.3d at 740 (applying this rule to an agreement that was subject to the Texas Arbitration Act). In determining whether a dispute falls within the terms of a given arbitration agreement, courts focus on the factual allegations in the suit as opposed to the legal causes of action that are in a parties' pleadings. *McReynolds*, 222 S.W.3d at 740. Generally, a strong presumption exists favoring arbitration under Texas law, and trial courts are required to resolve doubts that may arise on such matters in favor of requiring the parties to arbitrate their disputes. *Ellis v. Schlimmer*, 337 S.W.3d 860, 862 (Tex. 2011) (per curiam).

In Exxon's brief, Exxon argues that its dispute over coverage with Lexington is a matter that lies outside the scope of the matters the arbitration clause in the umbrella policy covers. The arbitration agreement in the umbrella policy provides, in pertinent part:

> . . . in the event of a disagreement as to the interpretation of this policy (except with regard to whether this policy is void or voidable), it is mutually agreed that such dispute shall be submitted to binding

> arbitration before a panel of three (3) Arbitrators consisting of two (2) party-nominated (non-impartial) Arbitrators and a third (impartial) Arbitrator (hereinafter "umpire") as the sole and exclusive remedy.

According to Exxon, no reasonable disagreement can exist about whether the umbrella policy covers the casualty because the policy is not ambiguous. However, in its brief, Lexington advanced several arguments to support its decision denying Exxon's assertion that the umbrella policy covered Exxon at the time of the casualty.

To determine whether a coverage dispute must be arbitrated, we examine the language in the arbitration agreement in context, and we give the arbitration clause its plain grammatical meaning. *See In re Wachovia Sec., LLC*, 312 S.W.3d 243, 247 (Tex. App.—Dallas 2010, orig. proceeding). We also determine the meaning of an arbitration clause in a contract in light of the entire contract. *See BBVA Compass Inv. Sols., Inc. v. Brooks*, 456 S.W.3d 711, 719 (Tex. App.—Fort Worth 2015, no pet.).

In this case, in part, the parties' dispute over coverage revolves around whether Exxon is, or is not, an "additional insured" under Lexington's umbrella policy. In pertinent part, the umbrella policy defines the term "insured" to include:

> Any person or organization, other than the 'Named Insured', included as an additional 'Insured' under 'scheduled underlying insurance', but not for broader coverage than would be afforded by such 'scheduled underlying insurance'.

The parties dispute how the "but not for broader coverage" clause affects Exxon's coverage. The parties also dispute whether the procurement agreement required Exxon to be named on Lexington's umbrella policy as an additional insured. According to Lexington, the procurement agreement required Brock Services to maintain "normal and customary general liability insurance coverage and policy limits." Lexington concludes that the "normal and customary" clause requires that Lexington recognize Exxon as an additional insured for the purposes of the coverage available to Exxon under the general liability policy that Lexington issued to Brock Services, but it claims that the "normal and customary" clause did not require Brock Services to obtain an umbrella policy that named Exxon as an additional insured.

In the trial court, Lexington argued that the question of whether Brock Services was obligated to obtain an umbrella policy naming Exxon as an additional insured should be made by examining Lexington's umbrella policy, the general liability policy, and the written agreement between Brock Services and Exxon in a six-step analysis. Under Lexington's six-step approach to the documents that it contends are relevant to construing the umbrella policy, Lexington concludes that Brock

Services' agreement with Exxon did not require that Brock Services obtain an umbrella policy naming Exxon as an additional insured. On the other hand, Exxon disputes Lexington's arguments regarding the documents that a court should consider in deciding whether Exxon is an additional insured under the umbrella policy, and Exxon contends that the dispute over coverage can be resolved as a matter of law by looking to the policy. In resolving the dispute, the trial court appears to have adopted Exxon's arguments about how to properly construe the umbrella policy. However, the umbrella policy's arbitration provision required the trial court to send the parties' disagreements about the policy to arbitration, "not merely those which the court will deem meritorious." *AT & T Techs.*, 475 U.S. at 649-50.

We express no opinion about whether the trial court properly construed Lexington's umbrella policy in resolving the parties' dispute. We also express no opinion regarding the merits of the parties' arguments about the appropriate method for resolving the coverage dispute. Once Lexington and Exxon disagreed about whether the policy covered the casualty, and Lexington established that the umbrella policy contained a valid arbitration agreement that required disputes over coverage to be arbitrated, the trial court was required to submit the matter to arbitration regardless of the merits of the respective parties' arguments. *Id.* We hold that the trial court erred by considering the merits of the coverage dispute before sending the matter to arbitration.

Defenses to Arbitration

Once Lexington established that Exxon was a party to an agreement containing a valid arbitration clause and that the dispute fell within the scope of the agreement, the burden shifted to Exxon to raise an affirmative defense to Lexington's motion to compel arbitration. *See Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014). In the trial court, Exxon advanced several defenses, arguing that: (1) Lexington breached the policy by denying coverage, excusing its obligation to comply with the arbitration clause in the agreement; (2) article 21.42 of the Insurance Code provides Texas courts with a right to exercise jurisdiction over surplus lines carriers that issue policies of insurance to Texas residents; (3) Lexington failed to show that it is an authorized surplus lines insurer with rights to enforce its policies in Texas; and (4) Lexington substantially invoked the judicial process by the actions it took to litigate the matter, thereby waiving its right to rely on the arbitration clause in its policy.

First, we address Exxon's argument that the arbitration clause did not survive Lexington's decision to deny coverage. Under both federal and state law, the arbitration clause in a written agreement survives the breach of other contract terms found in a written agreement. *See Local Union No. 721, United Packinghouse, Food & Allied Workers, AFL-CIO v. Needham Packing Co.*, 376 U.S. 247, 84 S. Ct. 773, 11 L. Ed. 2d 680 (1964) (explaining that arbitration provisions in collective bargaining agreements are meant to survive their breach);

Brooks, 456 S.W.3d at 718 ("An agreement to arbitrate contained within a contract survives the termination or repudiation of the contract as a whole."). We reject Exxon's argument that the arbitration clause was no longer enforceable once Lexington denied Exxon's claim seeking coverage under the policy.

Exxon also argues that enforcing the arbitration clause would frustrate the requirements in article 21.42 of the Texas Insurance Code, a provision that allows Texas courts to exercise jurisdiction over surplus lines carriers who sell insurance policies to Texas residents. Article 21.42 provides:

> Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same.

Tex. Ins. Code Ann. art. 21.42 (West 2009).

In our opinion, a court's decision to enforce an arbitration clause does not divest the trial court of jurisdiction over the dispute. Under the Texas Arbitration Act, a Texas court has jurisdiction "to enforce the agreement and to render judgment on" the arbitration award. Tex. Civ. Prac. & Rem. Code Ann. § 171.081 (West 2011). While an arbitration clause affects the forum for the resolution of a dispute, the enforcement of an arbitration clause under the Texas Arbitration Act and the Texas Insurance Code does not divest trial courts of jurisdiction to require the parties to abide by the terms of their agreement to arbitrate and to then enforce the arbitrator's decision based on the agreement the parties made to arbitrate their dispute. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 171.001-.098 (West 2011) (Texas Arbitration Act); Tex. Ins. Code Ann. art. 21.42. For example, Texas law allows a Texas court to exercise jurisdiction over nonresident insurance carriers who sell policies to Texas residents by enforcing an arbitration clause in a written agreement and ordering disputes that fall within the provisions of the arbitration agreement to arbitration. *See* Tex. Civ. Prac. & Rem. Code Ann. § 171.021 (requiring Texas courts to order parties to arbitrate on the application of a party showing an agreement to arbitrate and the opposing party's refusal to arbitrate). Contrary to Exxon's claim that the enforcement of the arbitration clause divests the court of jurisdiction, the Texas Arbitration Act vests a court with jurisdiction to enforce the agreement and to render judgments on arbitration awards. *See* Tex. Civ. Prac. & Rem. Code Ann. § 171.081.

We conclude that enforcing a valid arbitration clause does not divest the trial court of jurisdiction to enforce the arbitration award even though the trial court is no longer the entity assigned the responsibility of deciding the merits of the dispute the parties agreed to arbitrate. In this case, Lexington's umbrella policy required that its dispute with Exxon regarding coverage be resolved through arbitration, but the resolution that follows the arbitration is enforceable in a Texas court. We conclude that Exxon's suggestion that enforcing the arbitration clause defeats the purpose of article 21.42 of the Texas Insurance Code is without merit.***

Conclusion

"[A] litigant who sues based on a contract subjects him or herself to the contract's terms." *In re FirstMerit Bank, N.A.*, 52 S.W.3d at 755. We conclude that Exxon is not entitled to enforce some of the umbrella policy's terms but to defeat others. *See In re Weekley Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005) (orig. proceeding). We reverse the trial court's order denying Lexington's motion to compel arbitration, and we remand the cause to the trial court with instructions to render an order compelling Lexington and Exxon to arbitrate their disagreements over Exxon's contract rights, if any, under Lexington's umbrella policy number 052456339.***

***Gemini Insurance Co. v. Certain Underwriters at Lloyd's London*, 2017 AMC 1926 (S.D. Tex. 2017)**

Rosenthal, Chief District Judge:

The plaintiff, Gemini Insurance Company, issued a maritime liability insurance policy to Galveston Bay Energy, LLC. The defendants, Lloyd's Underwriters, underwrote another policy issued to Galveston Bay through the Osprey Underwriting Agency. Gemini and the Lloyd's defendants disputed whether the defendants were obliged to help fund a settlement in a personal injury suit against their mutual insured, Galveston Bay Energy, LLC. The defendants invoked an arbitration clause in the Galveston Bay policy and filed an arbitration in England seeking a declaration that they did not have to fund the settlement. Galveston Bay assigned its right to recover on the policy to Gemini in exchange for an additional payment toward the settlement. Gemini brought this subrogated suit in Texas state court, seeking a temporary restraining order and preliminary injunction barring the defendants from pursuing the London arbitration. The state court granted a temporary restraining order. The defendants timely removed.[1] This court set a hearing on the application for preliminary injunction. The defendants filed a brief in opposition to the motion for preliminary injunction and the plaintiffs filed a reply. The court held a hearing on April 12, 2017, at which counsel presented oral argument.

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[1] This court has jurisdiction under 9 U.S.C. § 205.

Based on the briefs, arguments, and applicable law, the temporary restraining order is dissolved and the application for a preliminary injunction is denied. The reasons are explained in detail below.

I. Background

This is an insurance coverage dispute arising from an underlying personal injury suit. Paul Blasingame was injured in a maritime accident and sued Galveston Bay Energy, LLC, in Texas state court. Galveston Bay had several relevant insurance policies in effect at the time of Mr. Blasingame's injury, including a policy issued by Gemini and a policy issued by the Lloyd's underwriter defendants via Osprey Underwriting Agency, Ltd. In this suit, Gemini alleges that all insurers except Osprey funded a settlement that resolved the underlying Blasingame litigation and that, in exchange for Gemini covering a larger part of the settlement than its pro rata share, Galveston Bay assigned its rights under the Osprey contract to Gemini. Gemini alleges that the Osprey policy covered the Blasingame settlement and that the Lloyd's defendants were obliged to pay.

On March 17, 2017, Osprey notified Galveston Bay and the other insurers that it had begun an arbitration proceeding in England seeking a determination that it did not owe any money toward the Blasingame settlement. Gemini sued in Texas state court, alleging that it was subrogated to Galveston Bay's rights under the insurance contract and asserting various contract and quasi-contract theories. The state-court petition also sought a temporary restraining order, preliminary injunction, and permanent injunction preventing Osprey from pursuing the English arbitration. The state court granted the TRO.

The Osprey maritime liability policy (which the Lloyd's defendants underwrote) contains two relevant provisions. The "Law and Practice Clause" provides for arbitration of all disputes in England:

> Notwithstanding anything else to the contrary, this insurance is subject to English law and practice and any dispute under or in connection with this insurance is to be referred to Arbitration in London, one Arbitrator to be nominated by the Assured and the other by Osprey on behalf of Underwriters. The Arbitration shall be conducted pursuant to exclusive supervision of the English High Court of Justice. In case the Arbitrators shall not agree, then the dispute shall be submitted to an Umpire to be appointed by them. The award of the Arbitrators or the Umpire shall be final and binding upon both parties. In the event of a conflict between this clause and any other provision of this insurance, this clause shall prevail and the right of either party to commence proceedings before any other Court or Tribunal in any other jurisdiction shall be limited to the process of enforcement of any award hereunder.

(Docket Entry No. 5-2, Ex. B at 27).

The policy also contains a "Service of Suit" clause:

> It is agreed that in the event of the failure of the Underwriters severally subscribing to this insurance (the Underwriters) to pay any amount claimed to be due hereunder, the Underwriters, at the request of the Assured, will submit to the jurisdiction of a court of competent jurisdiction within the United States of America.

Notwithstanding any provision elsewhere in this insurance relating to jurisdiction, it is agreed that the Underwriters have the right to commence an action in any court of competent jurisdiction in the United States of America, and nothing in this clause constitutes or should be understood to constitute a waiver of the Underwriters' rights to remove an action to a United States Federal District Court or to seek remand therefrom or to seek a transfer of any suit to any other court of competent jurisdiction as permitted by the laws of the United States of America or any state therein.

Subject to the Underwriters' rights set forth above:

> (a) It is further agreed that the Assured may serve process upon any senior partner in the firm of:

Mendes & Mount (Attorneys), 750 Seventh Avenue, New York N.Y. 10019-6829

and that in any suit instituted against any one of them upon this contract the Underwriters will abide by the final decision of the Court or of any Appellate Court in the event of an appeal.

> (b) The abovenamed are authorised and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the Assured to give a written undertaking to the Assured that they will enter a general appearance upon the Underwriters' behalf in the event such a suit shall be instituted.
>
> (c) The right of the Assured to bring suit as provided herein shall be limited to a suit brought in its own name and for its own account. For the purpose of suit as herein provided the word Assured includes any mortgagee under a ship mortgage which is specifically named as a loss payee in this insurance and any person succeeding to the rights of any such mortgagee.

. . .

Subject, in all respects, to the Osprey Law and Practice Clause as contained in the clauses dated 1.04.96.

(*Id.* at 25-26).***

b. Arbitration

This arbitration clause is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, an international treaty implemented through 9 U.S.C. §§ 201-208, known as the Convention Act. Under the Convention Act, the substantive law of the *Federal Arbitration Act* applies except to the extent that the Convention Act conflicts. *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 339 (5th Cir. 2004). The parties have not identified any divergence or conflict between the FAA and the Convention Act as applied to this case, and none appear on the record. The FAA caselaw applies.

The Convention Act requires enforcement of an arbitration agreement if four conditions are met. The four conditions add up to substantially the same inquiry the court performs in the commercial arbitration context:

> a court should compel arbitration if (1) there is a written agreement to arbitrate the matter; (2) the agreement provides for arbitration in a Convention signatory nation; "(3) the agreement arises out of a commercial legal relationship; and (4) a party to the agreement is not an American citizen." *Id.* (citing *Sedco,* 767 F.2d at 1146). Once "these requirements are met, the Convention requires the district court [ ] to order arbitration," *id.*, "unless it finds that the said agreement is null and void, inoperative or incapable of being performed." *Sedco,* 767 F.2d at 1146 (quoting Convention, Article II(3)).

Freudensprung, 379 F.3d at 339. There is no dispute that the agreement is in writing, that it provides for arbitration in a Convention signatory nation, that it arises from a commercial relationship, or that one party is a noncitizen. The disputes are whether there is an arbitration agreement, and whether it requires arbitration of this claim.

Determining whether a suit must be arbitrated is typically a two-step process. Generally, issues of contract formation (including the existence of an arbitration agreement) are decided under state law and are gateway issues for the court. *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016). The court also generally determines whether the scope of the arbitration agreement covers the claims before it. If the claims are within the scope of the arbitration clause, the court must compel arbitration. *Id.* But the parties may also agree to delegate that scope determination to the arbitrator by using a "delegation clause." *Id.*

When an arbitration agreement contains a delegation clause, the analysis changes. The Fifth Circuit recently clarified that [e]nforcement of an arbitration agreement involves two analytical steps. The first is contract formation—whether the parties entered into any arbitration agreement at all. The second involves contract interpretation to determine whether this claim is covered by the arbitration agreement. Ordinarily both steps are questions for the court. *Will—Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 214 (5th Cir. 2003). But where the arbitration agreement contains a delegation clause giving the arbitrator the primary power to rule on the arbitrability of a specific claim, the analysis changes. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). *Id.* at 201-02.

A delegation clause decisively "transfer[s] the court's power to decide arbitrability questions to the arbitrator." *Id.* at 202. The clause "requires the court to refer a claim to arbitration to allow the arbitrator to decide gateway arbitrability issues." *Id.* (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)). Under this approach,

> if the party seeking arbitration points to a purported delegation clause, the court's analysis is limited. It performs the first step—an analysis of contract formation—as it always does. But the only question, after finding that there is in fact a valid agreement, is whether the purported delegation clause is in fact a delegation clause—that is, if it evinces an intent to have the arbitrator decide whether a given claim must be arbitrated. If there is a delegation clause, the motion to compel arbitration should be granted in almost all cases.

Id.

Delegation clauses can be explicit or implicit. An explicit delegation clause states that the arbitrator has the power to determine her own jurisdiction or to determine whether specific claims are arbitrable. An implicit delegation clause incorporates some body of rules or law that, in turn, provides that the arbitrator is to have the power to determine her own jurisdiction or to rule on arbitrability in the first instance. For example, incorporating the AAA rules into an arbitration agreement makes threshold questions of arbitrability questions for the arbitrator to decide, rather than the court. Incorporating the AAA rules by reference is the functional equivalent of agreeing to arbitrate arbitrability. *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012). The AAA rules provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *Petrofac*, 687 F.3d at 675 (quoting AAA rules) (internal quotation marks omitted). Incorporation "presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Id.* (citing cases from the First, Second, Eighth, Eleventh, and Federal Circuits).

Like the AAA rules, English law defaults to delegation: Section 30 of the 1996 Arbitration Act provides that "the arbitral tribunal may rule on its own substantive jurisdiction" absent an agreement to the contrary by the parties.

III. Analysis

Gemini advances two core arguments. The first is that the "Law and Practice" provision in the Lloyd's/Osprey policy does not delegate the determination of whether this specific suit is arbitrable to the arbitrator, because incorporation of English law does not evince clear and unmistakable intent to delegate that power. In a supplemental brief, Gemini cites the Ninth Circuit's opinion in *Cape Flattery Ltd. v. Titan Mar., LLC,* 647 F.3d 914, 921 (9th Cir. 2011). That court held that a similar English-law provision in an arbitration clause was not sufficient to make English arbitrability law, rather than federal arbitrability law, apply. Although the opinion did not use the precise nomenclature, the Ninth Circuit effectively held that specifying English law was not an implicit delegation clause. Gemini also argues that the Fifth Circuit's *Crawford* opinion [*Crawford Professional Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249 (5th Cir. 2014)] is distinguishable based on the specific language of the AAA rules. Gemini argues that the AAA rules use mandatory language in describing the arbitrator's power to rule on arbitrability, while the English rules are phrased permissively, indicating that the arbitrator "may" decide arbitrability issues.
Gemini's second argument is that the "Service of Suit" provision is more specific than the "Law and Practice" provision, and therefore governs under the ordinary rule that specific provisions trump general provisions. *E.g., Matter of Pirani*, 824 F.3d 483 (5th Cir. 2016). Gemini argues that reading the contract as a whole and giving meaning to each clause requires the court to interpret the "Service of Suit" provision as a carveout from the broad and general arbitration agreement in the "Law and Practice" provision. Because the "Service of Suit" clause applies to a narrower universe of claims—only actions for "failure . . . to pay any amount claimed to be due" as opposed to the broader "any dispute under or in connection with" the policy—it governs.

In response, the defendants argue that incorporation of English law is an implicit delegation, making the only question before this court whether there is an agreement to arbitrate *some* set of claims. If the court finds that there is such an agreement, determining whether *this* claim should be arbitrated is for the arbitrator, not the court.

Second, the defendants argue that the "Law and Practice" clause in the policy is a valid arbitration agreement that overrides the "Service of Suit" provision. The "Law and Practice" clause explicitly overrides contract language that conflicts with its broad arbitration provision. The "Service of Suit" provision is explicitly made "[s]ubject, in all respects, to the Osprey Law and Practice Clause . . . ." The defendants cite the Fifth Circuit's opinion in *McDermott Int'l, Inc. v. Lloyds Underwriters of London,* 944 F.2d 1199, 1200 (5th Cir. 1991). That case addressed extremely similar arbitration and service-of-suit provisions and found reasonable readings of the two clauses that made them compatible, not conflicting. Due to its procedural posture, the court did not explicitly hold that the clauses did not conflict and the arbitration clause governed. Instead, it held that harmonizing the clauses by limiting the "Service of Suit" provision to actions to enforce arbitration awards issued under the "Law and Practice" provision was a reasonable and permissible interpretation of the contract.

The defendants also cite a Florida intermediate appellate decision addressing nearly identical clauses and arguments. There, the Florida state appellate court harmonized the provisions as the Fifth Circuit did in *McDermott* and as the defendants argue here. *Lloyds Underwriters v. Netterstrom*, 17 So. 3d 732, 736 (Fla. Dist. Ct. App. 2009). In the alternative, the Florida court held that, even if the provisions conflicted, the arbitration provision would control. The arbitration provision clearly and explicitly states that it overrules any conflicting language in the contract as to where a party could seek remedies for breach. The service-of-suit provision does not have this language. Therefore, if the two provisions conflict, the arbitration provision carries the day. *Id*.

At the hearing, the defendants also pointed out that the insurance policy at issue here has a summary of its terms on the first few pages. On the second page, the policy has an entry that reads "Choice of law and jurisdiction: As per Osprey Law and Practice Clause."

The defendants' arguments are supported by the applicable law and the record in this case. First, the "Law and Practice" provision contains an implicit delegation clause because it requires arbitration under English law. Gemini's argument that this is not a sufficiently clear statement of intent to delegate threshold arbitrability issues is unpersuasive. Incorporation of English law includes English arbitration law, which unambiguously provides that arbitrators have the power to decide threshold questions as a default unless the parties agree to the contrary. The parties did not do so here. By agreeing to arbitrate under English law, the parties clearly and unmistakably consented to delegate to the arbitrator the power to make threshold determinations about what claims are arbitrable.

Gemini's citation to the Ninth Circuit's opinion in *Cape Flattery* is unavailing. The Ninth Circuit's reasoning in that case was that unless an arbitration clause specifically identifies what body of rules should apply to the arbitrability determination, federal law was the overriding default option. 647 F.3d at 920-21. That reasoning is flatly incompatible with the Fifth Circuit's approach in *Crawford*. In *Crawford*, like *Cape Flattery*, the arbitration agreement was silent as to what body of law would apply to arbitrability questions; the only choice-of-law provision that the court analyzed was a provision that the case would be arbitrated under the AAA rules. Unlike the Ninth Circuit, the Fifth Circuit did not treat silence on the issue of whether federal or some other body of arbitrability law governed as an ambiguity requiring the court to decide arbitrabilty under federal arbitration law. Instead, the Fifth Circuit looked to the content of the specified body of law, found that the AAA rules gave the arbitrator the power to decide threshold arbitrability issues, and held that the agreement therefore contained an implicit delegation clause. *Crawford*, 748 F.3d at 262-63.

Gemini's effort to distinguish *Crawford* is unpersuasive. The basis for the proposed distinction is that the AAA rule is phrased in mandatory terms while the English Arbitration Act is phrased in permissive terms. Therefore, Gemini says, incorporation of English law does not provide clear and unmistakable evidence that the parties intended to delegate arbitrability issues to the arbitrator. The language of the respective rules does not support Gemini's characterization. The AAA rule the *Crawford* panel addressed stated that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." *Id.* at 262. Section 30 of the English Arbitration Act of 1996 states that "the arbitral tribunal may rule on its own substantive jurisdiction . . . ." There is no meaningful difference between the phrase "shall have the power to rule on" and the phrase "may rule on." Each indicates the same idea: the arbitrator has the power to decide arbitrability.

The Fifth Circuit's opinion in *Crawford* controls here. Because incorporation of English law is an implicit delegation clause, the only issue before this court is whether there is an agreement to arbitrate some set of claims. If there is, this case must be sent to arbitration for the arbitrator to decide whether a particular claim is arbitrable and, if so, to submit it to arbitration.

While Gemini initially argued in its state-court petition that there was no valid arbitration provision, in its reply and at the hearing it changed its position. Instead, it argued that the "Law and Practice" provision was a valid arbitration agreement that governed most potential claims arising out of the policy, but that the more specific "Service of Suit" provision overrode that arbitration agreement for claims for "failure . . . to pay any amount claimed to be due" under the policy. Gemini's concession that there is a valid arbitration agreement means that, given the delegation clause, the arbitrator decides whether the present claims are arbitrable. *Kubala*, 830 F.3d at 202. Gemini's argument that the claim here is covered by the "Service of Suit" provision rather than the "Law and Practice" provision is properly directed to the arbitrator.

Additionally, the policy requires arbitration. The policy specifies in its summary section that choice of law and jurisdiction are governed by the "Law and Practice" clause. The "Law and Practice" clause states that arbitration in England is required "[n]otwithstanding anything else to the contrary . . . ." It then adds suspenders to that belt, emphasizing that "[i]n the event of a conflict between this clause and any other provision of this insurance, this clause shall prevail and the right of either party to commence proceedings before any other Court or Tribunal in any other jurisdiction shall be limited to the process of enforcement of any award hereunder." The "Service of Suit" provision is explicitly subordinated to the "Law and Practice" provision: after describing the various rights and obligations of the parties, it states that it is "[s]ubject, in all respects, to the Osprey Law and Practice Clause . . . ."

This court finds persuasive the the Fifth Circuit's and the Florida appellate court's harmonizing interpretation. The best way to harmonize these two provisions is not, as Gemini suggests, to treat the "Service of Suit" provision as a carve-out from the "Law and Practice" provision's broad sweep. While Gemini is correct that, all else equal, specific provisions control over general provisions, that principle of construction cannot override clear contract language. The contract language cannot bear the interpretation that Gemini suggests. The "Law and Practice" provision is broad; it states that no other provision of the contract can alter the strict and broad arbitration requirement it imposes. It exempts one category of suits: actions to enforce an arbitration award. The "Service of Suit" provision is explicitly subordinated to the "Law and Practice" provision. The "Service of Suit" provision cannot be a general carveout from the "Law and Practice" provision, because the "Law and Practice" provision does not permit the full range of suits for "failure . . . to pay any amount claimed to be due" under the policy. Rather, it only permits one type of suit to be pursued outside of English arbitration: suits to compel the other party to pay an amount due as a result of English arbitration under the "Law and Practice" clause. The "Service of Suit" provision can only apply to that narrow category of actions.

In addition to being the most reasonable interpretation of the contract language, this interpretation makes sense and allows the two provisions to work in concert. The "Law and Practice" clause requires the parties to arbitrate the substance of their dispute in England under English law. The "Service of Suit" provision requires the defendants to submit to the jurisdiction of an appropriate American court for enforcement proceedings if that English arbitration produces an award in favor of the insured. The provisions work together to prevent costly fights over the appropriate forum for litigating issues arising out of this international contract.

Even if this harmonizing interpretation was not the most reasonable interpretation—which it is—and instead the provisions conflicted, the "Law and Practice" provision would still control. The "Law and Practice" provision controls if other provisions conflict with it, and the "Service of Suit" provision does not. To find otherwise would rewrite the parties' contract, which the court will not do.***

Chapter 17 Extra-Contractual Remedies

INA of Texas v. Richard, 800 F.2d 1379 (5th Cir. 1986)

Per curiam:

This case concerns the availability of attorney's fees to a prevailing party in a marine insurance dispute. In an unreported order without opinion, the district court granted summary judgment for appellee INA of Texas (INA), holding that appellant John Richard was not entitled to attorney's fees. We hold that the determination as to whether the award of attorney's fees is appropriate in marine insurance controversies is controlled by state law. We thus vacate the decision of the district court. We also remand for a finding as to whether Richard is entitled to attorney's fees under Texas law and, if an award of attorney's fees is appropriate, for a determination as to the proper amount of such fees.

I.

On September 12, 1981, the tug M/V Restless, owned by Richard, sank while moored at a dock off the coast of Texas. Richard unsuccessfully filed two claims with his insurance carrier INA, a Texas corporation, under his hull policy, which was issued in Texas. Rather than paying the claim, INA sought a declaratory judgment pursuant to 28 U.S.C. § 2201 to clarify its rights under the policy. Richard counterclaimed seeking damages, costs and attorney's fees. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1333.

On the eve of trial, INA and Richard entered into a settlement fully resolving the issues concerning coverage under the hull policy. Unable to agree as to attorney's fees, however, the parties submitted the controversy to the court for its determination on cross-summary judgment motions. The district court granted summary judgment for INA and denied Richard's motion for summary judgment.

II.

This case does not require extended analysis or discussion. The course of our analysis is charted by the polestar of *Wilburn Boat v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955), and by its progeny.

It is by now axiomatic that "the interpretation of a contract of marine insurance is -- in the absence of a specific and controlling federal rule -- to be determined by reference to appropriate state law." *Ingersoll-Rand Financial Corp. v. Employers Ins. of Wausau,* 771 F.2d 910, 912 (5th Cir. 1985), *cert. denied*, 475 U.S. 1046, 106 S. Ct. 1263, 89 L. Ed. 2d 573 (1986); *see, e.g., Gulf Tampa Drydock Co. v. Great Atlantic Ins. Co.*, 757 F.2d 1172, 1174 (11th Cir. 1985); *Navegacion Goya, S.A. v. Mutual Boiler & Machinery Ins. Co.,* 411 F. Supp. 929, 934 (S.D.N.Y. 1975). In case after case, we have applied state law in interpreting marine insurance policies, because there is no contrary federal admiralty rule. *See, e.g., Insurance Co. of*

North America v. Board of Commissioners of the Port of New Orleans, 733 F.2d 1161, 1167 (5th Cir. 1984); *Walter v. Marine Office of America,* 537 F.2d 89, 94 (5th Cir. 1976); *Irwin v. Eagle Star Ins. Co.,* 455 F.2d 827, 829 (5th Cir. 1972), *cert. denied*, 409 U.S. 852, 93 S. Ct. 118, 34 L. Ed. 2d 95 (1972).

Having held that state law controls the interpretation of marine insurance policies, it would defy both logic and sound policy were we to hold that the applicability of attorney's fees *vel non* must be determined by reference to uniform federal law. As a polyglot of differing state laws respecting the substance of marine insurance policies is permissible, we can think of no reason, nor has one been advanced, why a unitary and uniform federal rule respecting attorney's fees in marine insurance cases is required.

There is no specific and controlling federal rule of law relating to attorney's fees in maritime insurance litigation. On the contrary, we have consistently found state law to govern precisely the issue presented here; whether or not attorney's fees lie in the context of a marine insurance dispute. *American Eastern Development Corp. v. Everglades Marina, Inc.,* 608 F.2d 123, 125-26 (5th Cir. 1979); *Offshore Logistics Services, Inc. v. Arkwright-Boston Manufacturers Mutual Ins. Co.,* 639 F.2d 1142, 1146 (5th Cir. 1981); *Eagle Leasing Co. v. Hartford Fire Ins. Co.*, 540 F.2d 1257, 1261 (5th Cir. 1976), *cert. denied*, 431 U.S. 967, 97 S. Ct. 2926, 53 L. Ed. 2d 1063 (1977); *Solomon v. Warren,* 540 F.2d 777, 794-95 (5th Cir. 1976), *cert. dismissed sub nom., Warren v. Serody,* 434 U.S. 801, 98 S. Ct. 28, 54 L. Ed. 2d 59 (1977); *Stuyvesant Ins. Co. v. Nardelli,* 286 F.2d 600, 604-05 (5th Cir. 1961); *Gulf Oil Corp. v. Mobile Drilling Barge or Vessel,* 441 F. Supp. 1, 12-13 (E.D. La. 1975), *aff'd per curiam*, 565 F.2d 958 (5th Cir. 1978); *see Crispin Co. v. M/V Korea*, 251 F. Supp. 878, 879 (S.D. Tex. 1965).[2] Similarly, we have held that state law governs the propriety of treble damages for unfair handling of claims by marine insurers. *Austin v. Servac Shipping Line,* 794 F.2d 941, 948 (5th Cir. 1986). In both situations, we look to state law to decide when there has been a breach. It thus follows that we look to state law to decide the consequences of that breach. *See Wilburn Boat*, 75 S. Ct. at 373.

We are unable to ascertain whether the district court based its holding on Texas law. We therefore vacate and remand for that court to determine whether

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[2] The *general* federal rule in admiralty is, of course, that attorney's fees may not be recovered absent statutory authorization. *See, e.g., Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, Her Cargo, Apparel, Tackle, and Furniture,* 695 F.2d 893, 905 (5th Cir. 1983), *cert. denied sub nom., Texas v. Platoro LTD.*, 464 U.S. 818, 104 S. Ct. 77, 78 L. Ed. 2d 89 (1983); *Noritake Co. v. M/V Hellenic Champion*, 627 F.2d 724, 730, 730-31, n.5 (5th Cir. 1980); *cf. Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975). But as our cases vividly illustrate, we have never held the general rule applicable in the context of marine insurance, which is *sui generis* because state law supplies the rule of decision.

Richard is entitled to attorney's fees under Texas law and, if appropriate, to determine the amount of fees due.***

Tex. Civ. Prac. & Rem Code § 38.001. Recovery of Attorney's Fees

A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:

(1) rendered services;

(2) performed labor;

(3) furnished material;

(4) freight or express overcharges;

(5) lost or damaged freight or express;

(6) killed or injured stock;

(7) a sworn account; or

(8) an oral or written contract.

Tex. Civ. Prac. & Rem Code § 38.006. Exceptions

This chapter does not apply to a contract issued by an insurer that is subject to the provisions of:

(1) Title 11, Insurance Code;

(2) Chapter 541, Insurance Code;

(3) the Unfair Claim Settlement Practices Act (Subchapter A, Chapter 542, Insurance Code); or

(4) Subchapter B, Chapter 542, Insurance Code.

Austin v. Servac Shipping Line, 794 F.2d 941 (5th Cir. 1986)

Robert M. Hill, Circuit Judge:

Defendant Lexington Insurance Company (Lexington) appeals a judgment entered against it following a bench trial. Lexington presents several arguments calling for a complete reversal and the entry of a take-nothing judgment and several additional alternative arguments calling for a reduction of the damages assessed against it. While we reject the arguments calling for a complete reversal, we accept several of the damage reduction arguments and therefore order the damages reduced accordingly.

I. BACKGROUND

Plaintiffs Jim Austin and his wholly owned corporation, Aulemic, Inc., (collectively Austin) purchased the AMAZON TRADER, a refrigerated freight ship, at a United States Marshal's auctionin December 1981 for $125,000. After completing some repair and maintenance work, Austin agreed to a short-term charter party with Servac Shipping Line, Ltd. and its principal, Hassan Gaafar, (collectively Servac) so that Servac could evaluate the suitability of the vessel for its long-term charter needs. Austin obtained a $1,000,000 marine hull insurance policy with Lexington covering the AMAZON TRADER. During the period the policy was in force, pursuant to the short-term charter party, the AMAZON TRADER carried a Servac cargo from Tampa, Florida, to Alexandria, Egypt.

While en route from Tampa to Alexandria, the ship suffered engine, power train, and generator problems. Austin, through its agent Frank B. Hall & Co. (Hall & Co.), an insurance broker, contacted Lexington about the ship's mechanical problems and requested coverage. Lexington initially rejected the claim as occurring outside the vessel's trading warranty, which included only the Western Hemisphere, but Lexington later undertook a determination of the amount of the damages. One year after the claim arose the parties still could not agree on the cost to repair the vessel; consequently, Austin brought suit against Lexington, alleging failure to pay claims arising under the policy, seeking recovery of losses covered by the policy, lost profits, other consequential damages, and treble damages under article 21.21 of the Texas Insurance Code, Tex. Ins. Code Ann. art. 21.21 (Vernon 1981), and seeking the return of lay-up premiums.[1]

The district court, 610 F. Supp. 229, sitting in admiralty without a jury, entered judgment against Lexington in the amount of $367,592 for amounts owed under the policy,[2] plus prejudgment and post-judgment interest, and $2,582,547 in punitive damages[3] under article 21.21, plus costs, post-judgment interest, and stipulated attorney's fees. This appeal followed.

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[1] Austin also sued Servac and Gaafar, alleging breaches of the charter party and seeking actual and consequential damages. The district court entered a take-nothing judgment in favor of Servac and Gaafar. Austin has not appealed the district court's ruling.

[2] The amount owed under the policy consisted of the $373,600 cost to repair the vessel, less a $12,500 deductible, plus the return of $6,492 in lay-up premiums, for a total of $367,592.

[3] The punitive damages consisted of the $373,600 cost to repair the vessel, less the $12,500 deductible, plus $390,000 for lost future profits, plus $109,749 of other expenses, for a total of $860,849. The district court then trebled this amount to arrive at a figure of $2,582,547.

II. LEXINGTON'S CONTENTIONS

Lexington levels numerous attacks on the judgment entered by the district court. Lexington first offers two arguments for reversing the entire judgment: (1) the alleged misrepresentations made by the insured voided the policy, and (2) the alleged unseaworthiness of the vessel voided the policy. Lexington next offers several arguments for reducing the amount of the damages awarded against it because the district court erred: (1) in determining the cost to repair the vessel, (2) in subtracting only one deductible amount from the cost to repair, (3) in awarding lay-up premiums, (4) in determining that crew negligence caused all the losses, (5) in determining that Lexington's actions caused Austin to lose a future charter party agreement, (6) in determining other consequential damages incurred by Austin, and (7) in applying the punitive provisions of article 21.21 of the Texas Insurance Code.

III. LEXINGTON'S LIABILITY

A. *Misrepresentation*

Lexington's first argument for reversal is that the district court erred in finding that the alleged misrepresentations made by the insured did not void the policy.

> Nothing is better established in the law of *marine* insurance than that "a mistake or commission material to a marine risk, whether it be wilful or accidental, or result from mistake, negligence or voluntary ignorance, avoids the policy. And the same rule obtains, even though the insured did not suppose the fact to be material."

Fireman's Fund Insurance Co. v. Wilburn Boat Co., 300 F.2d 631, 646 (5th Cir.), *cert. denied*, 370 U.S. 925, 82 S. Ct. 1562, 8 L. Ed. 2d 505 (1962) (emphasis in original) (citation omitted); *see also Gulfstream Cargo, Ltd. v. Reliance Insurance Co.*, 409 F.2d 974, 980 (5th Cir. 1969). "A material fact is any fact, 'the knowledge or ignorance of which would naturally influence an insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of insurance.'" 300 F.2d at 640 (citations omitted).

Lexington claims that Hall & Co., Austin's broker, misrepresented Austin's maritime experience by stating that Austin had owned and operated the AMAZON TRADER for twelve years, that Austin owned numerous other maritime interests including twenty fishing vessels, and that Austin was contemplating the purchase of two new vessels, when in fact Austin had just purchased the AMAZON TRADER, had previously owned only one other vessel, an oilfield supply boat, and was not contemplating the purchase of additional vessels. Lexington further claims that the alleged misrepresentations were material to its determination of the risk.

Lexington cites the testimony of one witness, Niels Aaskov, an employee of Lexington's underwriting agent, Southeastern Risk Specialists, to support its contentions. Aaskov testified, based on a worksheet prepared at the time, that an employee of Hall & Co., Frank Sioli, informed him that the owner of the AMAZON TRADER had owned and operated the vessel for twelve years, that the owner owned numerous other vessels, and that the owner was contemplating the purchase of two other vessels. Later, on cross-examination, Aaskov testified that, in addition to gathering information on the current owner, he also compiled information concerning the previous owner. The previous owner of the vessel, Hines Worbs, had operated the vessel for twelve years, owned numerous other vessels, and was contemplating the purchase of two new vessels.

The district court also had before it the testimony of several other witnesses concerning the alleged misrepresentations. Sioli, the agent who contacted Aaskov concerning coverage for the AMAZON TRADER, testified that he met with Austin before contacting Aaskov and that he knew Austin owned the vessel. He further testified that he knew that the previous owner had not retained any ownership interest or managerial involvement with the vessel and that nothing in Hall & Co.'s files reflected that Sioli ever told Aaskov otherwise. Austin also testified that he told Sioli and the president of Hall & Co. that he owned the vessel. Furthermore, Lexington issued the policy to: "Aulemic, Inc. and Mr. James D. Austin, c/o Mr. James D. Austin."

We do not believe the district court's finding that no material misrepresentation occurred is clearly erroneous, *see* Fed. R. Civ. P. 52, as it is "plausible in light of the record viewed in its entirety." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 105 S. Ct. 1504, (1985). Based on the testimony before it, the district court easily could have decided that Sioli provided Aaskov with the correct information and that Aaskov somehow confused the past owner's experience with the present owner's experience. Since the district court's finding is plausible, we cannot disturb it.[4]

B. *Seaworthiness*

Lexington next contends that the policy was void from its inception because Austin allowed the vessel to sail in an unseaworthy condition.

> A warranty of seaworthiness by the owner is implied in every hull insurance policy unless expressly waived. The warranty is a

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[4] Lexington further contends that the AMAZON TRADER was laid-up without a crew and was not operated under her own power from December 1980 to January 1982 and that Hall & Co. should have disclosed this fact to Lexington. Contrary to Lexington's contention, the evidence reveals that the vessel operated until March 12, 1981, when it was arrested for nonpayment of debt. The deck logs further reveal that the crew remained on board into April 1981. Thus, Lexington bases its contention on an incorrect premise.

> continuing obligation that "the owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthiness condition. . . . The consequence of a violation of this 'negative' burden is merely a denial of liability for loss or damage caused proximately by such unseaworthiness."

Insurance Co. of North America v. Board of Commissioners, 733 F.2d 1161, 1165 (5th Cir. 1984) (citations omitted); *see also D.J. McDuffie, Inc. v. Old Reliable Fire Insurance Co.,* 608 F.2d 145, 147 (5th Cir. 1979), *cert. denied*, 449 U.S. 830, 101 S. Ct. 97, 66 L. Ed. 2d 35 (1980); *Saskatchewan Government Insurance Office v. Spot Pack, Inc.*, 242 F.2d 385, 388 (5th Cir. 1957).The law presumes that every vessel is seaworthy until the contrary is proved, and the burden of proving unseaworthiness lies with the insurance company. *Hanover Fire Insurance Co. v. Holcombe*, 223 F.2d 844, 845-46 (5th Cir.), *cert. denied*, 350 U.S. 895, 76 S. Ct. 154, 100 L. Ed. 787 (1955).

Lexington contends that the AMAZON TRADER was unseaworthy in two respects: (1) various mechanical deficiencies rendered the vessel unseaworthy and (2) the incompetence of the crew rendered the vessel unseaworthy. Lexington relies on the testimony of two expert witnesses to the effect that the vessel was unseaworthy due both to mechanical deficiencies and crew incompetence; however, the record also contains testimony to the opposite effect. At least five witnesses attested to the seaworthiness of the vessel, and one expert witness testified that the entire crew was competent. Since ample testimony supported the district court's finding that the vessel was not unseaworthy, the district court's finding is clearly plausible in light of the evidence, and we therefore refuse to set aside its finding. *See* Fed. R. Civ. P. 52; *Anderson v. City of Bessemer City*, 470 U.S. at ___, 105 S. Ct. at 1512, 84 L. Ed. 2d at 528; *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746, 766 (1948).

IV. AMOUNT OF DAMAGES

A. *Repair Costs*

Lexington contends that the district court erred in determining the cost to repair the vessel. The district court selected the figure suggested by Austin's expert, $373,600, and awarded Austin that amount less the $12,500 deductible. Lexington urges us to reject the figure accepted by the district court and to accept the figure suggested by Lexington's expert, $45,851. Lexington would have us overturn the district court's finding because Lexington's expert allegedly prepared a more "detailed" and "careful" report than did Austin's expert and because Austin's expert's report is "ephemeral in the extreme and inherently suspect." The district court observed both experts at trial and heard each expert's explanation of how he arrived at the figures used in the reports. The credibility judgments Lexington asks us to make are exactly the judgments that the Federal Rules of Civil Procedure leave for the district court to make. Fed. R. Civ. P. 52(a) ("due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses"); *Anderson v. City of Bessemer City*, 470 U.S. at ___, 105 S. Ct. 1504, 84 L. Ed. 2d at 518 ("when findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings"). We therefore refuse to disturb the district court's factual finding as to the cost to repair the vessel.

B. *Deductible Amount*

In addition to arguing that the district court erred in computing the cost to repair the vessel, Lexington also argues that the district court erred in applying only one deductible amount to the costs of repairs. The policy provides: "There shall be deducted from the aggregate of all claims . . . arising out of each separate accident, the sum of $12,500. . . ." Austin maintains that the district court correctly applied only one deductible because only one accident occurred, i.e., the captain's negligence in operating the vessel. Two decisions of the captain caused the damage to vessel: first, when the clutch began slipping, the captain ordered the clutch welded in the engaged position, resulting in damage to the engine and the power train, second, after discovering that the fuel used in the generators was contaminated, the captain allowed the crew to continue using the contaminated fuel in the generators, resulting in damage to the generators.

Lexington urged the district court and now urges this court to apply a separate deductible to each item of equipment damaged by the captain's negligence. For example, Lexington would apply a separate deductible to each of the generators damaged by the contaminated fuel, although the captain's one act of negligence in ordering the use of contaminated fuel damaged all the generators, and would apply separate deductibles to the engine, the clutch, and the tailshaft, although the captain's one act of negligence in ordering the clutch welded caused the damage to all three of these items.

While we cannot agree with Lexington's contention that up to ten deductibles should apply to Austin's claim, we do agree that the district court erred in applying only one deductible. The court should have applied the deductible twice since two separate accidents occurred. The first occurred when the captain decided to order the clutch welded, and the second occurred when the captain decided to allow the crew to continue using contaminated fuel in the generators. We therefore modify the recoverable cost of repairs by reducing it an additional $12,500 to $348,600.

C. *Layup Premiums*

Lexington next attacks the district court's award of lay-up premiums to Austin. The policy provides that the insurance company would return the premiums applicable to each period of thirty consecutive days the vessel was laid up. The AMAZON TRADER was laid up for four consecutive thirty-day periods in Spain when it broke down on its way back to Tampa; however, when Austin requested return of the applicable premiums, Lexington refused to return them. Lexington argues that Austin violated the following provision of the policy: "In no case shall a return for lay-up be allowed when the Vessel is lying . . . in any location not approved by the Underwriters." Lexington argues that since Lexington did not approve the lay-up in Spain, Austin is not entitled to lay up premiums. We disagree.

The policy does not say that Lexington must first approve a lay-up port; rather, the policy says that lay-up premiums will not be allowed when the vessel is laid up in a location "not approved by the Underwriters." This ambiguous phrase could easily be construed as meaning that Lexington maintained a list of unapproved ports and that the vessel could not be laid up at one of those ports. Applying the time-honored rule that ambiguities in insurance policies are to be construed against the insurer, *Walter v. Marine Office of America,* 537 F.2d 89, 94-95 (5th Cir. 1976), we hold that the district court correctly determined that Austin was entitled to lay-up premiums.

D. *Crew Negligence*

Returning to its wholesale attack on the factual findings made by the district court, Lexington next contends that the district court erred in finding that crew negligence caused the damage to the AMAZON TRADER. This finding was critical to the district court's award of damages for the cost of repairs because the court relied only on the Inchmaree clause of the insurance policy in awarding damages. The Inchmaree clause covers damage to the vessel caused by the negligence of the master, officers, crew, or pilots. Thus, if the damage to the vessel was not the result of crew negligence, the Inchmaree clause does not provide coverage.

Lexington again urges us to accept the version of the facts as related by its expert rather than the version related by Austin's expert and accepted by the district court. Again we must decline. Austin's expert testified that the captain of the vessel was negligent in ordering the clutch welded into a solid unit and in continuing to operate the generators with contaminated fuel. Thus, the district court's finding that crew negligence caused the damage to the vessel is entirely plausible and must be upheld on appeal.

E. *Future Charter*

Lexington next argues that the district court erred in finding that Lexington's actions caused Austin to suffer $390,000 in damages for the loss of a future charter party. The district court found that, under the proposed thirty-month charter party, Austin would have earned a profit of $13,000 a month, resulting in a $390,000 loss when Servac retracted the offer. Lexington argues that its actions did not cause Servac to retract the offer. We agree.

On July 8, 1982, while the AMAZON TRADER was en route from Tampa to Alexandria, Servac made an offer for a thirty-month charter of the vessel. No evidence in the record indicates that Austin accepted Servac's offer. In early August, before Servac had any knowledge of Lexington's handling of the claim, Servac decided to have nothing more to do with the AMAZON TRADER. Our review of the evidence indicates that, while there are several plausible reasons for Austin's and Servac's failure to agree to a long-term charter party, i.e., mechanical problems with the vessel, delays in the vessel's return voyage, and disputes over whether Servac or Austin was responsible for repairs, none of the explanations have anything to do with Lexington. Thus, finding ourselves left with a definite and firm conviction that a mistake has been made and finding the district court's finding implausible in light of the evidence, we reverse as to this element of damages.

F. *Other Consequential Damages*

Lexington's next contention is that the district court erred in awarding Austin $109,749 in other consequential damages. The damages consisted of Austin's expenses for crew wages, port fees, inspections, and other costs incurred while Austin sought repair approval for the vessel.

While ample testimony and documentation support the district court's finding that Austin incurred these expenses, the evidence fails to connect the expenses with Lexington's actions. No testimony indicated that Austin would not have incurred these expenses had Lexington promptly determined coverage and paid for the repairs. When substantial evidence does not support a finding of the district court, we may set that finding aside as clearly erroneous. *United States v. Florida*, 482 F.2d 205, 208 (5th Cir. 1973); *Ward v. Hobart Manufacturing Co.*, 450 F.2d 1176, 1182-83 (5th Cir. 1971). Since no evidence was introduced to show that Lexington's conduct caused Austin to incur the expenses, the district court's finding is clearly erroneous, and we reverse this element of the damage award.[5]

G. *Treble Damages*

Lexington's final argument is that the district court erred in concluding that it could apply the treble damages provision of article 21.21 of the Texas Insurance Code, Tex. Ins. Code Ann. art. 21.21 § 16 (Vernon 1981).[6] The district court held

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[5] While Austin did not introduce evidence to connect Lexington to the expenses Austin incurred while the vessel was laid up, some of Austin's testimony is relevant to the inquiry. Austin testified that, had Lexington promptly agreed to pay for the needed repairs, he would have incurred approximately $125,000 in expenses for maintaining the crew and vessel while repairs were being made and for bringing the vessel back across the Atlantic. Thus, Austin, according to his own testimony, incurred less expense by Lexington's delay than would have been incurred had Lexington promptly paid for the repairs.

[6] At the time of trial and at the time the alleged unfair settlement practices occurred, the

that the insurance policy was issued to and was payable to Texas plaintiffs and was therefore subject to the provisions of the Texas Insurance Code. See Tex. Ins. Code Ann. art. 21.42 (Vernon 1981). Lexington argues, first, that the court should have applied a federal rule to answer the question of whether treble damages are available and, second, that, if state law does apply, the court should have applied Florida rather than Texas law. Austin maintains that Texas law applies.

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pertinent part of article 21.21 read as follows:

> Sec. 16(a) Any person who has been injured by another's engaging in any of the practices declared in Section 4 of this Article or in rules or regulations lawfully adopted by the Board under this Article to be unfair methods of competition and unfair and deceptive acts or practices in the business of insurance or in any practice defined by Section 17.46 of the Business & Commerce Code, as amended, as an unlawful deceptive trade practice may maintain an action against the company or companies engaging in such acts or practices.
>
> (b) In a suit filed under this section, any plaintiff who prevails may obtain:
>
> > (1) three times the amount of actual damages plus court costs and attorney's fees reasonable in relation to the amount of work expended;
> >
> > (2) an order enjoining such acts or failure to act;
> >
> > (3) any other relief which the court deems proper.

(Vernon 1981). Between the time of trial and the time the district court entered judgment, the Texas Legislature altered article 21.21 to read as follows:

> Sec. 16.(a) Any person who has sustained actual damages as a result of another's engaging in an act or practice declared in Section 4 of this Article or in rules or regulations lawfully adopted by the Board under this Article to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance or in any practice defined by Section 17.46 of the Business & Commerce Code, as amended, as an unlawful deceptive trade practice may maintain an action against the person or persons engaging in such acts or practices.
>
> (b) In a suit filed under this section, any plaintiff who prevails may obtain:
>
> > (1) the amount of actual damages plus court costs and reasonable and necessary attorneys' fees. If the trier of fact finds that the defendant knowingly committed the acts complained of, the court shall award, in addition, two times the amount of actual damages; or
> >
> > (2) an order enjoining such acts or failure to act; or
> >
> > (3) any other relief which the court deems proper.

(Vernon Supp. 1986).

We begin our choice of law analysis with *Wilburn Boat Co. v. Fireman's Fund Insurance Co.,* 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955). *Wilburn Boat* teaches that, in the absence of a controlling federal admiralty rule, we are to turn to state law. *Id.* at 314-16, 99 L. Ed. at 342-44. *Wilburn Boat*, however, does not address the question of which state's law to apply.

Applying *Wilburn Boat*, we turn to the question of whether a controlling federal admiralty rule answers the question raised by the district court's award of treble damages. The question raised is whether, when an insurance company "engages in unfair and deceptive acts or practices" in the handling of its claims, may a district court award the insured three times his damages. Our review of admiralty law has not revealed, nor have the parties cited, any federal rule controlling the damages recoverable by an insured allegedly injured by the insurer's unfair acts in the handling of a claim. [7] In the absence of a controlling federal rule, we must turn to state law for the answer to the question of whether an insured may recover treble damages for unfair claims handling practices.

Lexington strongly urges the application of Florida law to the case, while Austin maintains that Texas law applies. We find it unnecessary to determine whether Texas or Florida law applies, since the result is the same under each state's law. Neither Texas nor Florida permits the recovery of treble damages under the facts of the instant case.

At the time the district court concluded that article 21.21 permitted Austin to recover treble damages, no Texas court had decided whether article 21.21 applied to a property insurer who failed to fairly handle a claim made by his insured. However, since the district court entered judgment, two Texas Courts of Appeal have addressed situations identical to those in the present case. In both cases the plaintiff-insured alleged that the defendant-insurer engaged in unfair claims settlement practices, and in both cases the Texas courts held that article 21.21 did not provide the insured a cause of action for unfair claims settlement practices.

In *Texas Farm Bureau Mutual Insurance Co. v. Vail*, 695 S.W.2d 692 (Tex. App. -- Dallas 1985, no writ), following the insurance company's denial of the insureds' fire loss claim, the insureds recovered treble damages based on their allegations of unfair claims settlement practices. The court of appeals, in holding that article 21.21 did not permit the insured to recover damages, stated that "'it was the intent of the legislature to "seal off" unfair claims settlements from the expansive language of the DTPA and the Insurance Code.'" *Id.* at 694 (citation omitted). In

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[7] While Lexington now claims that such a rule exists, Lexington is unable to cite a single case containing a federal rule on the subject. Interestingly, Lexington's Proposed Conclusions of Law filed in the district court contain the following statement: "Any question of unfair or inequitable claims handling is a matter of state law, there being no clearly established rule of federal jurisprudence on the subject."

Chitsey v. National Lloyd's Insurance Co., 698 S.W.2d 766 (Tex. App.--Austin 1985, writ of error granted), the jury found, in answer to a special issue, that the insurer engaged in an unfair act or practice in its handling of the insured's claim. The court of appeals held that the jury's finding did not entitle the insured to recover treble damages because article 21.21 did not apply to unfair claims settlement practices.[8]

Two federal district courts sitting in Texas have also held that article 21.21 does not provide the insured a cause of action for unfair claims settlement practices against property insurers. *Lexington Insurance Co. v. Bennet Evans Grain Co.*, No. C.A. G-84-184 (S.D. Tex. Feb. 17, 1986); *South Texas National Bank of Laredo v. United States Fire Insurance Co.*, 640 F. Supp. 278 (S.D. Tex. 1985). Thus, if Texas law applies to the instant case, the district court erred in awarding treble damages to Austin.

Similarly, Florida law does not provide the insured with a cause of action for treble damages if the insurance company engages in unfair claims settlement practices. By statute, Florida law prohibits unfair practices, Fla. Stat. Ann. § 626.9521 (West 1984), and specifically provides that unfair claims practices are one type of unfair practice, Fla. Stat. Ann. § 626.9541 (1)(i). The section prohibiting unfair practices, section 626.9521, provides that the violator shall be subject to penalties provided in section 627.381, which in turn provides for administrative fines and license suspensions, but does not provide for recovery of treble damages. *Fla. Stat. Ann.* § 627.381 (West 1984). Thus, if Florida rather than Texas law applies to the instant case, the district court would still be in error in awarding Austin treble damages. Since neither Texas nor Florida law permits the recovery of treble damages from an insurer who engages in unfair claims settlement practices, we reverse the portion of the district court's judgment awarding Austin treble damages.

V. CONCLUSION

We affirm the portion of the district court's judgment awarding Austin $361,100 as his costs of repairs . . . . We also affirm the portion of the judgment awarding

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[8] Austin argues that the decisions of the Texas Court of Appeals, rather than reaching consistent decisions on the applicability of section 21.21 to unfair claims settlement cases, are split. Austin cites two cases for this proposition. *Allstate Insurance Co. v. Kelly*, 680 S.W.2d 595 (Tex.App.--Tyler 1984, writ ref'd n.r.e.); *St. Paul Insurance Co. v. McPeak,* 641 S.W.2d 284 (Tex. App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.). As the court in *Vail* noted, the duties and responsibilities of a property insurer differ from those of other types of insurance providers. *Vail*, 695 S.W.2d at 694. In *Kelly* the insured brought suit for the insurer's handling of a suit brought by a third party against the insured. In *McPeak* the insured brought suit after the insurer terminated his worker's compensation benefits. Since *Kelly* and *McPeak* are distinguishable from *Vail* and *Chitsey*, both property cases, the Texas cases addressing unfair claims settlements in a property damage context are consistent.

Austin lay-up premiums in the amount of $6,492. We reverse all the remaining portions of the judgment awarding damages against Lexington. We remand the case to the district court with instructions to enter judgment for Austin in the amount of $355,092, plus attorney's fees, costs, and pre- and post-judgment interest.[10]

Further reading:

***Pace v. Insurance Co. of North America, 838 F.2d 572* (1st Cir. 1988)** (holding that a state tort cause of action against a marine insurer for bad faith refusal to pay a claim can coexist with federal admiralty law under *Wilburn Boat*)

***Atlantic Specialty Insurance Co. v. Mr. Charlie Adventures*, *LLC*, 644 F. App'x 922 (11th Cir. 2016)**

Per curiam:

Mr. Charlie Adventures, LLC, and Kim P. Kornegay (collectively, "Kornegay"), appeal the district court's grant of summary judgment in favor of Atlantic Specialty Insurance Company ("Atlantic") on Kornegay's bad-faith claim arising out of an insurance policy Atlantic had issued to provide coverage for a 40-foot yacht, called the "Mr. Charlie." On appeal, Kornegay argues that the district court erred in granting Atlantic's motion for summary judgment on Kornegay's bad-faith counterclaim because Atlantic had no arguable reason to deny the insurance claim. After careful review, we reverse and remand. ***

The relevant background is this. On March 3, 2013, while Kornegay was operating the Mr. Charlie, a fire started in the engine room, which caused the Mr. Charlie to burn to the water line, completely destroying the yacht and its contents. Kornegay reported the loss to Atlantic and filed a claim under the insurance policy for the policy limits. The policy covered damages to the Mr. Charlie and its contents, up to agreed-upon limits, but provided that Atlantic would not pay for:

> [A]ny loss, damage or expense caused by or resulting from:
>
> 1. Wear and tear; gradual deterioration; weathering; bubbling; osmosis; blistering; delamination of fiberglass or plywood; corrosion; rusting; electrolysis; mold; rot; inherent vice; *vermin*; insects or marine life; [or]
> 2. *Your* failure to maintain the covered *yacht* in good condition and repair.

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[10] The district court awarded Austin attorney's fees in amounts stipulated to by the parties. Lexington has not appealed this portion of the district court's judgment; therefore, the district court should include the stipulated amount of attorney's fees for the trial and appeal in the new judgment.

On September 16, 2013, Atlantic sent Kornegay a letter, notifying him that it was denying the claim based on reports by Guy Plaisance and Gary Jones--a marine surveyor and a fire-cause-and-origin investigator Atlantic had hired to investigate the fire--that concluded that the fire had been "caused by or resulted from growth of marine life on or in the vessel, which restricted the intake or flow of water to cool the engine and exhaust system." Atlantic also said that Plaisance's and Jones's reports "note[d] maintenance problems related to the loss."

After denying Kornegay's claim, Atlantic filed a declaratory judgment action in district court, seeking a declaration that it did not owe coverage for the fire damage. Kornegay counterclaimed, seeking damages for breach of contract and bad-faith refusal to pay the insurance claim. The parties thereafter cross-moved for summary judgment. As for the bad-faith claim, Atlantic argued that it had an arguable reason for denying Kornegay's insurance claim--namely, Plaisance's and Jones's reports that concluded that the growth of marine life on the starboard engine's seawater intake screen had caused the fire. Kornegay also moved to exclude expert testimony from Plaisance and Jones.

Notably, the district court granted Kornegay's motion to exclude the experts, on the ground that the reports were unreliable for five reasons under *Fed. R. Evid. 702*, which governs expert testimony. First, the district court found that the reports incorrectly stated the percentage of open area on the yacht's intake screens, which had been calculated by engineer and metallurgist Dr. Kendall Clarke. The reports provided that, due to marine growth, the intake screen for the starboard engine was only 20% open, while the intake screen for the identical port engine--where no fire started--was 26% open. Plaisance opined that the port screen's 6% additional open area was sufficient to keep the port engine from catching fire. But during discovery, it came to light that Plaisance had reversed the numbers and relied on 26% open for the starboard intake screen, and 20% open for the port intake screen.

Second, the reports relied on information Plaisance had received from John Moran, an employee of the screen manufacturer, who advised that the starboard screen on the Mr. Charlie had been too clogged to flow the required amount of water to cool the engine exhaust. The district court found that the information Plaisance received from Moran was not sufficiently reliable because: (a) Plaisance did not know Moran's qualifications; (b) Plaisance incorrectly told Moran that the starboard screen was only 20% open; (c) Plaisance initially provided Moran with the data sheet for a different engine than the one at issue in this case, and Moran did not run new calculations once Plaisance provided him with the data sheet for the correct engine, and (d) Moran told Plaisance only that he "[thought]" there "probably" would not be enough water flow to cool the exhaust.

Third, the district court found that Plaisance and Jones violated the scientific method by forming a conclusion first and then attempting to find support for that conclusion. The district court noted that on March 29, 2013, Plaisance wrote--in an email to Atlantic's claims adjuster Rita Boggan--that he believed the starboard engine had overheated as a result of the seawater intake screen being too occluded to allow sufficient water flow to cool the engine exhaust. But about one month later, two mechanics Atlantic hired to examine the engines determined that the starboard engine had not overheated. Subsequently, Plaisance sent an email to Jones and the two mechanics, with a copy to Boggan, asking whether it was possible that, due to limited seawater flow through the intake screen, the exhaust temperatures could exceed 257 degrees Fahrenheit, such that the engine would not overheat, but the exhaust tube would start to burn. Plaisance concluded in his final report that the fire had started in this manner. During his deposition, however, Plaisance could not confirm that he had ever gotten an answer to his question about this theory, and Atlantic proffered no evidence showing that he had.

Fourth, Plaisance's and Jones's reports incorrectly said that the exhaust tube could withstand temperatures up to 259 degrees, when, in fact, the exhaust tube was rated to withstand temperatures up to 350 degrees. While Atlantic claimed that the discrepancy did not matter because the engine's internal exhaust ranged from 900-1100 degrees, neither expert had determined what temperature the exhaust gases would have had in the starboard engine after having been cooled by whatever water came in through the partially occluded screen.

Finally, Plaisance and Jones had recommended additional inspections on other parts of the starboard and port engines to test their theory that restricted seawater flow through the starboard intake screen had caused the starboard exhaust tube to burn. These extra inspections were never done, yet in their final reports, Plaisance and Jones concluded that the fire had, in fact, occurred in this way. The district court noted that, while all of the requested inspections may not have been needed for the experts to reach a reliable conclusion, when it became clear that the starboard engine did not overheat as Jones and Plaisance had originally believed, "more testing or analysis was clearly needed to explain the circumstances."

The district court then determined that, once Plaisance's and Jones's reports were excluded, Atlantic had no admissible evidence to meet its burden to prove that the fire damage to the Mr. Charlie was excluded under Kornegay's policy. See *Acceptance Ins. Co. v. Brown*, 832 So. 2d 1, 12 (Ala. 2001). Accordingly, the district court granted Kornegay's motion for summary judgment on Atlantic's declaratory judgment claim and on Kornegay's breach-of-contract counterclaim. It also held, however, that Kornegay had proffered no evidence showing that, at the time it denied his claim, Atlantic knew or had reason to know that the expert reports were unreliable. The district court thus concluded that the reports provided Atlantic with an arguable basis for the denial, and granted Atlantic's motion for summary judgment on the bad-faith claim. This appeal follows.

This is a diversity case, and the parties agree that Alabama law applies. Under Alabama law, a bad-faith claim comes in two varieties: "normal" and "abnormal." *Emps.' Benefit Ass'n v. Grissett,* 732 So. 2d 968, 976 (Ala. 1998) (quotations omitted). In the normal case, the plaintiff must prove four elements: (a) "an insurance contract between the parties and a breach thereof by the defendant;" (b) "an intentional refusal to pay the insured's claim;" (c) "the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);" and (d) "the insurer's actual knowledge of any legitimate or arguable reason." *Id.* (quotations omitted). In the abnormal case, where the plaintiff relies on the defendant's reckless or intentional failure to properly investigate his claim, the plaintiff must prove elements (a) through (c), plus (e) "the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim." *Id.* (quotation omitted).

Alabama courts have made clear that, "[w]hen a claim is 'fairly debatable,' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." *Nat'l Sec. Fire & Cas. Co. v. Bowen,* 417 So. 2d 179, 183 (Ala. 1982). Thus, a plaintiff seeking to prove a bad-faith claim has a heavy burden. *Shelter Mut. Ins. Co. v. Barton*, 822 So. 2d 1149, 1154 (Ala. 2001). To establish a prima facie case, the plaintiff "must show that the insurer's decision not to pay was without any ground for dispute." *Id.* (quotation omitted). In so doing, the plaintiff "must eliminate any arguable reason propounded by the insurer for refusing to pay the claim." *Id.* (quotations omitted). In assessing whether the insurer had an arguable reason for denying the claim, the court must look to the information before the insurer at the time it denied the claim. *See Bowen*, 417 So. 2d at 183.

Generally, in a normal bad-faith case, to prove the absence of a debatable reason to deny the claim, the plaintiff must demonstrate that he is entitled to a pre-verdict judgment as a matter of law on his breach-of-contract claim. *Grissett,* 732 So. 2d at 976. Thus, if a factual dispute makes judgment as a matter of law for the plaintiff inappropriate on the breach-of-contract claim, the defendant is entitled to judgment as a matter of law on the plaintiff's bad-faith claim. *Id.* Where the plaintiff is entitled to judgment as a matter of law on his breach-of-contract claim, the defendant may still be entitled to judgment as a matter of law on the plaintiff's bad-faith claim if the defendant can show that it had an arguable reason to deny the claim: for example, if it relied on a legal position that was arguable, but was rejected by the trial court. *Safeco Ins. Co. of Am. v. Sims*, 435 So. 2d 1219, 1225 (Ala. 1983) (Jones, J., concurring); *see Attorneys Ins. Mut. of Ala., Inc. v. Smith, Blocker & Lowther, P.C.,* 703 So. 2d 866, 869-71 (Ala. 1996) (affirming grant of judgment as a matter of law for the insurer on bad-faith claim, where the insurer denied the insurance claim based on an arguable reading of the insurance policy, even though the trial court had rejected the insurer's policy interpretation in granting judgment as a matter of law for the insured on breach-of-contract claim).

In the abnormal case, where the plaintiff relies on the defendant's reckless or intentional failure to properly investigate his claim, a factual dispute on the breach-of-contract claim is not fatal to the plaintiff's bad-faith claim. *Grissett,* 732 So. 2d at 976. However, the plaintiff must still prove that the defendant lacked a debatable reason to deny the claim. *State Farm Fire and Cas. Co v. Brechbill*, 144 So. 3d 248, 258 (Ala. 2013). Evidence of the defendant's intentional failure to determine whether a lawful basis existed may be used as proof that no such basis, in fact, existed. *Cont'l Assurance Co. v. Kountz*, 461 So. 2d 802, 805 (Ala. 1984).

In this case, Kornegay has sought to prove both a normal and abnormal case of bad faith, and argues that the district court erred in determining that Plaisance's and Jones's reports provided Atlantic with an arguable reason to deny the claim. We agree. Kornegay has proffered sufficient evidence to create a triable issue as to whether Atlantic should have known the reports were unreliable -- indeed, the very evidence the district court relied upon in finding the reports unreliable. Specifically, there are numerous emails from Plaisance to Boggan, in which Plaisance informed Boggan of: (1) his initial theory that restricted seawater flow through the starboard intake screen had caused the starboard engine to overheat; (2) the mechanics' investigation that determined the starboard engine had not overheated; (3) Plaisance's question to Jones and the mechanics as to whether it was possible that restricted seawater flow through the starboard intake screen could have caused the exhaust pipe to burn without overheating the engine; and (4) Plaisance and Jones's recommendation that additional testing be done on the engine parts to prove or disprove that theory. In addition, Boggan testified in her deposition that: (1) she did not know if Plaisance had ever gotten an answer to his question as to whether it was possible for restricted seawater flow to cause the exhaust pipe to burn without overheating the engine; and (2) she did not know whether additional testing had been done on the engine parts to prove or disprove Plaisance and Jones's theory.

On this record, Kornegay has proffered sufficient evidence to create a triable issue as to whether Atlantic had an arguable reason to deny his claim. See *Lord v. Allstate Ins. Co.*, 47 F. Supp. 3d 1288, 1308-09 (N.D. Ala. 2014) (concluding that the opinion of an inexperienced adjuster did not provide an arguable basis for denying the plaintiff's claim, where, among other things, the adjuster recommended that the insurer obtain an engineer's evaluation but the insurer failed to do so); see also *Affiliated FM Ins. Co. v. Stephens Enters.*, 641 So. 2d 780, 783-84 (Ala. 1994) (affirming the trial court's denial of the defendant's motion for judgment as a matter of law on the plaintiff's bad-faith claim, where the defendant relied on expert reports that had been prepared with inaccurate information the experts had been given by the defendant). While Atlantic cannot be found liable to the extent its conduct constituted mere negligence, see *Davis v. Cotton States Mut. Ins. Co.*, 604 So. 2d 354, 359 (Ala. 1992), a reasonable jury could find that Atlantic knew or had reason to know that Plaisance's and Jones's reports were unreliable and that the reports did not provide an arguable basis for concluding that the fire damage to the Mr. Charlie had, in fact, been caused by the growth of marine life on the starboard intake screen. Accordingly, we reverse the district court's grant of summary judgment for Atlantic on Kornegay's bad-faith claim, and remand the case for proceedings consistent with this opinion.***

***State Farm Lloyds v. Nicolau*, 951 S.W.2d 444 (Tex. 1994)**

Justice Spector delivered the opinion of the Court:

This cause presents several questions about an insurer's liability for extracontractual damages. The court of appeals upheld jury findings of bad faith and malice, allowing the insureds to recover both mental anguish and exemplary damages. 869 S.W.2d 543. We agree that some evidence supports the jury's finding that the insurer violated its duty of good faith and fair dealing. In addition, we hold that there is no evidence that the insurer acted unconscionably or with malice. Because the latter holding eliminates the Nicolaus' recovery of common-law exemplary damages, we remand this cause to the court of appeals to consider the Nicolaus' entitlement to additional damages on statutory grounds.

In the insurance claim giving rise to this dispute, Ioan and Liana Nicolau sought coverage for extensive foundation damage at their Corpus Christi home. The Nicolaus' homeowners policy, issued by State Farm Lloyds, generally excludes losses caused by "inherent vice," or by "settling, cracking, bulging, shrinkage, or expansion of foundations." Under an express exception, however, these exclusions do not apply to losses caused by an "accidental discharge, leakage or overflow of water" from within a plumbing system.

The Nicolaus first experienced foundation problems in 1984, when cracks appeared in their walls. Unaware that the problems might be attributable to a plumbing leak and thus covered under their policy, the Nicolaus did not, at that time, file a claim. Instead, they hired Michael Krismer, a foundation repair contractor, to inspect the house. On his recommendation, they also engaged Dexter Bacon, a structural engineer with Maverick Engineering. After examining the house, Krismer and Bacon concluded that the ongoing drought that year--combined with four mesquite trees in the Nicolaus' front yard--was drying the soil under the front part of the house, causing the front of the house to sink. To prevent further downward movement, Krismer installed a series of concrete piers beneath the front of the house and part of the sides.

In 1986, the Nicolaus again noticed cracks in the interior and exterior of the house. Krismer again inspected the house but concluded that the cracks were insignificant. Krismer and Bacon both inspected the house again in 1988. Bacon determined that the piers installed in 1984 were providing adequate support. Krismer inspected the house once again in June 1989, and likewise concluded that the piers were continuing to function. Not yet realizing that they had a problem that might be covered under their insurance policy, the Nicolaus still did not file a claim.

In late 1989, however, Krismer became alarmed by additional foundation movement at the inches higher than the front. In Krismer's words, the rear end of the house appeared to be "digging up out of the ground." There was significant cracking in the sheetrock and exterior brick, and doors and cabinets were not closing properly.

At Krismer's request, Bacon reexamined the house. Bacon realized there was a problem and referred the matter to Fred Hayden, a licensed civil engineer with Maverick Engineering. Krismer, Bacon, and Hayden together determined that the problem was with *swelling* of the soil at the *back* of the house rather than contraction of the soil at the front of the house. For that reason, they decided to test for leaks in the drainline system under the foundation. Such leaks, they reasoned, could be causing expansion of the clay soil under the rear of the house. Initial testing indicated that there was a significant leak in the plumbing system.
Realizing for the first time that their homeowners' policy might cover their foundation problems, the Nicolaus filed a claim with State Farm in February 1990. State Farm referred the claim to Monty R. Murray, an adjuster with ABJ Adjusters, Inc. Murray provided an initial report to State Farm in late February 1990 and a second report in March. Both reports expressed doubts that the leak was responsible for the foundation damages, because the leak was located toward the front rather than the back of the house.

In late March, at Krismer's request, Maverick Engineering provided the Nicolaus with a report based on its investigation and testing. The Nicolaus gave the report to Ralph Cooper, State Farm's claims superintendent. The report stated that the water from the plumbing leak may have flowed along the plumbing lines and trenches and may have caused the rear of the house to heave.

After receiving the Maverick report, Cooper, on behalf of State Farm, notified the Nicolaus that he wanted to obtain a second opinion on the origin and extent of their damages. For that purpose, Cooper authorized ABJ Adjusters to obtain a report from Haag Engineering Company.

Two Haag engineers examined the Nicolaus' house. They provided Cooper with a report concluding that the reported sewer line leak did not significantly affect the foundation. Cooper forwarded the report to the Nicolaus, together with a letter reserving State Farm's rights to deny coverage.

A month later, after receiving an estimate from Michael Krismer, State Farm notified the Nicolaus that State Farm was denying most of the coverage sought. State Farm did reimburse the Nicolaus $ 1,820.50 for expenses incurred in locating and repairing the leak, but rejected the Nicolaus' claim for $ 102,200 for further piering or leveling of the foundation. Cooper explained in a letter that State Farm felt the Haag Engineering report was correct: that the foundation damage was not related to the water leak but was instead caused by inherent vice or by settling problems, both of which were not covered.

The Nicolaus then obtained a report from Trinity Engineering Testing Corporation (Tetco) prepared by Chien Fu, a licensed professional engineer with a master's degree in geotechnical engineering specializing in soils analysis and foundation reports. Based on soil samples taken at the house, Fu concluded that the plumbing leak had allowed water to travel great distances through the cushion sand layer, causing a widespread wet condition in the soils. The Nicolaus forwarded the Tetco report to Cooper.

Cooper then notified the Nicolaus that he and Haag Engineering had reviewed the Tetco materials. The Haag engineers had reported that Tetco's conclusions were unfounded, and that the opinions stated in Haag's initial report remained unchanged. Cooper agreed with Haag and stated that State Farm was adhering to its denial of the Nicolaus' claim.

The Nicolaus then sued State Farm, asserting breach of contract and several extracontractual claims based on State Farm's conduct. At trial, the jury found that State Farm had breached its insurance contract, engaged in an unfair or deceptive act or practice, maliciously breached its duty to deal fairly and in good faith, and knowingly engaged in an unconscionable action. The jury awarded the Nicolaus $ 102,200 in policy benefits owed for necessary repairs to their home; $ 50,000 for mental anguish suffered in the past; $ 300,000 in punitive damages; and attorney's fees of either forty percent or $ 150,000.

The trial court chose to disregard all of the jury's findings except those relating to breach of contract, amount of loss, and attorney's fees. After subtracting the amount State Farm had already paid for plumbing repairs, the trial court rendered judgment for the Nicolaus for $ 100,380, plus attorney's fees and interest.

The court of appeals affirmed the trial court's judgment on the breach of contract finding. 869 S.W.2d at 555. However, in all other respects, the court of appeals reversed the trial court's judgment and rendered judgment for the Nicolaus in accordance with the jury's findings. *Id.*

I. Bad Faith

In an opinion also issued today, we clarified the standard for imposing liability for a breach of the duty of good faith and fair dealing. *See Universe Life Ins. Co. v. Giles,* 881 S.W.2d 44, 47. We held in *Giles* that an insurer breaches its duty when the insurer fails to settle a claim if the insurer knew or should have known that it was reasonably clear that the claim was covered. *Giles*, 950 S.W.2d at 56. This case was submitted in accordance with the bad-faith standard established in *Arnold v. National County Mutual Fire Insurance Co.,* 725 S.W.2d 165 (Tex. 1987). Under *Arnold*, an insurer breaches its duty of good faith and fair dealing if the insurer denies a claim with no reasonable basis. *Id.* at 167. There is some evidence in the record in this case to sustain a bad-faith finding under either formulation of the standard.

Here, State Farm argues that the Haag Engineering reports conclusively establish that it did not act in bad faith in denying the Nicolaus' claim. Those reports, prepared by licensed engineers, conclude that a water leak did not cause the damage to the Nicolaus' foundation. Because State Farm based its denial on these reports in the dispute over coverage of the Nicolaus' claim, State Farm argues that any liability for bad faith is foreclosed as a matter of law.

We have recognized thatevidence showing only a bona fide coverage dispute does not, standing alone, demonstrate bad faith. *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex. 1994) citing *National Union Fire Ins. Co. v. Dominguez*, 873 S.W.2d 373, 376-77 (Tex. 1994). But we have never held that the mere fact that an insurer relies upon an expert's report to deny a claim automatically forecloses bad faith recovery as a matter of law. Instead, we have repeatedly acknowledged that an insurer's reliance upon an expert's report, standing alone, will not necessarily shield the carrier if there is evidence that the report was not objectively prepared or the insurer's reliance on the report was unreasonable. *Lyons v. Millers Casualty Ins. Co.,* 866 S.W.2d 597, 601 (Tex. 1993); *Dominguez*, 879 S.W.2d at 377.

Courts of appeals have likewise held, in similar circumstances, that evidence casting doubt on the reliability of the insurer's expert's opinions may support a bad-faith finding. *See State Farm Fire and Cas. Co. v. Price*, 845 S.W.2d 427, 436-38 (Tex. App.--Amarillo 1992, writ dism'd by agr.); *Guajardo v. Liberty Mut. Ins. Co.*, 831 S.W.2d 358, 364-65 (Tex. App.--Corpus Christi 1992, writ denied).

In this case, the Nicolaus presented evidence from which a fact-finder could logically infer that Haag's reports were not objectively prepared, that State Farm was aware of Haag's lack of objectivity, and that State Farm's reliance on the reports was merely pretextual. Accordingly, there is some evidence that State Farm denied the claim without a reasonable basis or without attempting to objectively determine whether its liability had become reasonably clear. *See Giles*, 951 S.W.2d at 56; *Lyons*, 866 S.W.2d at 601. David Teasdale, a Haag engineer since his graduation from college in 1985, provided evidence that a substantial amount of Haag's work is done for insurance companies; Teasdale estimated that eighty to ninety percent of his work consisted of investigations for insurance companies. He also testified that he was aware that an insurance company would be required to pay if a policyholder's home were damaged by a leak.

Furthermore, the evidence supports a logical inference that State Farm obtained the reports from Haag Engineering because of Haag's general view that plumbing leaks are unlikely to cause foundation damage. State Farm's claim superintendent, Ralph Cooper, testified that he was aware of Haag's view when he requested the first report:

> Q: Okay. Did you know that Haag had a general opinion about leaks underneath houses?

. . . .

> A: I knew that they were of the general opinion that a localized leak beneath the house would not cause foundation damage as a general rule. Sometimes they felt it would, sometimes they felt it wouldn't.
>
> Q: And you knew that before you hired Haag?
>
> A: Yes, I did.

Cooper's testimony was reinforced by Savannah Robinson, the Nicolaus' attorney, who initially testified only about attorney's fees. Under cross-examination, Robinson acknowledged that she had occasionally represented State Farm in the past. Robinson testified without objection that it was a "fair inference" that Cooper, whom she knew, hired Haag because he was aware that Haag, as a general rule, would not agree that a leak caused foundation damage.

Standing alone, this evidence would not always be evidence of bad faith. All experts presumably have certain general views and expertise, and an insurer's mere awareness of such views is not necessarily an indication of bad faith. Taken together with the evidence outlined below, however, it does provide more than a scintilla of evidence from which the jury could logically infer that State Farm did not reasonably rely on Haag's report to deny the Nicolaus' claim.

The Nicolaus' foundation repair contractor, Krismer, testified that he had reviewed eighty or ninety Haag reports in the local area. He knew of only two instances in which a Haag report concluded that a leak contributed to foundation movement. He further testified that, to his knowledge, neither of the two Haag engineers who reached that conclusion ever again worked on another case involving a slab foundation like the Nicolaus'.[1]

Krismer's testimony was corroborated by Robinson. Robinson testified that she was aware of only two instances in which Haag engineers had attributed foundation damage to a leak and that "the engineers who wrote those reports were never seen from [sic] again."

There was also evidence that State Farm, and the engineers on which it relied, did not conduct an adequate investigation. Krismer testified that the Haag report was based on inadequate information. He said the failure of State Farm and Haag Engineering to examine the leaking pipe, take core samples, and perform other tests was unreasonable. Brock Thomas, a licensed insurance adjustor, testified about an insurer's obligations when presented with a claim. He offered his opinion

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[1] The testimony of Krismer cited by the dissent is consistent with this evidence. Krismer acknowledged that two Haag engineers had found that a leak had caused foundation damage; thus, his testimony that it would not be true to say that "Haag only . . . finds that there's no relation between the leak and foundation movement" is not surprising.

that State Farm was obligated to fully investigate the claim and that the company had not done so. Thomas agreed that the investigators should have examined the leak and taken soil samples. Moreover, Cooper admitted that the Haag engineers had not seen the leaking pipe or taken any soil samples when they concluded that the leak did not cause the foundation damage. He also admitted that he did not contact Maverick Engineering to obtain further information after Maverick concluded that the leak may have caused the foundation damage.

Some evidence also indicates that State Farm knew, when it denied the Nicolaus' claim for the second time, that the Haag report did not justify denying the claim. The Tetco report, which the Nicolaus provided to State Farm after State Farm initially denied the claim, discussed the moisture content of soil samples taken from four locations within the Nicolaus' house. State Farm referred the Tetco report, which had found that water from the leak had spread throughout the soils underlying the Nicolaus' foundation, to the same Haag engineers who had prepared the initial report. There is no indication that the Haag engineers did any further testing in response to the Tetco report or that State Farm conducting the claim a second time.

Other evidence also called into question the accuracy of the Haag reports on which State Farm relied. The second Haag report asserted that the soil moisture content discussed in the Tetco report should not be considered high. Three of the Nicolaus' experts strongly disagreed with this conclusion, and even State Farm's own expert, Frelon Wiley, testified that he disagreed with it. The Haag report also suggested that the water Tetco's engineer had observed--which had flowed upward through a hole in the foundation for three to five minutes--could be explained as condensation that had accumulated naturally. Krismer testified that this suggestion was "the most ridiculous thing I've ever heard." Thomas Petrie, an expert called by State Farm, agreed that the suggestion was unreasonable.

Were we the trier of fact in this case, we may well have concluded that State Farm did not act in bad faith. That determination is not ours to make, however. Instead, the Constitution allocates that task to the jury and prohibits us from reweighing the evidence, as the dissent does. *See* TEX. CONST. art. I, § 15 and art. V, § 10; art. V, § 6. Accordingly, viewing the evidence in the light most favorable to the Nicolaus, we hold that there is some evidence to support the jury's finding that State Farm denied the Nicolaus' claim in bad faith.

II. Malice

State Farm also argues that the court of appeals erred by reinstating the jury's malice finding, because there is no evidence that State Farm's conduct had a reasonable probability to result in human death, great bodily harm, or property damage. We agree.

When the parties tried this case, the statutory definition of "malice" included the following:

> (A) conduct that is specifically intended by the defendant to cause substantial injury to the claimant; or
>
> (B) conduct that is carried out by the defendant with a flagrant disregard for the rights of others and with actual awareness on the part of the defendant that the act will, in reasonable probability, result in human death, great bodily harm, or property damage.

TEX. CIV. PRAC. & REM. CODE § 41.001(6).[2] The instruction accompanying the "malice" question in this case tracked part (B) of the statutory definition. The Nicolaus did not object to the omission of any language from part (A) and have not made any such complaint on appeal. Nor have the Nicolaus suggested that State Farm's conduct was likely to result in human death or great bodily harm. Thus, to establish malice, the Nicolaus had to present evidence that State Farm was actually aware that its conduct would, in reasonable probability, result in property damage. In support of the jury's finding, the Nicolaus point out that they were greatly inconvenienced by living with a hole in the hallway of their home for over five months. The Nicolaus' homeowners' policy provided for "additional living expenses" if the house became unlivable due to a covered loss, but the Nicolaus assert that State Farm never brought this provision to their attention. The fact that State Farm did not advise the Nicolaus that they might be entitled to additional living expenses is no evidence, however, that State Farm's denial of the Nicolaus' foundation damage claim caused or threatened to cause property damage to the Nicolaus' home.

The Nicolaus also assert that State Farm's conduct forestalled any effort to make permanent repairs to the foundation, resulting in a significant loss in the house's property value. But the damage to the Nicolaus' foundation was caused by a plumbing leak, which State Farm paid to repair. There is no evidence that State Farm's denial of the Nicolaus' foundation damage claim caused any additional property damage once the leak was repaired. The Nicolaus cite no other evidence that establishes that State Farm's denial of the claim caused or threatened to cause property damage. Therefore, under the plain language of section 41.001(6)(B), the malice finding cannot stand.

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[2] We note that the Legislature revised this definition in the last legislative session, and changed the paragraph number from (6) to (7). *See* Act of April 11, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108, 109. Pre-existing law governs suits filed before the Act's effective date. *Id.*, § 2, at 113.

III. Unconscionability

In addition to finding that State Farm acted with malice, the jury also found that State Farm knowingly engaged in an unfair or deceptive act or practice, as well as an unconscionable action or course of action. These findings, if supported by evidence, would allow the Nicolaus to recover additional damages under section 17.50 of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA), TEX. BUS. &. COM. CODE §§ 17.41-.63.

The only DTPA findings the court of appeals reached were the findings that State Farm engaged in unconscionable conduct that was a producing cause of damages to the Nicolaus. The court of appeals upheld these findings, reasoning that there was a gross disparity between the premiums the Nicolaus paid and the value they received. 869 S.W.2d at 554. State Farm argues that the court of appeals erred in reinstating the findings because there is no evidence that State Farm acted unconscionably. We agree.

> The DTPA defines unconscionable action as an act or practice which, to a person's detriment:
>
> (A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or
>
> (B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration.

TEX. BUS. & COM. CODE § 17.45(5). We have previously held that the term "gross," as used in this section, means "glaringly noticeable, flagrant, complete and unmitigated." *Chastain v. Koonce*, 700 S.W.2d 579, 583 (Tex. 1985).

In support of the jury's findings, the Nicolaus rely on testimony from Mr. Nicolau that State Farm should have conducted a more thorough investigation and should have told him about the insurance policy's provision for additional living expenses. The record, however, provides no support for the conclusion that State Farm took advantage of the Nicolaus to a grossly unfair degree. Mr. Nicolau testified that he was aware of the policy's provisions about foundation settlement and leaks when the claim was first made. Additionally, as mentioned previously, State Farm agreed to pay for the Nicolaus' plumbing repairs. State Farm also agreed to pay for the tests the Nicolaus arranged, including the report provided by Maverick Engineering and the plumbing tests. Considering this evidence, as well as the continual exchange of information between State Farm and the Nicolaus, there is no basis for concluding that State Farm took advantage of the Nicolaus to the degree that the resulting unfairness was glaringly noticeable, flagrant, complete, and unmitigated.

There is also no evidence that State Farm acted unconscionably because of an act that resulted in a gross disparity between the value the Nicolaus received and the consideration they paid. Although State Farm refused to pay the Nicolaus' claim for foundation repairs, it did pay for the plumbing repairs and investigative costs after the leak was discovered. There is no evidence that the disparity between what the Nicolaus paid for insurance and the amounts they received under the policy was "glaringly noticeable, flagrant, complete and unmitigated." *Chastain*, 700 S.W.2d at 583.***

We conclude that the Nicolaus should recover on their bad faith claim. Because no evidence supports the jury's finding of malice, however, the Nicolaus should not recover exemplary damages on that basis.

The Nicolaus may nonetheless be entitled to recover additional damages based on the jury's findings that State Farm knowingly engaged in unfair or deceptive acts or practices. *See* TEX. BUS. &. COM. CODE § 17.50. Accordingly, we affirm in part and reverse in part the judgment of the court of appeals and remand this cause to that court for review of these findings in light of State Farm's previously asserted reply points and cross-points, which include factual insufficiency arguments.[4] ***

***USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018)**

Justice Boyd delivered the opinion of the Court:

*****Background**

After Hurricane Ike struck Galveston Island in September 2008, Gail Menchaca contacted her homeowner's insurance company, USAA Texas Lloyds, and reported that the storm had damaged her home. The adjuster USAA sent to investigate Menchaca's claim found only minimal damage. Based on the adjuster's findings, USAA determined that its policy covered some of the damage but declined to pay Menchaca any benefits because the total estimated repair costs did not exceed the policy's deductible.[1] About five months later, at Menchaca's request, USAA sent another adjuster to re-inspect the property. This adjuster generally confirmed the first adjuster's findings, and USAA again refused to pay any policy benefits. Menchaca sued USAA for breach of the insurance policy and for unfair settlement practices in violation of the Texas Insurance Code. As damages for both claims, she sought only insurance benefits under the policy, plus court costs and attorney's fees.

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[4] Because the court of appeals' decision may affect the amount of damages awarded, as well as the award of attorney's fees, we do not reach State Farm's argument that the court of appeals erred by awarding attorney's fees on the entire amount of damages found by the jury.

[1] The policy's declaration page provides that the policy covers "only that part of the loss over the deductible stated," and then lists the deductible amounts for "wind and hail" and for "all other perils."

The parties tried the case to a jury. Question 1 of the jury charge, which addressed Menchaca's breach-of-contract claim, asked whether USAA failed "to comply with the terms of the insurance policy with respect to the claim for damages filed by Gail Menchaca resulting from Hurricane Ike." The jury answered "No." Question 2, which addressed Menchaca's statutory claims, asked whether USAA engaged in various unfair or deceptive practices, including whether USAA refused "to pay a claim without conducting a reasonable investigation with respect to" that claim. As to that specific practice, the jury answered "Yes." Question 3 asked the jury to determine the amount of Menchaca's damages that resulted from either USAA's failure to comply with the policy or its statutory violations, calculated as "the difference, if any, between the amount USAA should have paid Gail Menchaca for her Hurricane Ike damages and the amount that was actually paid."[5] The jury answered "$11,350."[6]

Both parties moved for judgment in their favor based on the jury's verdict. USAA argued that because the jury failed to find in answer to Question 1 that USAA failed to comply with the policy, Menchaca could not recover for "bad faith or extra-contractual liability as a matter of law." Menchaca argued that the court should enter judgment in her favor based on the jury's answers to Questions 2 and 3, neither of which required a "Yes" answer to Question 1. The trial court disregarded Question 1 and entered final judgment in Menchaca's favor based on the jury's answers to Questions 2 and 3. ***

II.

Recovering Policy Benefits for Statutory Violations

The parties agree that the damages the jury found in response to Question 3 represent the amount of insurance policy benefits the jury concluded USAA "should have paid" to Menchaca. USAA contends that Menchaca cannot recover any amount of policy benefits because the jury failed to find that USAA breached its obligations under the policy. Although the jury did find that USAA violated the Insurance Code, USAA contends that Menchaca cannot recover policy benefits

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[5] Specifically, Question 3 asked: "What sum of money . . . would fairly and reasonably compensate Gail Menchaca for her damages, if any, that resulted from the failure to comply you found in response to Question number 1 and/or that were caused by an unfair or deceptive act that you found in response to Question number 2"? The question thus required the jury to determine damages resulting from either a contract breach or a statutory violation or both. The charge instructed the jury to answer Question 3 only if it "answered 'Yes' to Question No. 1 *or* any part of Question No. 2 *or* both questions." The charge then instructed the jury that the "sum of money to be awarded is the difference, if any, between the amount USAA should have paid Gail Menchaca for her Hurricane Ike damages and the amount that was actually paid."

[6] The jury also found that Menchaca's reasonable and necessary attorney's fees "for representation in the trial court" totaled $130,000, and did not find that Menchaca failed to mitigate her damages or that USAA "knowingly" violated the Insurance Code.

based on that finding alone. USAA primarily relies on *Provident American Insurance Co. v. Castañeda*, in which we stated that an insurance company's "failure to properly investigate a claim is not a basis for obtaining policy benefits." 988 S.W.2d 189, 198 (Tex. 1998). Menchaca argues that the jury's findings that USAA violated the Code and that the violation resulted in Menchaca's loss of policy benefits USAA "should have paid" sufficiently support the award of policy benefits. Menchaca primarily relies on *Vail v. Texas Farm Bureau Mutual Insurance Co.*, in which we stated that an insurer's "unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld." 754 S.W.2d 129, 136 (Tex. 1988).

Courts and commentators have expressed confusion over our decisions in this area, and over our statements in *Castañeda* and *Vail* in particular. The Fifth Circuit, for example, concluded that *Castañeda* and other "decisions from the Supreme Court of Texas and Texas's intermediate appellate courts arguably cast doubt on *Vail*'s continued vitality." *In re Deepwater Horizon*, 807 F.3d 689, 698 (5th Cir. 2015). In the *Deepwater Horizon* panel's view, the Fifth Circuit had previously interpreted *Castañeda* as setting out "the opposite rule from that in *Vail*." *Id.* (citing *Great Am. Ins. Co. v. AFS/IBEX Fin. Servs. Inc.*, 612 F.3d 800, 808 & n.1 (5th Cir. 2010)). Today's case presents an opportunity to provide clarity regarding the relationship between claims for an insurance-policy breach and Insurance Code violations. In light of the confusing nature of our precedent in this area, we begin by returning to the underlying governing principles. *See, e.g., United States v. New Mexico,* 455 U.S. 720, 733, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982) (concluding that "the confusing nature of our precedents counsels a return to the underlying constitutional principle").

The first of these principles is that an "insurance policy is a contract" that establishes the respective rights and obligations to which an insurer and its insured have mutually agreed. *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015); *see also Tex. Ass'n of Ctys. Cty. Gov't Risk Mgmt. Pool v. Matagorda Cty.,* 52 S.W.3d 128, 131 (Tex. 2000) (noting that an "insurance policy . . . defines the parties' rights and obligations"). Generally, we construe a policy using the same rules that govern the construction of any other contract. *See Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008) (citing *Forbau v. Aetna Life Ins., Co.,* 876 S.W.2d 132, 133 (Tex. 1994)). An insurance policy, however, is a unique type of contract because an insurer generally "has exclusive control over the evaluation, processing[,] and denial of claims," and it can easily use that control to take advantage of its insured. *Arnold v. Nat'l Cty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987). Because of this inherent "unequal bargaining power," we concluded in *Arnold* that the "special relationship" between an insurer and insured justifies the imposition of a common-law duty on insurers to "deal fairly and in good faith with their insureds." *Id.*

Similar to that common-law duty, the Insurance Code supplements the parties' contractual rights and obligations by imposing procedural requirements that govern the manner in which insurers review and resolve an insured's claim for policy benefits. *See, e.g.*, Tex. Ins. Code § 541.060(a) (prohibiting insurers from engaging in a variety of "unfair settlement practices"). The Code grants insureds a private action against insurers that engage in certain discriminatory, unfair, deceptive, or bad-faith practices, and it permits insureds to recover "actual damages . . . caused by" those practices, court costs, and attorney's fees, plus treble damages if the insurer "knowingly" commits the prohibited act. *Id.* §§ 541.151, .152; *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 441 (Tex. 2012).[11]

"Actual damages" under the Insurance Code "are those damages recoverable at common law," *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 435 (Tex. 1995) (citing *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 939 (Tex. 1980)), which include "benefit-of-the-bargain" damages representing "the difference between the value as represented and the value received," *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997) (citing *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984)). But the Code does not create insurance coverage or a right to payment of benefits that does not otherwise exist under the policy. *See Lyons v. Millers Cas. Ins. Co. of Tex.,* 866 S.W.2d 597, 600 (Tex. 1993) (discussing the necessity of distinguishing bad-faith issues from "the contract issue of coverage").

An insured's claim for breach of an insurance contract is "distinct" and "independent" from claims that the insurer violated its extra-contractual common-law and statutory duties. *See Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996) ("Insurance coverage claims and bad faith claims are by their nature independent."); *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 666 (Tex. 1995) (noting that a bad-faith claim is "distinct" from a suit for breach of the policy); *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995) ("[A] policy claim is independent of a bad faith claim."). A claim for breach of the policy is a "contract cause of action," while a common-law or statutory bad-faith claim "is a cause of action that sounds in tort." *Twin City*, 904 S.W.2d at 666; *see also Viles v. Sec. Nat'l Ins. Co.*, 788 S.W.2d 566, 567 (Tex. 1990) ("[A] breach of the duty of good faith and fair dealing will give rise to a cause of action in tort that is separate from any cause of action for breach of the underlying insurance contract."). But the claims are often "largely interwoven," and the same evidence is often "admissible on both claims." *Akin*, 927 S.W.2d at 630.

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[11] Similarly, a claim for bad-faith conduct that breaches the common-law duty "can potentially result in three types of damages: (1) benefit of the bargain damages for an accompanying breach of contract claim, (2) compensatory damages for the tort of bad faith, and (3) punitive damages for intentional, malicious, fraudulent, or grossly negligent conduct." *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex. 1994), *abrogated on other grounds by U-Haul Int'l v. Waldrip*, 380 S.W.3d 118, 140 (Tex. 2012).

The primary question in this case is whether an insured can recover policy benefits as "actual damages" caused by an insurer's statutory violation absent a finding that the insured had a contractual right to the benefits under the insurance policy. Generally, the answer to this question is "no," but the issue is complicated and involves several related questions. In an effort to clarify these issues, we distill from our decisions five distinct but interrelated rules that govern the relationship between contractual and extra-contractual claims in the insurance context. First, as a general rule, an insured cannot recover policy benefits as damages for an insurer's statutory violation if the policy does not provide the insured a right to receive those benefits. Second, an insured who establishes a right to receive benefits under the insurance policy can recover those benefits as actual damages under the Insurance Code if the insurer's statutory violation causes the loss of the benefits. Third, even if the insured cannot establish a present contractual right to policy benefits, the insured can recover benefits as actual damages under the Insurance Code if the insurer's statutory violation caused the insured to lose that contractual right. Fourth, if an insurer's statutory violation causes an injury independent of the loss of policy benefits, the insured may recover damages for that injury even if the policy does not grant the insured a right to benefits. And fifth, an insured cannot recover *any* damages based on an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits.

A. The General Rule

The general rule is that an insured cannot recover policy benefits for an insurer's statutory violation if the insured does not have a right to those benefits under the policy. This rule derives from the fact that the Insurance Code only allows an insured to recover actual damages "caused by" the insurer's statutory violation. *See* Tex. Ins. Code § 541.151; *Minn. Life Ins. Co. v. Vasquez*, 192 S.W.3d 774, 780 (Tex. 2006). We first announced this rule in *Stoker*, 903 S.W.2d at 341. The insurer in *Stoker* relied on an invalid reason to deny the insureds' claim for benefits but later asserted a valid basis for denying the claim. *See id.* at 339. The insureds sued the insurer for breach of contract and for bad-faith denial of the claim, seeking only policy benefits as damages. *Id.* at 339-40. The trial court granted summary judgment for the insurer on the breach-of-contract claim because the policy did not cover the claim. *Id.* at 339. The jury, however, found the insurer liable on the extra-contractual claims, and based on that finding, the trial court awarded policy benefits as "extra-contractual damages." *Id.* at 339-40. The court of appeals affirmed, but we reversed and rendered judgment for the insurer. We explained that as "a general rule there can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered." *Id.* at 341.

Some courts have read *Stoker* to hold that no claim for *any kind of* bad-faith conduct can exist if the policy does not cover the insured's loss. But *Stoker* involved only a claim for bad-faith denial of the insureds' claim for benefits. We clarified this point the following year in *Akin*: "While *Stoker* held that a judgment for the insurer on the coverage claim prohibits recovery premised only on bad faith *denial of a claim*, it does not necessarily bar *all claims for bad faith*." 927 S.W.2d at 631 (citing *Stoker,* 903 S.W.2d at 342) (emphases added). Thus, a more accurate statement of the rule we announced in *Stoker* is that "there can be no claim for bad faith [denial of an insured's claim for policy benefits] when an insurer has promptly denied a claim that is in fact not covered." *Stoker*, 903 S.W.2d at 341.

Although *Stoker* involved only a bad-faith-denial claim, we have since applied its general rule to other types of extra-contractual violations. In doing so, we have confirmed that the rule is based on the principle that an insured who sues an insurer for statutory violations can only recover damages "caused by" those violations. In *Progressive County Mutual Insurance Co. v. Boyd*, for example, the insured alleged that the insurer breached the policy and violated the Code and its common-law duty by failing to promptly pay his claim, failing to fairly investigate the claim, and denying the claim in bad faith. 177 S.W.3d 919, 920, 922 (Tex. 2005) (per curiam). Because these extra-contractual claims were "predicated on [the] insurance policy and the accident being covered under the insurance policy," we held that the trial court's take-nothing judgment on the contract claim "negate[d]" the extra-contractual claims. *Id.* at 920-21. Specifically addressing the statutory prompt-payment claim, we explained that there "can be no liability [under the Code] if the insurance claim is not covered by the policy." *Id.* at 922. Similarly, in *Chrysler Insurance Co. v. Greenspoint Dodge of Houston, Inc.*, we quoted *Stoker*'s general rule and held that, because the insurer "did not breach the insurance contract, no basis supports" the insured's recovery of "punitive and extra-contractual damages." 297 S.W.3d 248, 253-54 (Tex. 2009) (per curiam). And in *State Farm Lloyds v. Page*, we said, "When the issue of coverage is resolved in the insurer's favor, extra-contractual claims do not survive," and there is "no liability under [the Insurance Code] if there is no coverage under the policy." 315 S.W.3d 525, 532 (Tex. 2010) (citing *Boyd,* 177 S.W.3d at 921). Most recently, in *JAW the Pointe, L.L.C. v. Lexington Insurance Co.*, we relied on *Stoker* for the proposition that when an insurance policy does not cover the insured's claim for benefits, "the insured cannot recover for the insurer's bad faith failure to effectuate a prompt and fair settlement of the claim." 460 S.W.3d 597, 599, 602 (Tex. 2015).

In the present case, the jury found that USAA violated the Code by denying the claim without conducting a reasonable investigation. *See* Tex. Ins. Code § 541.060(a)(7) (providing that an insurer that "refus[es] to pay a claim without conducting a reasonable investigation with respect to the claim" commits an unfair settlement practice). In our early decisions, we mentioned this type of statutory violation but did not specifically address whether the general rule applies to such a claim. In *Stoker,* we expressly stated that the general rule should not "be understood as retreating from the established principles regarding the duty of an insurer to timely investigate its insureds' claims." 903 S.W.2d at 341. But we did not cite any authority for those "established principles." Instead, we merely noted, "These circumstances are not present in this case." *Id.* That same year, we noted in *Twin City* that "some acts of bad faith, such as a *failure to properly investigate a claim* or an unjustifiable delay in processing a claim, do not *necessarily* relate to the insurer's breach of its contractual duties to pay covered claims, and may give rise to different damages." 904 S.W.2d at 666 n.3 (emphases added). The following year, we noted in *Akin* that the insured alleged that the insurer violated its statutory duties by failing to "properly investigate" the claim, 927 S.W.2d at 629, and we explained that the general rule "does not necessarily bar all claims for bad faith," *id.* at 631 (citing *Stoker,* 903 S.W.2d at 342), but we did not specifically address whether the general rule applies to an improper-investigation claim.

We did address something akin to an improper-investigation claim, however, in *Castañeda*. The insured in that case sued her insurer alleging statutory violations "arising out of the denial of her claim for benefits under a health insurance policy and the manner in which her claim was handled." 988 S.W.2d at 191. But she did not assert a claim for breach of contract or seek a finding that the policy covered her claim. *Id.* at 196, 201. Instead, she argued that she was entitled to recover damages "*equivalent* to policy benefits" based on the jury's finding that the insurer violated the statute by failing to acknowledge communications about the claim and by failing "to adopt reasonable standards for investigating claims." *Id.* at 198 (emphasis added). We found no evidence that the insurer violated the statute in either manner. *Id.* at 192. We also explained that, even if there had been evidence of a violation, a "failure to properly investigate a claim is not a basis for obtaining policy benefits." *Id.* at 198 (citing *Stoker,* 903 S.W.2d at 341). We ultimately rendered judgment for the insurer because "no support in the evidence for any of the extra-contractual claims" existed and because the insured "did not plead and did not obtain a determination [that the insurer] was liable for breach of the insurance contract." *Id.* at 201. We held similarly in *Boyd*, 177 S.W.3d at 922. Because the claim there was predicated on the accident being covered under the insurance policy, when the trial court granted a take-nothing judgment on the insured's breach-of-contract claim, the insured's failure-to-fairly-investigate claim failed as well. *Id.* at 920-21; *see also In re Allstate Cty. Mut. Ins. Co.*, 447 S.W.3d 497, 501 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding) (citing *Boyd* for the proposition that an "insurer generally cannot be liable for failing to settle or investigate a claim that it has no contractual duty to pay").

Here, Menchaca contends that she can recover policy benefits as damages resulting from USAA's statutory violation because that claim is independent from her claim for policy breach. The court of appeals agreed, reasoning that the statute "imposes a duty on an insurer, above and beyond the duties established by the insurance policy itself, to conduct a reasonable investigation prior to denying a claim," and thus "USAA could have fully complied with the contract even if it failed to reasonably investigate Menchaca's claim." __ S.W.3d __ , 2017 Tex. LEXIS 361 at *18. While we agree with the court's premise that USAA could have complied with the policy even if it failed to reasonably investigate the claim, we reject its conclusion just as we expressly rejected it in *Stoker*. Although we accepted the argument's premise that "a policy claim is independent of a bad faith claim," we found that the "asserted conclusion . . . does not necessarily follow," at least when the claim seeks benefits "not covered by the policy." *Stoker*, 903 S.W.2d at 340-41.

The reason we reject Menchaca's independent-claims argument—indeed, the very reason for the general rule—derives from the fact that the Insurance Code only allows an insured to recover actual damages "caused by" the insurer's statutory violation. Tex. Ins. Code § 541.151. "Actual damages" are the common-law damages the insured sustains "as a result of" the statutory violation. *Kish v. Van Note*, 692 S.W.2d 463, 466 (Tex. 1985) (citing *Smith v. Baldwin*, 611 S.W.2d 611, 617 (Tex. 1980)). If the insurer violates a statutory provision, that violation—at least generally[14]—cannot cause damages in the form of policy benefits that the insured has no right to receive under the policy. We acknowledged this reasoning in *Castañeda*, noting that the "concurring Justices in *Stoker* agreed that the manner in which a claim is investigated must be the proximate cause of damages before there could be a recovery." 988 S.W.2d at 198 (citing *Stoker*, 903 S.W.2d at 345 (Spector, J., concurring)). We held that, in the absence of a finding that the insurer had breached the policy, the insured could not recover any damages because none of the insurer's alleged statutory violations "was the producing cause of any damage separate and apart from those that would have resulted from a wrongful denial of the claim." *Id.* Because the insured only sought damages that "flow[ed]" and "stemmed from the denial of benefits," *id.* at 198, 199, she could not recover anything because she "did not plead and did not obtain a determination [that the insurer] was liable for breach of the insurance contract." *Id.* at 201.

Relying on these decisions, USAA contends that the general rule applies here and Menchaca cannot recover policy benefits based on a statutory violation because the jury failed to find that USAA "breached" the insurance contract. In response, Menchaca argues that she can avoid the general rule by obtaining a finding that the policy "covers" her losses, and she did not have to obtain a finding that USAA "breached" the policy to recover under the statute. Our precedent is confusing on this point because we have actually used both phrases to describe the general rule. *See, e.g., JAW the Pointe*, 460 S.W.3d at 599 (holding that insured could not recover benefits as statutory damages because "the policy *did not cover* the insured's losses") (emphasis added); *Page*, 315 S.W.3d at 532 ("There can be no liability under [the Insurance Code] if there is *no coverage* under the policy.") (emphasis added); *Chrysler*, 297 S.W.3d at 254 (holding that insured could not recover extra-contractual damages because the insurer "*did not breach* the insurance contract") (emphasis added); *Boyd*, 177 S.W.3d at 920-21 (concluding

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[14] We say "generally" here because in some cases the insurer's statutory violation may cause the policy to not cover the claim when, but for the statutory violation, the policy would cover the claim. *See, e.g., JAW the Pointe*, 460 S.W.3d at 602. We discuss this situation further below.

that a take-nothing judgment on a breach-of-contract claim negated recovery of benefits as statutory damages); *Castañeda,* 988 S.W.2d at 201 (holding that insured could not recover statutory damages "equivalent to policy benefits" because she did not plead or establish that the insurer "was *liable for breach* of the insurance contract") (emphasis added); *Stoker,* 903 S.W.2d at 341 ("[T]here can be no claim for bad faith when an insurer has promptly denied a claim that is in fact *not covered*.") (emphasis added).

In at least a general sense, no relevant distinction exists between "breach" and "coverage" in this context because no breach can occur unless coverage exists, and a breach necessarily occurs if coverage exists and the insurer fails to pay the amount covered. If the policy does not cover the insured's loss, the insurer does not breach the policy by failing to pay benefits for that loss because the insured is not entitled to those benefits. Conversely, if the policy does cover the loss, the insurer necessarily breaches the policy if it fails to pay benefits for the loss because the insured is entitled to those benefits.

In a more specific sense, however, an important distinction does exist, at least to the extent the term "breach" is used to refer specifically to a breach-of-contract claim. Here, for example, USAA contends that, even if its policy covered Menchaca's loss, Menchaca could not recover policy benefits unless she prevailed on her breach-of-contract claim under Question 1. According to USAA, in other words, an insured can only recover policy benefits as damages on a breach-ofcontract claim and can never recover policy benefits as damages on a statutory-violation claim.

We disagree. Although our prior decisions refer interchangeably to both "breach" and "coverage," our focus in those cases was on whether the insured was entitled to benefits under the policy, because an insurer's statutory violation cannot "cause" the insured to suffer the loss of benefits unless the insured was entitled to those benefits. But if the insured was entitled to the benefits and the insurer's statutory violation caused the insured to lose those benefits, the statute authorizes the insured to recover those benefits as "actual damages . . . caused by" the statutory violation, even if the insured does not submit a separate breach-of-contract claim. Tex. Ins. Code § 541.151. Thus, although we have referred to both "breach" and "coverage," what matters for purposes of causation under the statute is whether the insured was entitled to receive benefits under the policy. While an insured cannot recover policy benefits for a statutory violation unless the jury finds that the insured had a right to the benefits under the policy, the insured does not *also* have to prevail on a separate breach-of-contract claim based on the insurer's failure to pay those benefits. As we explain further in the following sections, if the jury finds that the policy entitles the insured to receive the benefits and that the insurer's statutory violation resulted in the insured not receiving those benefits, the insured can recover the benefits as "actual damages . . . caused by" the statutory violation. *See id.*

Nevertheless, an insurer's obligation to pay policy benefits and the insured's right to receive them derive solely from the insurance policy's terms: "If the loss is covered, then the insurer is obligated to pay the claim according to the terms of the insurance contract." *Moriel*, 879 S.W.2d at 17. Because an insurer's statutory violation permits an insured to receive only those "actual damages" that are "caused by" the violation, we clarify and affirm the general rule that an insured cannot recover policy benefits as actual damages for an insurer's statutory violation if the insured has no right to those benefits under the policy.

B. The Entitled-to-Benefits Rule

The second rule from our precedent is that an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as "actual damages" under the statute if the insurer's statutory violation causes the loss of the benefits. This rule, a logical corollary to the general rule, is what we recognized in *Vail*. The insureds in *Vail* sued their insurer for commonlaw bad faith and statutory violations (but not for breach of contract), alleging a "bad faith failure to pay the claim" and seeking "the full amount" of policy benefits plus statutory damages. 754 S.W.2d at 130. The jury found that the insurer violated the statute by failing to "attempt[ ] in good faith to effectuate a prompt, fair, and equitable settlement" when "liability had become reasonably clear," and breached its common-law duty of good faith and fair dealing by failing "to exercise good faith in the investigation and processing of the claim." *Id.* at 134. Based on these findings, the trial court awarded benefits in the amount of the "full policy limit" plus treble that amount, attorney's fees, and prejudgment interest. *Id.* at 131.

The insurer argued that the insureds could not recover policy benefits as damages for statutory violations because "the amount due under the policy solely represents damages for breach of contract and does not constitute actual damages in relation to a claim of unfair claims settlement practices." *Id.* at 136. We rejected that argument and held that "an insurer's unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld." *Id.* We explained that the insureds "suffered a *loss* . . . for which they were entitled to make a claim under the insurance policy," and that loss was "transformed into a legal *damage*" when the insurer "wrongfully denied the claim." *Id.* "That damage," we held, "is, at minimum, the amount of policy proceeds wrongfully withheld by" the insurer. *Id.* Because the Insurance Code provides that the statutory remedies are cumulative of other remedies, we concluded that the insureds could elect to recover the benefits under the statute even though they also could have asserted a breach-of-contract claim. *Id.*

USAA contends, and some Texas courts have concluded, that we later rejected the *Vail* rule in *Castañeda* and *Stoker*, and thus an insured can never recover policy benefits as actual damages for statutory or common-law bad-faith violations. *See, e.g., Y Ngoc Mai v. Farmers Tex. Cty. Mut. Ins. Co.,* No. 14-07-00958-CV, 2009

Tex. App. LEXIS 3220, 2009 WL 1311848, at *6 (Tex. App.—Houston [14th Dist.] May 7, 2009, pet. denied*)* (mem. op.) ("This position, that expected policy benefits can equate to bad faith damages, has been firmly rejected by the Texas Supreme Court."). The Fifth Circuit reached the same conclusion in *Parkans International, LLC v. Zurich Insurance Co.*, holding that, in light of *Castañeda*, there "can be no recovery for extra-contractual damages for mishandling claims unless the complained of actions or omissions caused injury independent of those that would have resulted from a wrongful denial of policy benefits." 299 F.3d 514, 519 (5th Cir. 2002). The Fifth Circuit later relied on *Parkans* to reject an insured's argument that "it did not need to prove a separate injury in order to maintain its extra-contractual claims" because the insurer's "denial of insurance proceeds, standing alone, entitled it to recover on its extra-contractual claims." *Great Am. Ins. Co.*, 612 F.3d at 808 n.1.

We did not reject the *Vail* rule in *Stoker* or in *Castañeda*. While we could have made the point more clearly, the distinction between the cases is that the parties in *Vail* did not dispute the insured's entitlement to the policy benefits, and the only issue was whether the insured could recover those benefits as actual damages caused by a statutory violation. *Vail,* 754 S.W.2d at 136. The rule we announced in *Vail* was premised on the fact that the policy undisputedly covered the loss in that case, and the insurer therefore "*wrongfully* denied" a "*valid* claim." *Id.* at 136-37 (emphases added). If an insurer's wrongful denial of a valid claim for benefits results from or constitutes a statutory violation, the resulting damages will necessarily include "at least the amount of the policy benefits wrongfully withheld." *Id.* at 136. We confirmed this reading of *Vail* and reaffirmed the general rule in *Twin City*, 904 S.W.2d at 666. There, we explained that "*Vail* was only concerned with the insurer's argument that policy benefits *improperly withheld* were not 'actual damages in relation to a claim of unfair claims settlement practices.'" *Id.* (emphasis added) (quoting *Vail,* 754 S.W.2d at 136). We further explained that the Court rejected the insurer's argument in *Vail* because "policy benefits *wrongfully withheld* were indeed actual damages" under the statute. *Id.* (emphasis added).

By contrast, in *Castañeda*, the insured did not establish and the insurer did not concede that the insured had a right to benefits under the policy. To the contrary, the insured "never sought and did not receive any contractual relief," *Castañeda,* 988 S.W.2d at 196, and never even alleged that the insurer "was liable for breach of the insurance contract," *id.* at 201. Instead, she sought only to recover damages "*equivalent* to policy benefits" based solely on her statutory claims that the insurer failed to acknowledge communications about her claim and failed to "adopt reasonable standards for investigating claims." *Id.* at 198 (emphasis added). We expressly refused to provide any opinion on "whether there was contractual coverage." *Id.* at 196. We first addressed whether any evidence existed that the insurer violated the statute or its common-law duties, and in deciding that issue we concluded that, even *assuming* that there was coverage, the mere existence of coverage would not prove that the insurer violated the statute or its common-law duties by denying the claim. *Id.* at 196-97. We made no such assumption, however, when we later addressed the insured's separate argument regarding "the damages that might be recoverable if an insurer failed to adequately investigate a claim." *Id.* at 198. On that issue, we held that an insurer's "failure to properly investigate a claim is not a basis for obtaining policy benefits," but we did not assume that coverage existed when deciding that separate issue. *Id.* Instead, we relied on the fact that the insured "did not plead and did not obtain a determination [that the insurer] was liable for breach of the insurance contract." *Id.* at 198, 201.

In short, *Stoker* and *Castañeda* stand for the general rule that an insured cannot recover policy benefits as damages for an insurer's extra-contractual violation if the policy does not provide the insured a right to those benefits. *Vail* announced a corollary rule: an insured who establishes a right to benefits under the policy can recover those benefits as actual damages resulting from a statutory violation. We clarify and affirm both of these rules today.

C. The Benefits-Lost Rule

A third rule that our precedent recognizes is that an insured can recover benefits as actual damages under the Insurance Code even if the insured has no right to those benefits under the policy, *if the insurer's conduct caused the insured to lose that contractual right*. We have recognized this principle in the context of claims alleging that an insurer misrepresented a policy's coverage, waived its right to deny coverage or is estopped from doing so, or committed a violation that caused the insured to lose a contractual right to benefits that it otherwise would have had. In each of these contexts, the insured can recover the benefits even though it has no contractual right to recover them because the benefits are actual damages "caused by" the insurer's statutory violation.

In the first context, we have recognized that an insurer that violates the statute by misrepresenting that its policy provides coverage that it does not in fact provide can be liable under the statute for such benefits if the insured is "adversely affected" or injured by its reliance on the misrepresentation. *See Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 694 (Tex. 1979). Although the policy does not give the insured a contractual right to receive the benefits, the insurer's misrepresentation of the policy's coverage constitutes a statutory violation that causes actual damages in the amount of the benefits that the insured reasonably believed she was entitled to receive. *Id.* When, for example, a health insurer's agent represented that a policy "offered full coverage without qualification" for preexisting medical conditions, and the insured reasonably relied on that representation, the insured could recover the full coverage even though the policy actually limited such coverage to a specific maximum amount. *Kennedy v. Sale,* 689 S.W.2d 890, 891-92 (Tex. 1985); *see also Tapatio Springs Builders Inc. v. Md. Cas. Ins. Co.,* 82 F. Supp. 2d 633, 647 (W.D. Tex. 1999) ("A misrepresentation claim is independent, and may exist in the absence of coverage. To allege a misrepresentation claim under the DTPA, a plaintiff must plead a misrepresentation that caused actual damages.") (citing *Tex. Bus. & Com. Code § 17.50(a)*; *Castañeda*, 988 S.W.2d at 199-200); In re Allstate Cty. Mut. Ins. Co., 447 S.W.3d 497, 502 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding) ("[M]isrepresentation claims . . . are not dependent upon a determination that [the insurer] has a contractual duty to pay . . . benefits to the [insureds], and will not be rendered moot if [the insurer] prevails on the breach of contract claim.") (citing *Tex. Bus. & Com. Code* § 17.46(b)(5), (12); Tex. Ins. Code § 541.061(3)-(5)).

The second context in which the benefits-lost rule might apply involves claims based on waiver and estoppel. We have explained that waiver and estoppel cannot be used to re-write a policy so that it provides coverage it did not originally provide. *Ulico*, 262 S.W.3d at 775. But if the insurer's statutory violations prejudice the insured, the insurer may be estopped "from denying benefits that would be payable under its policy as if the risk had been covered." *Id.* Under such circumstances, the insured may recover "any damages it sustains because of the insurer's actions," even though the policy does not cover the loss. *Id.* at 787.

Finally, the benefits-lost rule may apply when the insurer's statutory violation actually caused the policy not to cover losses that it otherwise would have covered. *See, e.g., JAW the Pointe*, 460 S.W.3d at 602. The insured in *JAW the Pointe* sought policy benefits to cover its costs to demolish and rebuild an apartment complex that sustained significant damage from Hurricane Ike. *See id.* at 599. The primary insurance policy covered three hundred otherwise unrelated apartment complexes but limited the total coverage to $25 million per occurrence. *Id.* When the insurer denied the insured's claim for some of the losses, the insured filed suit asserting claims for both breach of contract and statutory violations. *Id.* at 601. As the parties continued efforts to resolve their dispute, the insurer continued paying claims filed by the other covered apartment complexes until the insurer reached the policy's $25 million limit. *Id.* The insurer then filed for summary judgment on the insured's contract claim, arguing that it no longer had a contractual duty to cover the losses because it had paid the policy limits. *Id.* at 600. The insured did not oppose the motion and the trial court granted it, leaving only the statutory claims for trial. *Id.* A jury found that the insurer had violated the statute, and based on those violations the trial court awarded the insured both actual damages in the form of the policy benefits and additional statutory damages based on the insurer's "bad faith" statutory violations. *Id.* at 601-02.

The insurer appealed, arguing that the insured could not recover policy benefits or statutory damages because the policy did not cover the insured's losses. *See id.* at 602. But instead of relying on the policy limits to defeat coverage, the insurer argued that the policy never covered the losses even before the insurer paid the limits because a policy exclusion applied and negated any coverage. *See id.* We acknowledged that as "a general rule there can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered." *Id.* (quoting *Stoker*, 903 S.W.2d at 341) (internal quotation marks omitted). But we also noted that the insured argued that "the policy covered [the insured's losses] and [the insurer] should have paid those costs before it made other payments that exhausted the policy limits." *Id.* In other words, the insured argued that, although it could no longer prevail on its breach-of-contract claim because the insurer had paid its policy limits, the insurer's statutory violations caused the insured to lose its contractual right to the policy benefits by delaying the payments until after the limits had been reached. We accepted this argument, but ultimately concluded that the insured was never entitled to the policy benefits because the exclusion negated any coverage under the policy. Because the policy "excluded coverage for [the insured's] losses, [the insured] cannot recover against [the insurer] on its statutory bad-faith claims." *Id.* at 610. Put simply, an insurer that commits a statutory violation that eliminates or reduces its contractual obligations cannot then avail itself of the general rule.

D. The Independent-Injury Rule

The fourth rule from our precedent derives from the fact that an insurer's extra-contractual liability is "distinct" from its liability for benefits under the insurance policy. *See Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 214 (Tex. 1988), *overruled on other grounds by Ruttiger*, 381 S.W.3d at 441. In *Stoker*, after we announced the general rule that "there can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered," we explained that we were not excluding "the possibility that in denying the claim, the insurer may commit some act, so extreme, that would cause injury independent of the policy claim." 903 S.W.2d at 341 (citing *Aranda*, 748 S.W.2d at 214).

There are two aspects to this independent-injury rule. The first is that, if an insurer's statutory violation causes an injury independent of the insured's right to recover policy benefits, the insured may recover damages for that injury even if the policy does not entitle the insured to receive benefits. *Id.* We recognized this in *Twin City*, explaining that some extra-contractual claims may not "relate to the insurer's breach of contractual duties to pay covered claims" and may thus "give rise to different damages." 904 S.W.2d at 666 n.3. If such damages result from an independent injury "caused by" the insurer's statutory violation, the insured can recover those damages, just as insureds have always been able to recover "compensatory damages for the tort of bad faith" under the common law. *Moriel*, 879 S.W.2d at 17. Thus, an insured can recover actual damages caused by the insurer's bad-faith conduct if the damages "are separate from and . . . differ from benefits under the contract." *Twin City*, 904 S.W.2d at 666 (identifying mental anguish damages as an example). We reaffirmed this aspect of the independent-injury rule in *Castañeda*, recognizing that "there might be liability for damage to the insured other than policy benefits or damages flowing from the denial of the claim if the insured mishandled a claim." 988 S.W.2d at 198. We concluded that the insured could not recover anything in that case, however, because "none of the [insurer's] actions or inactions . . . was the producing cause of any damage separate and apart from those that would have resulted from a wrongful denial of the claim." *Id.*

This aspect of the independent-injury rule applies, however, only if the damages are truly independent of the insured's right to receive policy benefits. It does not apply if the insured's statutory or extra-contractual claims "are predicated on [the loss] being covered under the insurance policy," *Boyd*, 177 S.W.3d at 920, or if the damages "flow" or "stem" from the denial of the claim for policy benefits, *see Castañeda*, 988 S.W.2d at 198-99. When an insured seeks to recover damages that "are predicated on," "flow from," or "stem from" policy benefits, the general rule applies and precludes recovery unless the policy entitles the insured to those benefits. *See Boyd*, 177 S.W.3d at 920-22 (concluding that insured's common-law conversion claim, commonlaw bad-faith claim, and statutory claims were all "negated" because policy did not cover underlying losses and insured did "not allege that he suffered any damages unrelated to and independent of the policy claim"); *Castañeda,* 988 S.W.2d at 199 (holding that insured could not recover damages for loss of credit reputation because any such loss "stemmed from the denial of benefits" that were not owed under the policy).

The second aspect of the independent-injury rule is that an insurer's statutory violation does not permit the insured to recover *any* damages beyond policy benefits unless the violation causes an injury that is independent from the loss of the benefits. Thus, we held in *Twin City* that an insured who prevails on a statutory claim cannot recover punitive damages for bad-faith conduct in the absence of independent actual damages arising from that conduct. 904 S.W.2d at 666; *see also Powell Elec. Sys., Inc. v. Nat'l Union Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 96848, 2011 WL 3813278, at *9 (S.D. Tex. Aug. 29, 2011) (granting summary judgment for the insured on its breach-of-contract claim but for the insurer on common-law and statutory bad-faith claims because the insured "failed to allege damage independent of the damages arising from the underlying breach of the insurance contract").

Our reference in *Stoker* to "the possibility" that a statutory violation could cause an independent injury suggested that a successful independent-injury claim would be rare, and we in fact have yet to encounter one. *See, e.g., Mid-Continent Cas. Co. v. Eland Energy, Inc.*, 709 F.3d 515, 521-22 (5th Cir. 2013) ("The *Stoker* language has frequently been discussed, but in seventeen years since the decision appeared, no Texas court has yet held that recovery is available for an insurer's extreme act, causing injury independent of the policy claim . . . ."). This is likely because the Insurance Code offers procedural protections against misconduct likely to lead to an improper denial of benefits and little else. *See, e.g.*, Tex. Ins. Code § 541.060 (prohibiting an insurer from "requiring a claimant as a condition of settling a claim to produce the claimant's federal income tax returns"). We have further limited the natural range of injury by insisting that an injury is not "independent" from the insured's right to receive policy benefits if the injury "flows" or "stems" from the denial of that right. *See Castañeda*, 988 S.W.2d at 199. Today, although we reiterate our statement in *Stoker* that such a claim could exist, we have no occasion to speculate what would constitute a recoverable independent injury.

E. The No-Recovery Rule

The fifth and final rule is simply the natural corollary to the first four rules: An insured cannot recover *any* damages based on an insurer's statutory violation unless the insured establishes a right to receive benefits under the policy or an injury independent of a right to benefits. *Castañeda*, 988 S.W.2d at 198; *see also Lundstrom v. United Servs. Auto. Ass'n-CIC*, 192 S.W.3d 78, 96 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (rendering judgment for insurer because policy did not cover claim and insureds "have not alleged any act so extreme as to cause an injury independent of [the insurer's] denial of their policy claim"); *Bailey v. Progressive Cty. Mut. Ins. Co.*, No. 05-01-00822-CV, 2004 Tex. App. LEXIS 4880, 2004 WL 1193917, at *1 (Tex. App.—Dallas June 1, 2004, no pet.) (mem. op., not designated for publication) (rendering judgment against insureds because policy did not cover claim and insureds demonstrated no "independent injury arising from" statutory violations); *see also Alaniz v. Sirius Int'l Ins. Corp.*, 626 F. App'x 73, 79 (5th Cir. 2015) (per curiam) (citing *Boyd*, 177 S.W.3d at 922) (affirming summary judgment for insurer on all claims because no coverage or breach and insured put forth no evidence of "extreme conduct or of damages suffered independent of those that would have resulted from an alleged wrongful denial of his claim").***

III.

Menchaca's Claims Against USAA

Having clarified the governing rules, we now apply them to the case before us. As explained above, the jury in this case (1) failed to find in answer to Question 1 that USAA failed to comply with its obligations under the insurance policy; (2) found in answer to Question 2 that USAA violated the Insurance Code by failing to pay Menchaca's claim for policy benefits "without conducting a reasonable investigation with respect to" that claim; and (3) found in answer to Question 3 that USAA's statutory violation resulted in Menchaca incurring damages of $11,350, representing the amount of policy benefits USAA "should have paid" Menchaca.

Ever since the jury returned its verdict, the parties have disputed the effect of its answers. Relying on the jury's answer to Question 1, USAA has contended that Menchaca cannot recover any policy benefits for a statutory violation because she did not prevail on her breach-of-contract claim. Meanwhile, Menchaca has consistently argued that she can recover the award of policy benefits even though she did not prevail on her breach-of-contract claim because the jury found in answer to Questions 2 and 3 that USAA violated the statute and the violation caused Menchaca to incur damages in the form of policy benefits that USAA "should have paid" to Menchaca.

USAA's argument overlooks the fact that—as we have clarified today—an insured need not prevail on a separate breach-of-contract claim to recover policy benefits for a statutory violation. Instead, as we have explained, the insured can prevail under the entitled-to-benefits rule or the benefits-lost rule if she establishes (1) the insurer violated the statute and (2) the violation resulted in her loss of benefits she was entitled to under the policy. Menchaca contends she obtained those findings through Questions 2 and 3. But if USAA "should have paid" policy benefits to Menchaca and did not, then the jury's answers to Questions 2 and 3 conflicted with the jury's answer to Question 1 because USAA necessarily failed to comply with the policy.

The trial court noted this apparent conflict before it dismissed the jury, but both parties took the position that no conflict existed. After the court received the verdict and asked for USAA's response, USAA replied: "We accept the verdict, Your Honor." Menchaca then began explaining why she did not believe the jury's answers conflicted. The trial court asked USAA whether it believed the court should "call the jury back" and have it "reconcile" its answers. USAA replied that calling the jury back "would be totally inappropriate. If it was per se irreconcilable it never should have been submitted to them." The trial court apparently agreed and discharged the jury. At the hearing on USAA's motion for entry of judgment, the trial court raised the conflict issue again, asking whether the jury's answers to Questions 1 and 2 conflicted. It asked Menchaca:

> I mean, failure to be reasonable in the investigation of the incident and the behavior of the adjuster is a breach of contract, and so now you have one that says, no, there is no breach of contract, and the other one says, yeah, there was? Isn't that a conflict between the two?

Menchaca responded, "no, there's not [a conflict] based upon what the jury found in damages." Ultimately, the trial court side-stepped the issue by disregarding the jury's answer to Question 1 and entered judgment for Menchaca based on the jury's answers to Questions 2 and 3.

USAA asserts that the trial court erred by disregarding the jury's answer to Question 1. We unanimously agree. But a majority of the Court concludes that the answer to Question 1 creates an irreconcilable and fatal conflict with the answers to Questions 2 and 3. And a plurality concludes that a judgment based on a fatal conflict does not constitute fundamental error, so parties must preserve the error by objecting to the conflict before the trial court discharges the jury. Because the error was not preserved in this case, we cannot reverse the trial court's judgment on that ground. Nevertheless, in light of the parties' obvious confusion regarding our precedent and the clarifications we provide today, the plurality agrees that we should reverse the judgment and remand for a new trial in the interest of justice.***

B. The Effect of Questions 2 and 3

USAA insists that, in light of our agreement that the trial court erred in disregarding the jury's answer Question 1, we must reverse and render judgment in USAA's favor. It argues, correctly, that Menchaca effectively cannot recover policy benefits if USAA did not breach the policy. It also points out, correctly, that Menchaca did not secure that finding in Question 1. But USAA ignores—or at least misconstrues—the effect of the jury's answers to Questions 2 and 3, in which the jury found that USAA's Insurance Code violation caused Menchaca damages of $11,350, representing the difference "between the amount USAA should have paid Gail Menchaca for her Hurricane Ike damages and the amount that was actually paid." This award, USAA agrees, constitutes an award of "policy benefits." The jury's finding that USAA's statutory violation resulted in Menchaca's loss of $11,350 in policy benefits that USAA "should have paid" necessarily constitutes a finding that Menchaca was entitled to receive those benefits under the policy.
USAA argues that we cannot read the jury's answer to Question 3 as a finding that Menchaca was entitled to policy benefits because Question 3 was "merely a damages question." In fact, however, Question 3 was a causation-and-damages question, requiring the jury to determine the amount of Menchaca's loss "that resulted from" *either* USAA's contractual breach *or* its statutory violation. The jury failed to find a contractual breach, but it did find a statutory violation. Thus, the jury's answer to Question 3 can only constitute a finding that USAA's statutory violation caused Menchaca to lose policy benefits that USAA "should have paid." The trial court agreed on this as well. When it disregarded Question 1, it determined that Question 2 and Question 3 together contained all the elements of Menchaca's Insurance-Code-violation claim: (1) USAA violated the insurance code, (2) that violation caused Menchaca to lose policy benefits she otherwise would have been entitled to, and (3) the benefits she "should have" received were $11,350.***

C. Fatal Conflict

We next consider whether the jury's answer to Question 1 creates an irreconcilable and fatal conflict with its answers to Questions 2 and 3. "In reviewing the jury findings for conflict, the threshold question is whether the findings are about the same material fact." *Bender v. S. Pac. Transp. Co.*, 600 S.W.2d 257, 260 (Tex. 1980) (citing *Pearson v. Doherty*, 143 Tex. 64, 183 S.W.2d 453, 455 (Tex. 1944)). Here, the jury's answer to Question 3 (USAA "should have paid" $11,350 in policy benefits to Menchaca) necessarily addresses the same material fact as its answer to Question 1 (USAA "fail[ed] to comply with the terms of the insurance policy"), because both requested findings on whether USAA failed to pay benefits Menchaca was entitled to under the policy. The answers conflict because if USAA "should have paid" Menchaca benefits under the policy and did not, then USAA necessarily failed to comply with the policy's terms.

A court "must 'reconcile apparent conflicts in the jury's findings' if reasonably possible in light of the pleadings and evidence, the manner of submission, and the other findings considered as a whole." *Id.* (quoting *Ford v. Carpenter*, 147 Tex. 447, 216 S.W.2d 558, 562 (Tex. 1949)). If the court can reasonably construe the findings in a way that harmonizes them, it must do so "when possible." *Id.* Here, however, the findings are irreconcilable. Menchaca urges us to reconcile them by construing the jury's "No" answer to Question 1 as merely "a failure to find" that USAA failed to comply with the policy, as opposed to an affirmative finding that USAA did not fail to comply with the policy. *See Grenwelge v. Shamrock Reconstructors, Inc.*, 705 S.W.2d 693, 694 (Tex. 1986) (per curiam) (explaining that a failure to find liability is not the same as an affirmative finding of compliance). But we have previously rejected this very argument. *Union Mut. Life Ins. Co. v. Meyer*, 502 S.W.2d 676, 679 (Tex. 1973) ("The inconsistency [giving rise to a conflict] exists in this verdict whether the answer is a failure to find, or a finding, according to the preponderance of the evidence."). Although the jury did not affirmatively find that USAA complied with its policy obligations, its answer to Question 1 confirms its conclusion that Menchaca "failed to carry [her] burden of proof" to establish that USAA failed to comply with the policy's terms. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989).

Conversely, we could attempt to construe the jury's answer to Question 3 as something other than a finding that Menchaca was entitled to policy benefits. We might, for example, speculate that the jury awarded $11,350 as the amount the jury believed USAA "should have paid" Menchaca as a matter of equity or charity, rather than as a policy obligation. But any such effort would require mere speculation and an assumption that the jury ignored the questions and instructions the trial court provided. The trial court asked the jury to determine the amount of damages Menchaca incurred as a result of USAA's contractual breach or statutory violation and instructed the jury to determine that amount based on the difference "between the amount USAA should have paid Gail Menchaca for her Hurricane Ike damages and the amount that was actually paid." As both parties agree, the amount the jury awarded represents the amount of benefits the jury determined USAA "should have paid" to Menchaca under the policy.

When an irreconcilable conflict involves one jury answer that would require a judgment in favor of the plaintiff and another that would require a judgment in favor of the defendant, the conflict is fatal. *Little Rock Furniture Mfg. Co. v. Dunn*, 148 Tex. 197, 222 S.W.2d 985, 991 (Tex. 1949). Here, both questions address the decisive issue—whether USAA failed to pay benefits Menchaca was entitled to under the policy. Without Questions 2 and 3, the jury's answer to Question 1 would require a judgment in USAA's favor. But without Question 1, the jury's answers to

Questions 2 and 3 would require a judgment in Menchaca's favor. We thus conclude that the answers created a fatal conflict.***

Remand in the Interest of Justice

Having concluded that the trial court and court of appeals erred in disregarding the jury's answer to Question 1, we are left with findings that support the judgment in Menchaca's favor based on statutory violations but that also contain a fatal conflict. We could render judgment for Menchaca based on the jury's verdict because USAA failed to preserve that conflict. In the interest of justice, however, we could also "remand the case to the trial court even if a rendition of judgment is otherwise appropriate." Tex. R. App. P. 60.3. Such a remand is particularly appropriate when it appears that one or more parties "proceeded under the wrong legal theory," *Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex. 1993), especially when "the applicable law has . . . evolved between the time of trial and the disposition of the appeal." *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 162 (Tex. 2012); *see Hamrick v. Ward*, 446 S.W.3d 377, 385 (Tex. 2014) (remanding in the interest of justice "in light of our clarification of the law"); *Moriel*, 879 S.W.2d at 26 (same, in light of our "substantial clarification"). In light of the parties' obvious and understandable confusion over our relevant precedent and the effect of that confusion on their arguments in this case, as well as our clarification of the requirements to preserve error based on conflicting jury answers, we conclude that a remand is necessary here in the interest of justice.

USAA has steadfastly maintained that Menchaca cannot recover policy benefits for a statutory violation unless she also obtains a finding that USAA "breached" the insurance policy or that USAA's statutory violation caused an injury independent of her right to benefits. At trial, USAA objected to the charge's failure to condition Question 2 on a "Yes" finding to Question 1 and objected to the submission of Question 3 on the ground that "Texas courts have held that extra[-]contractual damages need to be independent from policy damages." After the jury returned its verdict, USAA argued that it should prevail because "the jury found 'NO' breach of contract" and awarded only policy benefits. After the trial court entered its judgment, USAA argued in its motion for new trial that Menchaca cannot recover in the absence of a finding of breach because she did not seek damages "separate and apart from those sought under the breach of contract theory." Although we have clarified today that a plaintiff does not have to prevail on a separate breach-of-contract claim to recover policy benefits for a statutory violation, the confusing nature of our precedent precludes us from faulting USAA for the position it has maintained throughout this litigation. Moreover, although USAA failed to preserve any objection based on the jury's conflicting answers, Menchaca agreed with USAA that the answers did not conflict, and neither the parties nor the trial court had the benefit of the guidance we have provided today regarding the preservation of such error. Under these circumstances, we conclude that justice requires that we reverse and remand the case to the trial court for a new trial.***

Tex. Ins. Code § 541.060

(a) It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to engage in the following unfair settlement practices with respect to a claim by an insured or beneficiary:

(1) misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;

(2) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of:

(A) a claim with respect to which the insurer's liability has become reasonably clear; or

(B) a claim under one portion of a policy with respect to which the insurer's liability has become reasonably clear to influence the claimant to settle another claim under another portion of the coverage unless payment under one portion of the coverage constitutes evidence of liability under another portion;

(3) failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim;

(4) failing within a reasonable time to:

(A) affirm or deny coverage of a claim to a policyholder; or

(B) submit a reservation of rights to a policyholder;

(5) refusing, failing, or unreasonably delaying a settlement offer under applicable first-party coverage on the basis that other coverage may be available or that third parties are responsible for the damages suffered, except as may be specifically provided in the policy;

(6) undertaking to enforce a full and final release of a claim from a policyholder when only a partial payment has been made, unless the payment is a compromise settlement of a doubtful or disputed claim;

(7) refusing to pay a claim without conducting a reasonable investigation with respect to the claim;

(8) with respect to a Texas personal automobile insurance policy, delaying or refusing settlement of a claim solely because there is other insurance of a different kind available to satisfy all or part of the loss forming the basis of that claim; or

(9) requiring a claimant as a condition of settling a claim to produce the claimant's federal income tax returns for examination or investigation by the person unless:

(A) a court orders the claimant to produce those tax returns;

(B) the claim involves a fire loss; or

(C) the claim involves lost profits or income.

(b) Subsection (a) does not provide a cause of action to a third party asserting one or more claims against an insured covered under a liability insurance policy.

***Maryland Insurance Co. v. Head Industrial Coatings and Services*, Inc., 938 S.W. 2d 27 (Tex. 1996)**

Per curiam:

The issue we address in this case is whether an insurer owes its insured a duty of good faith and fair dealing to investigate and defend claims by a third party against its insured. The court of appeals held that such a duty exists. 906 S.W.2d 218. We disagree.

The facts of this case are set out in the court of appeals' opinion. 906 S.W.2d 218. We summarize only those material to the issue we address.

Don Nelson, an employee of Head Industrial Coatings & Services, Inc., sued Texas Utilities Electric Company and others for personal injuries he sustained while working on TU's premises. TU cross-claimed against Head for contractual indemnity. We refer to this lawsuit as "the PI case". Head demanded coverage and a defense from its insurer, Maryland Insurance Company. Head had been assured by Gans & Smith Insurance Agency, Maryland's local recording agent, that Head had $ 500,000 coverage for claims like Nelson's. In fact, Gans & Smith had failed to procure such coverage because of a clerical error. Relying on the policy language, and unaware of Gans & Smith's actions, Maryland denied coverage and refused to defend Head. Head then sued Maryland and Gans & Smith.

All the parties to both suits, except Maryland, settled without Maryland's knowledge. TU and Head each assigned Nelson their claims against Maryland, and Nelson agreed to prosecute them and attempt to recover TU's and Head's defense costs in the PI case. Head guaranteed Nelson a recovery of $ 500,000, and Nelson promised not to enforce any judgment against Head's assets. Gans & Smith guaranteed Head's liability to Nelson up to $ 500,000, and Head agreed to hold Gans & Smith harmless for any liability greater than that amount and to indemnify Gans & Smith against claims by Maryland. The parties all released each other from liability except as provided in the settlement. Head then dismissed its action against Maryland, Payne, and Gans & Smith, and Nelson obtained a judgment against TU and Head for about $ 1.8 million, after a brief non-jury trial.

Nelson then filed this suit in Head's name against Maryland for policy benefits and for damages due to Maryland's refusal to defend Head in the PI suit. Nelson/Head alleged that Maryland's refusal to defend Head was a breach of the duty of good faith and fair dealing and violated the Insurance Code and the Deceptive Trade Practices--Consumer Protection Act, TEX. BUS. & PRAC. CODE §§ 17.41-.62. Shortly before trial Maryland learned of Gans & Smith's mistake and tendered to Nelson/Head $ 500,000, which was refused. Maryland cross-claimed against Gans & Smith for breach of fiduciary duty, but at trial Maryland limited the damages it sought against Gans & Smith to any extra-contractual liability it incurred. Based on jury findings that Maryland had breached its duty of good faith and fair dealing to Head, the district court rendered judgment against Maryland for $ 4,398,642.79 consisting of $ 1.8 million, the amount of Nelson's judgment in the PI suit; $ 37,792, defendants' costs and attorney fees in that suit; $ 640,759.75 as an 18% statutory penalty under *Article 21.55 of the Insurance Code*; $ 663,335.96 prejudgment interest; and 40% of these damages, or $ 1,256,755.08, as attorney fees. The court also rendered judgment that Maryland take nothing against Gans & Smith.

A divided court of appeals modified the judgment to: limit actual damages to the $ 500,000 policy limits plus defense costs in Nelson's suit against TU and Head; reduce prejudgment interest; eliminate the 18% statutory penalty but treble the actual damages and prejudgment interest; and recalculate attorney fees, again as 40% of the total. The court remanded Maryland's claim against Gans & Smith for a new trial. 906 S.W.2d 218.

In *Texas Farmers Insurance Company v. Soriano*, 881 S.W.2d 312, 317 (Tex. 1994), the Court stated that it "has never recognized a cause of action for breach of the duty of good faith and fair dealing where the insurer fails to settle third-party claims against its insured." A *Stowers* claim is not a bad faith claim. *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 847 (Tex. 1994). Other courts have refused to recognize a duty of good faith and fair dealing in handling third-party insurance claims. *See Charter Roofing Co. v. Tri-State Ins. Co.*, 841 S.W.2d 903, 905-906 (Tex. App.--Houston [14th Dist.] 1992, writ denied); *United Servs. Auto. Ass'n v. Pennington*, 810 S.W.2d 777, 783 (Tex. App.--San Antonio 1991, writ denied); *Snug Harbor, Ltd. v. Zurich Ins.*, 968 F.2d 538, 546 (5th Cir. 1992) ("A finding of bad faith cannot be premised solely on the breach of . . . the duty to defend."); *Employers Nat'l Ins. Corp. v. Zurich Am. Ins. Co.*, 792 F.2d 517, 520 (5th Cir. 1986). The Court stopped short of rejecting a duty of good faith in third-party insurance cases in *Soriano* because it concluded that the issue had not been preserved. This is the precise issue in the present case. For the reasons expressed in the concurring opinion in *Soriano*, we now hold "that Texas law recognizes only one tort duty in this context, that being the duty stated in *Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved). *Soriano*, 881 S.W.2d at 318 (Cornyn, J., joined by Hecht, J., concurring).

The court of appeals reasoned that a duty of good faith and fair dealing arises because of the special relationship between insurer and insured, and because of the insurer's superior position in that relationship. Because those factors exist whether a claim is made by the insured or by a third party, the court of appeals concluded that the same duty should exist in both instances. The court overlooked the fact that an insured is fully protected against his insurer's refusal to defend or mishandling of a third-party claim by his contractual and *Stowers* rights. Imposing an additional duty on insurers in handling third-party claims is unnecessary and therefore inappropriate.

Hence, we hold that Nelson/Head are entitled to recover against Maryland for breach of contract damages equal to the $ 500,000 policy limits and defense costs in the PI suit. These damages are not trebled, and for the reasons explained by the court of appeals, are not subject to penalty under Article 21.55 of the Insurance Code. We also agree with the court of appeals that Nelson/Head failed to prove any other damages. Nelson/Head are also entitled to prejudgment and postjudgment interest, and attorney fees as found by the jury. Inasmuch as Maryland has incurred no extra-contractual liability, it is not entitled to recover against Gans & Smith.

Accordingly, the Court grants Maryland's application for writ of error, denies Nelson/Head's and Gans & Smith's applications for writ of error, and without hearing argument, reverses the judgment of the court of appeals and remands the case to the district court for rendition of judgment in accordance with this opinion.

G.A. Stowers Furniture Co. v. American Indemity Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved)

Justice Critz delivered the opinion of the court.

This case involves issues that are questions of first impression in this court, and are so important to the jurisprudence of this state that we deem it advisable to make a very full and complete statement of the issues involved.

This suit was originally filed by the G. A. Stowers Furniture Company, plaintiff in error, hereinafter styled plaintiff, against American Indemnity Company, defendant in error, hereinafter styled defendant, for $ 14,103.15, together with interest, and for cause of action the petition states, in substance:

> That defendant was a private corporation in the city of Galveston, and was engaged during the years 1919 and 1920 in the business of writing and issuing insurance policies and bonds to indemnify the assured against loss by reason of liability imposed by law upon the assured for injuries on account of bodily injuries, etc., and that the said indemnity company issued to said Stowers Furniture Company a policy of insurance for the sum of $ 5,000 which proposed to indemnify the said furniture company against loss by reason of injuries accidentally suffered by any person or persons if such loss or damage so sustained was by reason of the said furniture company's ownership of the automobiles described in said policy.

It was further charged that defendant, indemnity company, agreed in said policy, and had reserved the right, to defend any suit in the name and behalf of said named assured for such damage or loss sustained if same was by reason of said plaintiff's ownership.

It was further provided that the furniture company should immediately, in the case of an accident, give notice to defendant, indemnity company, at Galveston and should forward to said indemnity company any summons or other process served upon them, and, when requested by said company, the assured should aid in effecting settlement, etc.

It was further stipulated in said policy that the assured, meaning said furniture company, should not voluntarily assume any liability, settle any claim or expense, except at its own cost, and should not engage in any negotiations of such settlement or legal proceedings without the consent of said insurance company, and the said insurance company reserved the right to settle any and all claims or suits brought against the plaintiff.

It was further alleged that the premiums were all paid on said policy, and the same was valid and subsisting and in full force and effect, that said policy had been mislaid, and that proof would be offered of its contents.

It was further charged in said petition that on the 23d day of January, 1920, a truck belonging to said furniture company, and covered by said policy of insurance, which was hauling and delivering furniture and being operated by one of the said furniture company's servants, and was being driven on Austin street in the city of Houston, Tex., at about the hour of 7 p. m., came in contact with a wagon standing on the side of Austin street and was thereby disabled and so crippled that said servant could not longer operate it, and that it was left by the servant of said furniture company, without a light and without any one to watch it, and that shortly thereafter Miss Mamie Bichon, who was an employee in a drug store, left for her home at about 8:30 p. m. and was driven by Jamail in a Ford coupe very rapidly along said street, and came in collision with said truck; that the coupe was turned over, and that she was very seriously injured; and that about the 3d day of March, 1920, the said Miss Bichon brought suit for damages against said Stowers Furniture Company for $ 20,000.

It was further charged that defendant herein took charge of the defense of said suit for this plaintiff in accordance with the terms of said policy.

It was further charged that defendant herein employed counsel and proceeded to trial in said cause of Miss Bichon against the plaintiff, furniture company, and that, after hearing the evidence and the charge of the court, the jury returned a verdict for Miss Bichon for the sum of $ 12,207 besides cost; that there was an appeal by the defendant herein from said judgment; that the same was affirmed; and that this plaintiff paid to Miss Bichon the sum of $ 14,107.15, including interest and costs of court.

It was further charged that during the pendency of this suit, and before the trial, Miss Bichon offered to accept $ 4,000 in full settlement for the damages due her;

that defendant herein refused to pay more than $ 2,500, although its policy bound it to pay $ 5,000; that the defendant herein knew that the case which Miss Bichon had against this plaintiff was a very dangerous one, and that she was likely to get a judgment for far more than $ 5,000, and that a person of ordinary prudence would have settled said cause for said sum of $ 4,000; that defendant admitted that said offer of settlement was a good one and should be accepted; that it willfully and negligently refused to make such settlement, knowing at the time it did so that it was jeopardizing the interests of this plaintiff in it very large amount; that, in refusing to make such settlement, it did not act in good faith, and it did not act like a prudent person would have done under like circumstances; and that by reason of such conduct of said indemnity company the furniture company had been compelled to pay the said sum of more than $ 14,000.

The material portion of the defendant's answer as shown in the opinion of the Court of Civil Appeals, is as follows:

> "That after the happening of the said accident made the basis of this suit the defendant investigated it, and after suit was filed and after citation was forwarded to it by plaintiff herein, it made defense of said suit and defended it through all the courts. That under the terms and provisions of said contract it was to have control of the defense of said suit and no settlement was to be made without its consent, it having the option of settling or defending the suit as it might deem best, and it was under no duty to settle said suit, and it elected to and did defend the said suit. That after making investigation in reference to said accident and the extent of the injuries suffered by Mamie Bichon, this defendant reached the conclusion that the facts of the accident were of such nature that it could and did reasonably suppose that judgment would ultimately result in a verdict for the defendant, and that the injuries suffered by Mamie Bichon as a result of the accident were not of a permanent nature or of such seriousness as to justify a settlement of this case for $ 4,000.***

The policy further provides:

> "The Company's Liability is Limited:
>
> > "Under Clause One (Liability) regardless of the number of Assured involved, the Company's liability for the loss from an accident resulting in bodily injuries to or in/death of one person is limited to five thousand dollars ($ 5,000.00), and, subject to the same limit for each person, the Company's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to ten thousand dollars ($ 10,000.00)."***

At the close of the testimony in the district court, the trial court withdrew the case from the jury, and entered judgment for the defendant. This judgment was, on appeal, affirmed by the Court of Civil Appeals. 295 S.W. 257.

The case is now before this court on writ of error granted on application of the plaintiff.

We are of the opinion that the plaintiff's petition states a cause of action against the defendant for the amount sued for, and that the evidence in the case raised an issue of fact to be submitted to the jury by the trial court under proper instructions. The Court of Civil Appeals, in passing on the issues of this case holds: "We do not think the indemnity company was, by the terms of the policy, under any obligation to do more than faithfully defend the suit. As before stated, it had not agreed to settle the suit, but had reserved the right to do so. It had the unquestioned right to defend the suit to the end that it might not be called upon to pay a judgment which might be rendered in favor of Miss Bichon."

As stated in the beginning, the matters involved in this litigation are of first impression in this state, and the holding of the Court of Civil Appeals is in the main supported by the authorities cited by that court.

We, however, are of the opinion that the Court of Civil Appeals was in error in the above holding, and that the better and sounder authorities, and those more in harmony with the spirit of our laws, support a contrary rule. *Douglas v. United States Fidelity & Guaranty Co.*, 81 N.H. 371, 127 A. 708, 37 A. L. R. 1477; *Mendota Electric Co. v. New York Indemnity Co.,* 169 Minn. 377, 211 N.W. 317; *Cavanaugh Bros. v. General Accident, Fire & Life Assur. Corporation,* 79 N.H. 186, 106 A. *604*; *Attleboro Mfg. Co. v. Frankfort, Marine Accident & Plate Glass Ins. Co. (*C. C. A.) 240 F. 573; *Brown & McCabe, Stevedores, Inc., v. London Guarantee & Accident Co. (*D. C.*)* 232 F. 298.

As shown by the above-quoted provisions of the policy, the indemnity company had the right to take complete and exclusive control of the suit against the assured, and the assured was absolutely prohibited from making any settlement, except at his own expense, or to interfere in any negotiations for settlement or legal proceeding without the consent of the company; the company reserved the right to settle any such claim or suit brought against the assured. Certainly, where an insurance company makes such a contract; it, by the very terms of the contract, assumed the responsibility to act as the exclusive and absolute agent of the assured in all matters pertaining to the questions in litigation, and, as such agent, it ought to be held to that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business; and if an ordinarily prudent person, in the exercise of ordinary care, as viewed from the standpoint of the assured, would have settled the case, and failed or refused to do so, then the agent, which in this case is the indemnity company, should respond in damages.

It is true that the policy is for $ 5,000, so far as this accident is concerned, but when the liability arose against plaintiff the indemnity company was in duty bound to exercise ordinary care to protect the interest of the assured up to the amount of the policy, for the reason that it had contracted to act as his agent, and assumed full and absolute control over the litigation arising out of the accident covered by the policy. The provisions of the policy giving the indemnity company absolute and complete control of the litigation, as a matter of law, carried with it a corresponding duty and obligation, on the part of the indemnity company, to exercise that degree of care that a person of ordinary care and prudence would exercise under the same or similar circumstances, and a failure to exercise such care and prudence would be negligence on the part of the indemnity company.

It is the duty of the court to give effect to all the provisions of the policy, and it would certainly be a very harsh rule to say that the indemnity company, in a case such as this, owed no duty whatever to the insured further than the face of the policy, regardless of whether it was negligent in discharging its duties as the sole and exclusive agent of the assured, in full and complete control. Such exclusive authority to act in a case of this kind does not necessarily carry with it the right to act arbitrarily. *Douglas v. United States, etc., Guaranty Co., supra.*

In the Douglas Case, supra, the Supreme Court of New Hampshire lays down the law, which we think applies to the issues of the case at bar, as follows:

> "The fundamental question is, Does or does not the insurer owe to the insured a duty in the matter of a settlement? If it does not owe such a duty, it is not liable either for a failure to act or for the manner of action. It may refrain from completing a settlement for any reason, however essentially dishonest, and still there would be no liability. If, as the cases roundly state, it has an exclusive and absolute option, no one can question its motives for the exercise or nonexercise of the privilege. No case has gone that far. All acknowledge a liability for fraudulent conduct, or lack of good faith, in refusing to settle. But they are silent as to any reasoning which would sustain such liability and at the same time deny responsibility for negligent conduct.
>
> "The whole question of insurance against loss may be laid out of the case, and still the defendant would be accountable for negligence. It has contracted to take charge of the defense of this claim. That contract created a relation out of which grew the duty to use care when action was taken. The insurer entered upon the conduct of the affair in question. It had and exercised authority over the matter in every respect, even to negotiating for a settlement. It is difficult to see upon what ground it could escape responsibility when its negligence resulted in damage to the party it had contracted to serve. Attleboro Manufacturing Co. v. [Frankfort Marine, Accident & Plate Glass Ins.] Company, 240 F. 573, 153 C. C. A. 377.

"Denial of agency upon the part of the insurer is put upon the ground that, if there were such a relation the insurer would be bound to consider the interests of the insured, when in conflict with its own. It is then said that, when there is such conflict, the insurer may consult its own interests solely. Therefore, it is concluded, there can be no agency.

"This reasoning seems to imply that one party cannot be the agent of the other party. But the law is plainly otherwise. The parties may make that sort of an agreement if they see fit. The result of such a compact is not to leave the promisor free to act as though he had made no promise. On the contrary, his conduct will be subject to closer scrutiny than that of the ordinary agent, because of his adverse interest. The fact that here the insurer stood to lose but a part of the claim, and that as to the balance of the chances of loss growing out of mismanagement of the defense were upon the insured, is an added reason for holding the defendant to the use of reasonable care in the exercise of its exclusive control over the negotiations. Where one acts as agent under such circumstances, he is bound to give the rights of his principal at least as great consideration as he does his own. *Colby v. Copp,* 35 N.H. 434, and cases cited; *Richards v. Insurance Co.,* 43 N.H. 263. The insurer cannot betray the trust it has undertaken nor be relieved from the usual rule that in such a case an agent must serve as he has promised to serve."

In the *Cavanaugh Case, supra*, the same court announces the same rule as is announced in the Douglas Case.

In our opinion the other authorities above cited sustain the rule announced by us, and, while there are authorities holding the contrary rule, we are constrained to believe that the correct rule under the provisions of this policy is that the indemnity company is held to that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business.***

Of course knowledge on the part of the indemnity company is also an issue. The facts and circumstances surrounding the original injury, and the extent of same, would not raise the issue of negligence on the part of the indemnity company unless it had knowledge thereof, or by the exercise of ordinary care could have had such knowledge.

We think, further, that the testimony offered by plaintiff, to the effect that it was a rule of the indemnity company never to make a settlement for more than one-half the amount of the policy, should have been admitted as bearing on the issue of negligence on the part of the indemnity company.

What we have said disposes of all the assignments.

We recommend that the judgments of the Court of Civil Appeals and of the district court be both reversed and the cause remanded to the district court for a new trial.

CURETON, C. J. Judgments of the district court and Court of Civil Appeals reversed, and cause remanded to the district court.

We approve the holdings of the Commission of Appeals on the questions discussed in its opinion.