Liability Under the Oil Pollution Act: Current Law and Needed Revisions

Kenneth M. Murchison
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INTRODUCTION

Federal law governing liability for oil pollution has largely developed at two-decade intervals in response to major oil spills. Major spills from a tanker and an offshore oil platform led to the enactment of the first federal statute governing oil pollution liability, the Federal Water Quality Improvement Act of 1970.1 Twenty years later, the release of oil following the grounding of the Exxon Valdez prompted Congress to enact the Oil Pollution Act of 1990.2 Today, the oil released as a result of the blowout at BP’s Deepwater Horizon well in the Gulf of Mexico has raised new questions regarding the adequacy of the existing federal provisions governing liability for oil spills.

This Article begins by tracing the growth of federal liability standards over the last 40 years. It then summarizes the current liability provisions of the Oil Pollution Act and proposes solutions to problem areas revealed by the Deepwater Horizon well blowout. Specifically, it advocates eliminating the limits on liability included in the Oil Pollution Act, expressly allowing claimants to recover attorney fees in claims under the Act, strengthening the Oil Spill Liability Trust Fund to guarantee compensation to injured parties, improving claims procedures, clarifying the provisions that preserve the rights claimants have under other laws, and imposing a penalty when a responsible party fails to pay claims promptly.

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I. THE DEVELOPMENT OF FEDERAL LIABILITY STANDARDS FOR OIL POLLUTION

A. Federal Law Prior to 1970

Historically, production of oil occurred on land, and state law governed liability for costs of cleanup and any damages resulting from production activities. In the 1960s, two new dangers of damage from production and transportation activities beyond the reach of state law emerged. First, international transportation of petroleum increased the risk of tanker spills in the navigable waters that the federal government had traditionally regulated. Second, offshore drilling technology improved significantly, creating the risk of damage from oil production activities outside the jurisdiction of any state.

Events soon demonstrated that the risks associated with these activities were not hypothetical. The grounding of the tanker Torrey Canyon off the western coast of England in 1967 and the release of oil following a blowout on an oil drilling platform off the California coast near Santa Barbara in 1969 led Congress to enact a statute establishing the first liability standards for oil spills in 1970.

3. See, e.g., LA. REV. STAT. ANN. § 31:22 (2000) (owner of mineral servitude “is obligated, insofar as practicable, to restore the surface to its original condition at the earliest reasonable time”); TS&C Invs. L.L.C. v. Beusa Energy, Inc., 637 F. Supp. 2d 370 (W.D. La. 2009) (business owners along interstate highway whose businesses were affected by the closure of highway as a result of an oil well blowout not entitled to recover damages for their economic losses allegedly occasioned by the closure of the interstate); Corbello v. Iowa Prod., 850 So. 2d 686, 692–93 (La. 2003) (damages for failure to restore premises as required in mineral lease not limited to the market value of the land that was leased); Dupree v. Oil, Gas & Other Minerals, 731 So. 2d 1067 (La. Ct. App. 1999) (mineral servitude owners liable for damage to land caused by the lessee of the servitude owners when the lessee went bankrupt).


The Water Quality Improvement Act of 1970 made several significant changes in federal law relating to oil spills. It enacted new prohibitions on discharges of oil, authorized federal actions to respond to oil spills, and provided for the assessment of civil penalties against violators. The Act also made the owner or operator of the vessel or facility where the discharge occurred liable for the cost of cleaning up the oil, but it limited the maximum liability that the owner or operator could face.

The 1970 Act prohibited the "discharge" of oil "in harmful quantities" into "the navigable waters of the United States, adjoining shorelines, or . . . the waters of the contiguous zone" and required any person responsible for such a discharge to notify the appropriate federal agency "immediately." The statute itself defined "discharge" to include "spilling" and "leaking," and it directed the President to determine by regulations "those quantities of oil the discharge of which, at such times, locations, circumstances, and conditions, will be harmful." The Act also conferred on the President the power to issue regulations establishing methods and procedures for oil removal; criteria for local and regional contingency plans; and procedures, methods,

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9. Water Quality Improvement Act, sec. 102, § 11(b)(2), 84 Stat. at 92. The prohibition implemented the congressional declaration of United States policy "that there should be no discharges of oil into or upon the navigable waters of the United States, adjoining shorelines, or . . . the waters of the contiguous zone." Id. § 11(b)(1).

10. Id. § 11(b)(4).

11. Id. § 11(a)(2), 84 Stat. at 91.

12. The Act granted the President authority to delegate the various powers granted by the Water Quality Improvement Act "to the heads of those Federal departments, agencies, and instrumentalities which he determines to be appropriate." Id. § 11(i), 84 Stat. at 97.

13. Id. § 11(b)(3), 84 Stat. at 92. The initial regulation defining when an oil spill was harmful applied the so-called "sheen" test. This regulation determined that any oil spill that caused "a film or sheen upon or discoloration of the surface of the water or adjoining shorelands" was "harmful to the public health or welfare of the United States." Part 610—Discharge of Oil, 35 Fed. Reg. 14,306 (Sept. 10, 1970). Despite the 1978 amendment to the statutory prohibition, see supra note 8, the modern codification of the successor to the original rule retains the sheen test, see 40 C.F.R. § 110.3 (2010).
and requirements to prevent discharges as well as rules governing inspections of vessels and oil cargoes. The Water Quality Improvement Act also authorized the federal government to respond when oil was discharged in violation of the statutory prohibition. It required the President to act to “remove” oil discharged in violation of the Act unless the President determined “such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs”; and it instructed the President to prepare “a National Contingency Plan for removal of oil.” If “a discharge or an imminent discharge, of large quantities of oil from a vessel” created a “substantial threat of a pollution hazard to the public health or welfare of the United States,” the Act allowed the federal government to “coordinate and direct all public and private efforts directed at the removal or elimination of such threat” and also to remove “summarily” and, “if necessary, destroy such vessel.”

To assist the government in enforcing its provisions, the 1970 statute established criminal and civil penalties to be assessed against violators. Any person in charge of a vessel or facility who failed to notify the federal agency “immediately” following an oil spill covered by the Act was, “upon conviction,” subject to a fine of $10,000, imprisonment for a year, or both. In addition, the Coast Guard could impose a civil penalty of not more than $10,000 on the owner or operator of a vessel or facility from which oil was “knowingly discharged” in violation of the Act. Also, the President could assess a civil penalty of not more than $5,000 on any person who failed to comply with the regulations governing removal methods, local and regional contingency plans, the prevention of discharges, or inspections of vessels or cargoes.

Finally, the Act imposed limited liability on the owner or operator of a vessel or facility from which a discharge occurred. Except when the owner or operator could establish narrow defenses based on an act of God, an act of war, negligence on the part of the United States, or the act or omission of a third party, the owner or operator was liable for the “actual costs” that the United

15. Id. § 11(c)(1), 84 Stat. at 93.
16. Id. § 11(c)(2).
17. Id. § 11(d), 84 Stat. at 93–94.
18. Id. § 11(b)(4), 84 Stat. at 92.
19. Id. § 11(b)(5).
20. Id. § 11(f)(2), 84 Stat. at 96.
21. Id. § 11(f)(1), 84 Stat. at 94 (vessel); id. § 11(f)(2), 84 Stat. at 94–95 (onshore facility); id. § 11(f)(3), 84 Stat. at 95 (offshore facility).
States incurred "for the removal of such oil" up to a statutory maximum. For a vessel, the liability limit was the lesser of $100 per gross ton or $14,000,000; for an onshore or offshore facility, the limit was $8,000,000. If, however, the discharge from a vessel or a facility "was the result of willful negligence or willful misconduct within the privity and knowledge of the owner," the liability limits did not apply.

The liability provisions of the Act stopped with removal costs. They did not impose liability for personal injury or damage to property or natural resources. The Act did, however, disavow any intent to "affect or modify in any way the obligations of any owner or operator . . . 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." It also directed that nothing in the oil pollution provisions was to 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."

In 1972, Congress amended the Federal Water Pollution Control Act to establish the modern regulatory scheme for water pollution. The amended statute, now known as the Clean Water Act, incorporated the 1970 oil spill legislation as section 311 of the new statute and extended it to cover discharges of hazardous

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22. Id. § 11(f)(1)–(3), 84 Stat. at 94–95. If the owner or operator proved that a third party caused the discharge, the owner or operator was relieved of liability, and the third party was liable to the United States. Id. § 11(g), 84 Stat. at 95.

23. Id. § 11(f)(1), 84 Stat. at 94.

24. Id. § 11(f)(2), 84 Stat. at 94–95 (onshore facility); id. § 11(f)(3), 84 Stat. at 95 (offshore facility).


26. Id. § 11(o)(1), 84 Stat. at 97.

27. Id. § 11(o)(2).


Although neither the 1970 statute nor the 1972 amendments expressly defined the nature of liability under section 311, courts construed the legislation as imposing strict liability.31

C. The Outer Continental Shelf Lands Act Amendments of 1978: Damages from Offshore Spills

The Outer Continental Shelf Lands Act of 195332 established the legal rules that govern mineral development on the Outer Continental Shelf beyond the territorial boundaries of the states. Congress amended the Act in 197833 to establish the modern leasing and development program.34 Title III of the 1978 Amendments (which was repealed by the Oil Pollution Act of 1990)35 established a liability and compensation system for oil pollution in offshore waters.36

30. Federal Water Pollution Control Act Amendments of 1972, sec. 2, § 311, 86 Stat. at 862 (codified as amended at 33 U.S.C. § 1321 (2006)). The Water Quality Improvement Act had introduced more limited provisions governing hazardous substances. It authorized the President to designate substances as hazardous, Water Quality Improvement Act, sec. 102, § 12(a), 84 Stat. at 98; required a party responsible for the discharge of a hazardous substance to notify the appropriate federal officials, id. § 12(c); granted the President the authority to remove hazardous substances that were spilled “unless removal is immediately undertaken by the owner or operator” of the vessel or facility responsible for the spill, id. § 12(d), 84 Stat. at 99; and instructed the President to submit a report on the need for legislation imposing liability on owners and operators “for the cost of removal of hazardous substances discharged” from vessels and facilities, id. § 12(g).


36. The definition of “oil pollution” limited the term to unlawful quantities or unlawful discharges “(i) in or on the waters above submerged lands seaward from the coastline of a State . . . , or on the adjacent shoreline of such a State, or (ii) on the waters of the contiguous zone established by the United States.” Outer Continental Shelf Lands Act Amendments of 1978, § 301(9), 92 Stat. at 671; see also id. § 301(5), 92 Stat. at 670 (definition of “vessel”); id. § 301(8), 92 Stat. at 670–71 (definition of “offshore facility”).
The Amendments made the "owner or operator"37 of a vessel38 or offshore facility39 "jointly and severally and strictly liable" for "removal costs"40 and certain economic damages that were proximately caused by oil pollution to which the statute applied.41 Any claimant could recover removal costs,42 and "any United States claimant"43 could recover for damage to, or loss of, real or

37. An "owner" was "any person holding title to or in the absence of title, any other indicia of ownership of, a vessel or offshore facility, whether by lease, permit, contract, license, or other form of agreement." Id. § 301(19), 92 Stat. at 672. If an offshore facility was abandoned with the prior approval of the Secretary of the Interior, the owner was "the person who owned such offshore facility immediately prior to such abandonment." Id.

38. A "vessel" was "every description of watercraft or other contrivance, whether or not self-propelled, which is operating in the waters above the Outer Continental Shelf . . . , or which is operating in the waters above the submerged lands seaward from the coastline of a State . . . , and which is transporting oil directly from an offshore facility." Id. § 301(5), 92 Stat. at 670.

39. An "offshore facility" included any refinery, drilling structure, oil storage or transfer terminal or pipeline, or any appurtenance related to any of the foregoing, which is used to drill for, produce, store, handle, transfer, process, or transport oil produced from the Outer Continental Shelf . . . , and is located on the Outer Continental Shelf except that vessels and deepwater ports were excluded from the definition. Id. § 301(8), 92 Stat. at 670–71.

40. "[R]emoval costs" were "costs incurred under subsection (c), (d), or (f) of section 311 of the Federal Water Pollution Control Act, and section 5 of the Intervention on the High Seas Act" and other "cleanup costs." Id. § 301(22), 92 Stat. at 672. "[C]leanup costs" were "costs of reasonable measures taken, after an incident has occurred, to prevent, minimize, or mitigate oil pollution from such incident." Id. § 301(14), 92 Stat. at 671.

41. Id. § 304(a), 92 Stat. at 675. The statute did eliminate liability (1) if the incident is caused solely by any act of war, hostilities, civil war, or insurrection, or by an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effect of which could not have been prevented or avoided by the exercise of due care or foresight; or (2) if the incident was caused solely by the negligent or intentional act of the damaged party or any third party (including any government entity).

Id. § 304(c), 92 Stat. at 676.

42. Id. § 303(a)(1), (b)(1), 92 Stat. at 674.

43. The Amendments defined a United States claimant as "any person residing in the United States, the Government of the United States or an agency thereof, or the government of a State or a political subdivision thereof, who asserts a claim." Id. § 301(10), 92 Stat. at 671.
personal property or the loss of use of natural resources. A United States claimant could also recover for loss of profits or impairment of earning capacity "due to" damage to real or personal property or natural resources if 25% of the claimant’s earnings came "from activities which utilize the property or natural resources." Only the federal government or states could recover for injury to, or destruction of, natural resources. Finally, the federal government and states and their political subdivisions could recover "the loss of tax revenue for a period of one year due to injury to real or personal property or natural resources."

The 1978 Amendments limited the liability of owner and operators

except when the incident is caused primarily by willful misconduct or gross negligence, within the knowledge of the owner or operator, or is caused primarily by a violation, within the privity or knowledge of the owner or operator, of applicable safety, construction, or operating standards or regulations of the Federal Government.

The extent of liability differed for vessels and offshore facilities. The maximum liability for a vessel was "$250,000 or $300 per gross ton, whichever is greater," but the owner or operator was always liable for removal costs incurred by the federal government or by states. An offshore facility was liable for "the total of removal and cleanup costs" plus a maximum of $35,000,000 for damages. To insure that the amounts for which owner and operators were liable would be paid, the statute required owners and operators of both vessels and offshore facilities to establish "evidence of financial responsibility."

44. *Id.* § 303(a)(2)(A)-(B), (D), (b)(2), 92 Stat. at 674. A foreign claimant could assert a claim under these sections if certain conditions were satisfied. *Id.* § 303(b)(6), 92 Stat. at 675.
45. *Id.* § 303(a)(2)(E), (b)(4), 92 Stat. at 674–75. A foreign claimant could also recover under this section if the conditions in section 303(b)(6) were satisfied.
46. *Id.* § 303(a)(2)(C)-(D), (b)(3).
47. *Id.* § 303(a)(2)(F), (b)(5).
48. *Id.* § 304(b), 92 Stat. at 675–76.
49. *Id.* § 304(a)(1), 92 Stat. at 676.
50. *Id.* § 304(d).
51. *Id.* § 304(a)(2).
52. *Id.* § 305, 92 Stat. at 677. The owner or operator of a vessel had to provide "evidence of financial responsibility sufficient to satisfy the maximum amount of liability to which the owner or operator of such vessel would be exposed in a case where he would be entitled to limit his liability." *Id.* § 305(a)(1). The owner or operator of an offshore facility had to provide
To cover removal costs and claims not paid by owners or operators, the 1978 statute established a $200 million Offshore Oil Pollution Compensation Fund supported by a fee on oil produced from the Outer Continental Shelf and money recovered by the fund. If the fund paid a claim, it was subrogated to the rights of the claimant.

D. The Oil Pollution Act of 1990: Expanded Liability for Damages

The March 24, 1989 grounding of the Exxon Valdez released 11 million gallons of oil into Prince William Sound in Alaska. The cost of removing the oil greatly exceeded the liability limit of section 311 of the Clean Water Act, and the release caused significant damage to natural resources as well as substantial economic losses to people living in the area.

Exxon spent more than $2 billion in cleanup efforts. Because of the limited reach of section 311 of the Clean Water Act, both governments and private parties relied principally on other remedies to collect penalties and damages, and Exxon paid substantially more than $14 million as a result of the spill. The federal government filed civil and criminal charges against Exxon, and Exxon paid $900 million to settle the civil charges and a $100 million fine in the criminal case. Exxon settled with some private parties for $303 million, but the remaining civil cases involving commercial fishermen, Native Alaskans, and landowners went to trial. The jury awarded the plaintiffs slightly more than $300 million in compensatory damages, and the plaintiffs initially won

"evidence of financial responsibility sufficient to satisfy the maximum amount of liability to which the owner or operator would be exposed in a case where he would be entitled to limit his liability . . . , or $35,000,000, whichever is less."  

Id. § 305(b), 92 Stat. at 678.

53. Id. §§ 302(c), 307(a)–(b), 92 Stat. at 672, 679.
54. Id. § 302(a)–(b), (d)(1), 92 Stat. at 672–73.
55. Id. § 308, 92 Stat. at 682.
57. Baker, 554 U.S. at 479.
60. Id. at 480–81.
a $5 billion punitive damage award. The Ninth Circuit reduced the award for punitive damages to $2.5 billion, and the Supreme Court lowered it to approximately $500 million, an amount approximately equal to the relevant compensatory damages collected by private parties.

The spill that resulted from the grounding of the Exxon Valdez prompted Congress to enact the Oil Pollution Act of 1990. Subtitle I of the 1990 legislation expanded liability for oil spills. The new statute did not repeal section 311 of the Clean Water Act, but it did provide that the liability provisions of section 311 do not apply to a spill for which liability is established under the Oil Pollution Act. In place of the section 311 provisions, the Oil Pollution Act expanded liability for cleanup costs, imposed liability for damages to natural resources as well as for certain economic losses suffered by governments and individuals, and allowed use of the Oil Spill Liability Trust Fund to pay for the losses that were not paid by a responsible party.

The Oil Pollution Act also added new regulatory provisions. The most substantial of the new regulatory requirements was a

61. Id. at 481.

In addition to the provisions summarized in the text, other portions of the Act covered prevention and removal of international pollution, Oil Pollution Act §§ 3001–3005, 104 Stat. at 507–08; federal removal authority, id. §§ 4201–4204, 104 Stat. at 523–33; Prince William Sound (the place where the Exxon Valdez spill occurred), id. §§ 5001–5007, 104 Stat. at 542–54; and the Trans-Alaska Pipeline System, id. §§ 8001–8302, 104 Stat. at 564–73.
66. Id. § 2002, 104 Stat. at 507.
67. One unusual provision prohibited any tank vessels that, after March 22, 1989, "have caused an oil spill of more than 1,000,000 gallons of oil into the marine environment" from operating in Prince William Sound. Oil Pollution Act § 5007, 104 Stat. at 554 (codified at 33 U.S.C. § 2737 (2006)). An Exxon subsidiary filed a legal action contending that this provision was effectively a bill of attainder and also denied Exxon due process and equal protection of the laws. See generally Alison C. Carrigan, Comment, The Bill of Attainder Clause: A New Weapon to Challenge the Oil Pollution Act, 28 B.C. ENVTL. AFF. L. REV. 926 [Vol. 71
phase-in mandate for double hulls for oil tankers.\textsuperscript{68} Other new provisions involved manning and record requirements\textsuperscript{69} and enhanced enforcement powers under section 311 of the Clean Water Act.\textsuperscript{70}

II. THE LIABILITY PROVISIONS OF THE OIL POLLUTION ACT

As previously explained, the Oil Pollution Act establishes the current liability scheme applicable to oil spills.\textsuperscript{71} Because the Oil Pollution Act did not repeal section 311 of the Clean Water Act, that section still prohibits discharges, authorizes federal response actions, provides for assessment of civil and criminal penalties, and governs liability for spills of hazardous substances.\textsuperscript{72}

When oil is discharged from a vessel or facility into the navigable waters of the United States, adjacent shorelines, or the exclusive economic zone, the Oil Pollution Act makes each "responsible party" liable for "removal costs" and "damages."\textsuperscript{73} The Oil Pollution Act explicitly adopts the standard of liability of section 311 of the Clean Water Act.\textsuperscript{74} As explained above,\textsuperscript{75} courts have consistently construed section 311 to establish strict liability.

Under the Oil Pollution Act, the definition of the term "responsible party" varies depending on the source of the discharge. If the discharge originates from a vessel, the responsible party is "any person owning, operating, or demise chartering the vessel."\textsuperscript{76} For an "onshore facility" or a pipeline, "any person owning or operating" the facility or pipeline is a responsible

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\textsuperscript{69} Id. §§ 4101–4103, 4106, 4114, 104 Stat. at 509–14, 517.

\textsuperscript{70} Id. §§ 4301–4306, 104 Stat. at 533–41.


\textsuperscript{72} For a brief summary of those provisions, see supra Part I.B.

\textsuperscript{73} Oil Pollution Act § 1002(a), 104 Stat. at 489 (codified at 33 U.S.C. § 2702(a) (2006)).

\textsuperscript{74} Id. § 1001(17), 104 Stat. at 487 (codified as amended at 33 U.S.C.A. § 2701(17) (West, Westlaw through Feb. 25, 2011)).

\textsuperscript{75} See supra note 31 and accompanying text.

\textsuperscript{76} Oil Pollution Act § 1001(32)(A), 104 Stat. at 488.
party. In the case of an offshore facility (other than a pipeline or a deepwater port), the responsible party is "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 state law or the Outer Continental Shelf Lands Act. For a deepwater port, the licensee is the responsible party. If a vessel, onshore or offshore facility, deepwater port, or pipeline is abandoned, the responsible parties are "the persons who would have been responsible parties immediately prior to the abandonment of the vessel or facility." The statute broadly defines the "removal costs" that can be recovered under the statute. They include "the costs of removal that are incurred after a discharge of oil has occurred" or "the costs to prevent, minimize, or mitigate oil pollution" in an incident involving "a substantial threat of a discharge of oil." Removal includes not only containment or removal of oil but also the taking of other actions that are "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." Federal and state governments and Indian tribes can recover all removal costs incurred under section 311 of the Clean Water Act, and "any person" can recover removal costs the person incurs through actions that "are consistent with the National Contingency Plan.

The Oil Pollution Act does not address liability for personal injury, but it does impose liability for damages to natural resources and property as well as for certain other losses suffered by individuals and governments. Three types of damages are only recoverable by governments; private parties (and, in some cases, governments as well) can recover the remaining three types of damages for which liability is established. In a case involving property damage and economic loss, the First Circuit noted that the Oil Pollution Act's provisions for damages appear to extend only

77. Id. § 1001(32)(B), (E), 104 Stat. at 488–89. In the case of an onshore facility other than a pipeline, a governmental owner that "transfers possession and right to use the property to another person by lease, assignment, or permit" is not a responsible party. Id. § 1001(32)(B), 104 Stat. at 488.
78. Id. § 1001(32)(C), 104 Stat. at 488–89. A governmental owner that "transfers possession and right to use the property to another person by lease, assignment, or permit" is not a responsible party. Id.
79. Id. § 1001(32)(D), 104 Stat. at 489.
80. Id. § 1001(32)(F).
81. Id. § 1001(31), 104 Stat. at 488.
82. Id. § 1001(30).
83. Id. § 1002(b)(1), 104 Stat. at 489 (codified at 33 U.S.C. § 2702(b)(1) (2006)).
84. Id. § 1002(b)(2), 104 Stat. at 490.
to compensatory damages because the “comprehensive list of recoverable damages” contains “no mention of punitive damages.”

The damages for which only governments can recover are losses resulting from injuries to natural resources, reduced tax revenues, and costs of increased public services. Federal and state governments and Indian tribes can recover for damages to natural resources. The damages recoverable for natural resources are those resulting from “injury to, destruction of, loss of, or loss of use of” the natural resources; they also include the “costs of assessing the damage” incurred by the natural resources trustees that the Oil Pollution Act establishes. Federal, state, and local governments can recover damages “equal to the net loss of taxes” and other revenues suffered as the result of injury, destruction, or loss of property or natural resources. Finally, states and local governments can recover damages “for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards.”

Private parties can recover for the remaining three categories of damages. Subsistence users of natural resources can recover damages for the loss of subsistence use “without regard to the ownership or management of the resources.” The subsection governing property damages allows “any claimant who owns or leases” real or personal property to recover damages “for injury to, or economic losses resulting from destruction of,” the property. A separate subsection allows “any claimant” to recover damages for lost “profits or impairment of earning capacity due to the

85. S. Port Marine, LLC v. Gulf Oil Ltd. P'ship, 234 F.3d 58, 64 (1st Cir. 2000). The statute defines “damages” as “the damages specified in section 1002(b) . . . and includes the cost of assessing these damages.” Oil Pollution Act § 1001(5), 104 Stat. at 486 (codified as amended at 33 U.S.C.A. § 2701(5) (West, Westlaw through Feb. 25, 2011)).
86. Oil Pollution Act § 1002(b)(2)(A), 104 Stat. at 490 (codified at 33 U.S.C. § 2702(b)(2)(A) (2006)). Section 1006 contains the provisions regarding the appointment of trustees to determine the amount of damages to natural resources. The federal government, states, and the Indian tribes can all appoint trustees. Id. § 1006, 104 Stat. at 494–95 (codified at 33 U.S.C. § 2706 (2006)).
87. Id. § 1002(b)(2)(D), 104 Stat. at 490 (codified at 33 U.S.C. § 2702(b)(2)(D) (2006)).
88. Id. § 1002(b)(2)(F).
89. Id. § 1002(b)(2)(C).
90. Id. § 1002(b)(2)(B).
Liability for removal costs and damages under the Oil Pollution Act is subject to the same narrow defenses that are recognized in section 311 of the Clean Water Act. To avoid liability, a responsible party has the burden of establishing “by a preponderance of the evidence” that the discharge and damages were caused “solely” by “an act of God,” “an act of war,” “an act or omission of a third party,” or “any combination” of those causes. However, a responsible party cannot claim the defenses allowed by the Oil Pollution Act when the responsible party has failed “to report the incident as required by law,” or “to provide all reasonable cooperation and assistance requested by a responsible official,” or, “without sufficient cause, to comply with an order” regarding removal.

Although the Oil Pollution Act retains some limits on the liability of responsible parties, the maximum potential liability is greater than under earlier oil pollution statutes. As with the earlier statutes, the limit on liability varies for different responsible parties, and the limit does not apply in all cases.

91. Id. § 1002(b)(2)(D). A report submitted to the Administrator of the Gulf Coast Claims Facility argues that the “due to” language in subsection D requires that a claimant suffer “economic loss because a spill has damaged, destroyed or otherwise rendered physically unavailable to them property or resources that they have a right to put to commercial use.” John C.P. Goldberg, Liability for Economic Loss in Connection with the Deepwater Horizon Oil Spill 3 (Nov. 22, 2010), available at http://dash.harvard.edu/handle/1/4595438. For a broader view of the scope of “due to” language, see David W. Robertson, The Oil Pollution Act’s Provisions on Damages for Economic Loss, 29 Miss. C. L. Rev. (forthcoming 2011).


93. Oil Pollution Act § 1003(a), 104 Stat. at 491 (codified as amended at 33 U.S.C. § 2703(a) (2006)). To establish the act-of-a-third-party defense, the responsible party must demonstrate that the act causing the discharge and damages was the “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.” Id. § 1003(a)(3). In addition, the responsible party must establish, “by a preponderance of the evidence,” that the responsible party “exercised due care with respect to the oil concerned” and “took precautions against foreseeable acts or omissions” of the third party and “the foreseeable consequences of those acts or omissions.” Id. Even when a responsible party cannot establish one of the defenses recognized by the act, the responsible party is not liable “to a claimant, to the extent that the incident [giving rise to liability was] caused by the gross negligence or willful misconduct of the claimant.” Id. § 1003(b).

94. Id. § 1003(c).
The maximum liability of a responsible party differs depending on whether the discharge originates on a vessel, an onshore facility, or an offshore facility. Originally, the maximum liability for tank vessels was the greater of (1) $1,200 per ton or (2) $10 million for a vessel greater than 3,000 gross tons or $2 million for a smaller vessel. Following a 2006 amendment, the liability limit for tank vessels varies according to hull design and size. For a single-hull tank vessel greater than 3,000 gross tons, the liability limit is the greater of $3,000 per gross ton or $22 million. For non-tank vessels, the liability limit is the greater of $950 per gross ton or $800,000. The maximum liability for an offshore facility other than a deepwater port is “the total of all removal costs” plus $75 million. For onshore facilities and deepwater ports, the maximum liability is $350 million; however, the President can reduce the maximum liability for an onshore facility to an amount not less than $8 million and the maximum liability for a deepwater port to an amount not less than $5 million. The statute also directs the President to report to Congress “from time to time” on the desirability of adjusting the liability limits and requires the President to adjust the amounts every three years “to reflect significant increases in the Consumer Price Index.”

The statutory limits on liability in the Oil Pollution Act are subject to some important exceptions. First, as noted above, the limits do not apply to removal costs for a discharge from an offshore facility. Second, the owner or operator is responsible for all of the removal costs incurred by the United States or any state or local official or agency in connection with a discharge from an Outer Continental Shelf facility or a vessel carrying oil.

95. Id. § 1004(a)(1), 104 Stat. at 491–92.
97. Id.
98. Id.
100. Id. § 1004(a)(4).
101. Id. § 1004(d)(1), 104 Stat. at 493.
102. Id. § 1004(d)(2)(A). The statute is unclear whether this authorization is a continuing one or whether it existed only at the time the President submitted the required report on “the relative operational and environmental risk posed by the transportation of oil by vessel to deepwater ports . . . versus the transportation of oil by vessel to other ports.” Id.
103. Id. § 1004(d)(3).
104. Id. §1004(d)(4).
105. Id. § 1004(a)(3); see supra note 99 and accompanying text.
from such a facility. Third, the limits on liability do not apply to removal costs or damages in two circumstances:

1. When the incident was "proximately caused by" the "gross negligence or willful misconduct of," or "the violation of an applicable Federal safety, construction, or operation regulation," by the responsible party, or
2. When the responsible party fails to report the incident, provide reasonable cooperation and assistance, or—with sufficient cause—comply with a cleanup order.

The Oil Pollution Act does not provide an exclusive basis for imposing liability for an oil spill. Section 1018 preserves the power of states and local governments to impose greater liability for "the discharge of oil or other pollution by oil within such State" or for "any removal activities in connection with such a discharge." It also provides that nothing in the Oil Pollution Act affects or modifies any obligations under the Solid Waste Disposal Act or state law, "including common law." In addition, section 6001 provides that, "[e]xcept as otherwise provided," the Oil Pollution Act does not affect admiralty and maritime law or the admiralty or maritime jurisdiction of federal district courts, "saving to suitors in all cases all other remedies to which they are otherwise entitled." Despite this later provision, the First Circuit ruled in 2000 that the passage of the Oil Pollution Act precludes the recovery of punitive damages in an admiralty action.

In addition to prescribing the basis and scope of liability for oil spills, the Oil Pollution Act contains other provisions designed to insure that claims under the Act are paid. It imposes financial responsibility requirements on responsible parties for vessels and facilities, requires the responsible party for an oil spill to establish a procedure for the payment of interim claims, and allows the Oil Spill Liability Trust Fund to pay claims that are not paid by the responsible party.

Section 1016 requires responsible parties of certain vessels and offshore facilities to "establish and maintain . . . evidence of

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107. Id. § 1004(c).
109. Id. § 1018(a)(2), 104 Stat. at 506.
110. Id. § 6001(e), 104 Stat. at 555 (codified at 33 U.S.C. § 2751(e) (2006)).
financial responsibility.” The requirements differ for different types of vessels and for onshore and offshore facilities. A responsible party can satisfy the financial responsibility requirements by furnishing evidence of any combination of insurance, surety bond, guarantee, letter of credit, or qualification as a self-insurer.

The financial responsibility provision for vessels applies to “any vessel over 300 gross tons . . . using any place subject to the jurisdiction of the United States” and “any vessel using the waters of the exclusive economic zone to tranship or lighter oil destined for a place subject to the jurisdiction of the United States.” The responsible party for such a vessel must provide evidence of financial responsibility equal to the statutory limit on liability for the vessel.

The amount of financial responsibility required for the responsible party of an offshore facility varies according to the type of facility. Unless the Secretary of the Department in which the Coast Guard is operating lowers the limit, each responsible party for a deepwater port must maintain financial responsibility equal to $350 million, the statutory limit on liability for deepwater ports. For other offshore facilities, the amount is $35 million for facilities seaward of the seaward boundary of a state and $10 million for facilities landward of the seaward boundary of a state, unless the President determines that a greater amount is justified.

The Oil Pollution Act contains some minimal provisions governing claims made to a responsible party. As the result of a 1996 amendment, section 1005 now requires a responsible party to establish a procedure for settling “claims for interim, short-term damages.” It also requires a responsible party to pay interest on

113. Id. § 1016(c), 104 Stat. at 503–04.
114. Id. § 1016(a), 104 Stat. at 502.
115. Id. §§ 1001(33), 1016(c)(2), 104 Stat. at 489, 503 (codified as amended at 33 U.S.C.A. §§ 2701(33), 2716(c)(2) (West, Westlaw through Feb. 25, 2011)).
116. Id. § 1016(c)(1)(B)–(C), 104 Stat. at 503.
117. Coast Guard Authorization Act of 1996, Pub. L. No. 104-324, § 1142(a), 110 Stat. 3901, 3991 (codified at 33 U.S.C. § 2705(a) (2006)). Although BP initially administered the claims procedure required by law itself, the company subsequently created the Gulf Coast Claims Facility and established a $20 billion escrow fund to fulfill its claims processing obligations under the Oil Pollution Act. BP selected Kenneth R. Feinberg as the third-party administrator of the new claims facility. Although the claims facility and Mr. Feinberg “are acting for and on behalf of BP in order to fulfill BP’s statutory
claims "beginning on the 30th day following the date on which the claim is presented." Section 1013 generally requires that a claim be presented to the responsible party before it is presented to the Oil Spill Liability Trust Fund. Section 1014 requires a responsible party that does not deny its designation as the responsible party for a spill to "advertise the designation and the procedures by which claims may be presented." The advertisement must begin within 15 days after the date of the designation as responsible party, and it must continue for at least 30 days.

Section 1012 authorizes the use of the Oil Spill Liability Trust Fund to pay some removal costs, claims, and other expenses. The fund is "available to the President" to pay removal costs incurred by federal authorities or state officials, costs incurred by trustees in assessing natural resource damages and developing restoration plans, removal costs and damages resulting from discharges from foreign offshore units, and other removal costs and damage claims that are not paid by a responsible party. The maximum amount that can be paid for the fund as the result of a single incident is $1 billion. Moreover, the fund cannot be used to pay a claim "to the extent that the incident, removal costs, or damages are caused by the gross negligence or willful misconduct of [the] claimant." When the fund pays a claim for removal costs or damages, it obligations as a responsible party under" the Oil Pollution Act, the claims facility and Mr. Feinberg "exercise their own judgment with respect to the evaluation and payment of claims." Frequently Asked Questions, GULF COAST CLAIMS FACILITY, http://www.gulfcoastclaimsfacility.com/faq#Q1 (last visited Apr. 2, 2011).

119. Id. § 1013(a), 104 Stat. at 501 (codified as amended at 33 U.S.C. § 2713(a) (2006)).
120. Id. § 1014(b) (codified as amended at 33 U.S.C. § 2714(b) (2006)).
121. Id. § 1012(a)(1)–(4), 104 Stat. at 498 (codified as amended at 33 U.S.C.A. § 2712(a)(1)–(4) (West, Westlaw through Feb. 25, 2011)). For removal costs to be paid from the fund, the President must determine that they were consistent with the National Contingency Plan. Id. § 1012(a)(1), (4). In addition to allowing payments for removal costs and damages, the Act also allows the use of the fund to pay certain federal expenses associated with implementation, administration, and enforcement of the Act and section 311 of the Clean Water Act. Id. § 1012(a)(5).
122. Id. § 9001(c)(1), 104 Stat. at 573–74 (codified at 26 U.S.C. 9509(c)(2) (2006)).
123. Id. § 1012(b), 104 Stat. at 499.
acquires “by subrogation all rights of the claimant or State to recover from the responsible party.”

Section 1013 governs procedures for claims presented to the Oil Spill Liability Trust Fund. In most cases, the Oil Pollution Act requires that claimants first present their claims to the responsible party or its guarantor. It also precludes approval or certification of a claim while an action is pending in court to recover the costs that are the subject of the claim. If a responsible party denies a claim or fails to settle a claim within 90 days, the claimant may file a judicial action against the responsible party or present the claim to the fund. If “full and adequate compensation is unavailable,” a claimant may present to the fund “a claim for uncompensated damages and removal costs.” Beyond these minimal provisions, the Oil Pollution Act grants the President authority to promulgate “regulations for the presentation, filing, processing, settlement, and adjudication of claims” against the fund.

Finally, section 1017 contains provisions relating to jurisdiction and prescription. United States district courts have “exclusive original jurisdiction over all controversies arising under [the] Act” with two exceptions: (1) Judicial review of regulations promulgated under the Oil Pollution Act is available only in the Circuit Court of Appeals for the District of Columbia Circuit; and (2) state trial courts “of competent jurisdiction over claims for removal costs or damages, as defined under [the Oil Pollution] Act may consider claims under [the] Act or State law.” The Oil Pollution Act generally requires claims to be filed within three years. For most damage claims, the three years begins

124. Id. § 1012(f), 104 Stat. at 500.
125. Id. § 1013(a), 104 Stat. at 501 (codified as amended at 33 U.S.C. § 2713(a) (2006)). A claimant can present a claim to the fund before presenting it to the responsible party if any of the following conditions apply:
   - The President notifies claimants that the responsible party and its guarantor both deny designation as a responsible party, the discharge is from a public vessel, or the President is unable to designate the source of the discharge.
   - The claimant is a responsible party who is authorized to submit a claim because the responsible party is entitled to a defense or a limitation of liability.
   - The claimant is the governor of a state that is filing a claim for removal costs.
   - The United States is the claimant in a case where a foreign offshore unit has discharged oil causing damage for which the fund is liable.
   Id. § 1013(b).
126. Id. § 1013(b)(2).
127. Id. § 1013(c).
129. Oil Pollution Act § 1013(e), 104 Stat. at 501.
130. Id. § 1017(b), 104 Stat. at 504 (codified at 33 U.S.C. § 2717(b) (2006)).
131. Id. § 1017(a).
132. Id. § 1017(c).
to run on "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"; for natural resource damages, the three-year period begins to run on "the date of the completion of the natural resources damage assessment." The prescriptive period for actions for removal costs begins to run upon "completion of the removal action."

III. THE BP DEEPWATER HORIZON OIL SPILL AND THE OIL POLLUTION ACT

The Oil Pollution Act appears to have functioned reasonably well for the first two decades following its passage. Responsible parties have paid claims, and the fund has paid claims that were not paid by responsible parties or exceeded the liability limits established by the Act. Lower federal courts have resolved disputes over various statutory ambiguities. The massive claims associated with the BP Deepwater Horizon oil spill, however, have highlighted a number of the Act's shortcomings. This section identifies six areas in which Congress should correct problems brought to light by the BP Deepwater Horizon spill: the statutory limits on the liability of responsible parties, the lack of an express provision allowing claimants to recover attorney fees, the need for a more robust Oil Spill Liability Trust Fund, the inadequate procedural requirements governing claims against responsible parties, the ambiguity in the provisions preserving rights under other laws, and the lack of a penalty provision applicable when claims are not paid in a timely fashion.

133. Id. § 1017(f)(1), 104 Stat. at 505.
134. Id. § 1017(f)(2). Similar three-year periods govern contribution and subrogation actions. Id. § 1017(f)(3)-(4).
136. See, e.g., Evergreen Int'l, S.A. v. Norfolk Dredging Co., 531 F.3d 302 (4th Cir. 2008) (damage limit of Oil Pollution Act is applicable because plaintiff failed to prove the responsible party violated an applicable federal safety, construction, or operating regulation); S. Port Marine, LLC v. Gulf Oil Ltd. P'ship, 234 F.3d 58 (1st Cir. 2000) (Oil Pollution Act precludes recovery of punitive damages under admiralty law); United States v. Hyundai Merch. Marine Co., 172 F.3d 1187 (9th Cir. 1999) (responsible party is liable for Coast Guard response costs even though responsible party contained the spill at its own expense), cert. denied, 528 U.S. 963 (1999).
A. Limits on Liability

As described in the preceding section, the Oil Pollution Act has a complicated set of statutory provisions limiting the liability of responsible parties. Those statutory limits on liability deny reasonable compensation to innocent parties injured by oil spills, and they discourage the adoption of environmental and safety measures by companies engaged in activities that may give rise to oil spills. By immunizing companies engaged in producing and transporting oil against full liability for the losses associated with their activities, the Oil Pollution Act unfairly shifts the loss from the party benefitting from highly profitable economic activities to innocent individuals and property owners who receive no direct benefit from the economic activity. If a disaster that causes damages greater than the liability limits occurs, the amount of damages that innocent victims suffer does not decline because an actor is not required to pay the full costs associated with its economic activity. Instead, some persons suffering injury are not compensated at all or each person suffering injury recovers only a portion of the damage. In either event, individuals with no connection to the economic activity suffer injury and are forced to bear the cost of the loss. The limit is, in effect, a contingent tax on a group not directly involved with the economic activity to benefit those who are profiting from activity that caused the damages.

A basic principle of justice suggests that it is fairer to make the party who experiences the economic gain of the activity bear the loss, rather than the innocent bystander. The BP Deepwater Horizon oil spill aptly illustrates how the statutory limits on liability violate this fairness principle. Many thousands of innocent property owners and businesses have suffered losses that threaten their livelihoods and financial well-being. Requiring them to subsidize an oil company that is still likely to reap huge profits from the oil field as the affected areas and the people in them struggle economically and environmentally is unjust.

137. See supra notes 95–107 and accompanying text.
138. The Oil Pollution Act does not indicate the order in which claims against a responsible party or the Oil Spill Liability Trust Fund are to be prioritized. Presumably, the responsible party will first try to take credit for its direct expenditures for removal costs. See Oil Pollution Act § 1004(a), 104 Stat. at 491–92 (codified as amended at 33 U.S.C.A. § 2704(a) (West, Westlaw through Feb. 25, 2011)) (limiting total liability of responsible party for damages “and any removal costs incurred by, or on behalf of, the responsible party”). But see id. § 1004(a)(3) (making the responsible party of an offshore facility liable for “the total of all removal costs plus $75,000,000”).
Of course, the federal government can mitigate the unfairness to victims by compensating those whose losses were not covered. The Oil Spill Liability Trust Fund accomplishes that mitigation in part, but—as the BP Deepwater Horizon spill demonstrated—a $1 billion payment is grossly inadequate for a major spill. More fundamentally, that approach amounts to taxpayers providing a subsidy to the economic activity that was shielded from complete liability. Governmental payments to individuals who have been harmed dilutes the unfairness by transferring the cost to all taxpayers, but it does not change the general proposition that persons not directly benefitting from the economic activity are being required to bear the cost of the damages rather than the economic actor.

The economic case for eliminating limits on liability is straightforward. Immunizing an economic actor from bearing all the economic costs associated with its operations has the effect of underdeterring measures designed to improve safety and to protect the environment. That is, the actor will engage in conduct that would not be profitable if the actor bore the full economic costs or will forego safety or environmental controls that would be cheaper than paying the costs that the actor is avoiding. Essentially, the economic argument embraces a “polluter pays” principle that forces those responsible for oil spills to internalize the costs of damages that directly results from those spills.139

Given the possibility of huge economic gains from production and transportation of oil, the liability limit in the Oil Pollution Act probably does not induce drilling or shipping that would be unprofitable without the limits on liability. Those activities would almost certainly occur with or without the limits on liability for damages. The protection from economic loss may, however, have the unconscious effect of discouraging some additional safety and environmental protections.

The relatively small limits on liability in the Oil Pollution Act are particularly inappropriate. The grounding of the Exxon Valdez demonstrated that removal costs damages from a major tanker spill can vastly exceed the current maximum liability of $3,000 per

139. As currently drafted, the Oil Pollution Act imperfectly implements this principle because it limits the liability of responsible parties. See U.S. Gov't Accountability Office, GAO-10-795T, Oil Spills: Cost of Major Spills May Impact Viability of Oil Spill Liability Trust Fund (2010), available at http://www.gao.gov/new.items/d10795t.pdf (“The Oil Pollution Act of 1990 . . . established a ‘polluter pays’ system that places the primary burden of liability for the costs of spills up to a statutory maximum, on the party responsible.”).
Even the $350 million limit for an onshore facility or a deepwater port is far less than the total losses from either the Exxon Valdez spill or the BP Deepwater Horizon spill. In the case of offshore oil facilities, even a moderate spill could exceed the $75 million limit on liability for damage claims. The capital costs involved in those operations and the large potential for gain would make the current limit on liability a relatively minor aspect of the overall cost of operations even if the liability limit had been adjusted to reflect changes in the consumer price index as the statute requires.

Thus far, efforts to adjust the liability limits of the Oil Pollution Act in light of the BP Deepwater Horizon spill have understandably focused on raising the limits for damages from offshore facilities. The House of Representatives passed a bill that included a section eliminating the liability limit for offshore facilities, and the Senate Committee on Environment and Public Works also passed a bill eliminating that limit. Enactment of either of those proposals would be a significant first step in reforming the compensation provisions of the Oil Pollution Act. Eliminating the limit on damages resulting from oil spills from offshore facilities would eliminate the unfairness of imposing the burden of the uncovered damages on innocent victims of an oil spill or on the general taxpayers. It should also encourage

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140. Oil Pollution Act § 1004(a)(1), 104 Stat. at 492; see supra note 97 and accompanying text.
141. Id. § 1004(a)(4); see supra notes 100–02 and accompanying text.
142. The Coast Guard has regularly adjusted the limits in the liability provisions for which it is responsible, see 33 C.F.R. §§ 138.200–240 (2010), but the Minerals Management Service appears never to have updated the limits for offshore facilities.
144. The Senate Committee approved S. 3305, which eliminated the limit on offshore facilities, on June 30, 2010, but the Senate took no further action on the bill. See Big Oil Bailout Prevention Unlimited Liability Act of 2010, S. 3305, 111th Cong. (2010). The author appeared before the Senate Committee to testify in favor of S. 3305. See The Big Oil Bailout Prevention Liability Act of 2010: Hearing on S. 3305 Before the S. Comm. on the Env’t & Pub. Works (June 9, 2010) [hereinafter Bailout Prevention Hearing] (statement of Kenneth M. Murchison, Professor, Paul M. Hebert Law Center, Louisiana State University). The Senate bill made the elimination of the liability limit effective on April 15, 2010, a date that would make the bill applicable to the BP Deepwater Horizon oil spill. See S. 3305, § 3; see also Hearing on S. 3346 Before the S. Comm. on Energy & Natural Res. (May 25, 2010) (statement of Robert Meltz, Legislative Attorney, Congressional Research Service) (concluding that a retroactive change in the liability limit would be constitutional).
responsible parties to exercise greater care in offshore drilling activities.

At least two objections have been raised against the effort to eliminate the Oil Pollution Act’s limit on liability for offshore facilities. On the one hand, some have expressed concern that eliminating the limits on liability will preclude smaller companies from participating in drilling operations and lead to further domination of drilling activities by the small group of major oil companies. Others contend that the limit on damages under the Oil Pollution Act is a minor problem that should not be the focus of legislative response to the problems revealed by the Gulf catastrophe. Neither objection is persuasive.

The basis for the argument that making oil producers liable for the full extent of the damages they cause would preclude offshore drilling by anyone other than the major oil companies is the claim that the insurance available to cover these risks is limited. Testimony at the Senate committee hearing on the bill to eliminate the liability limits on offshore facilities claimed that total third-party liability coverage currently available for production activities in the United States “is in the range of $1.25 billion to $1.5 billion.”

For “control of well risks,” the “working capacity” is “in the range of $600 million to $750 million.”

For oil spill financial responsibility certification, “the working capacity is even lower” with “a top range of no more that $200 million.” In light of these limits, advocates for offshore facilities have argued that the only companies that could satisfy the financial responsibility requirement for unlimited liability would be the major oil companies who could file adequate self-insurance requirements.

Acceptance of the claim regarding the current limits on available insurance does not, however, require one to agree that liability limits are also needed. First, the logic of the argument is incorrect. Eliminating limits on liability does not mandate that proof of financial responsibility also be unlimited. Second, the industry has not demonstrated that smaller companies would no longer seek offshore leases if liability limits were eliminated. Third, if assistance for smaller companies is needed, alternate mechanisms could lessen the risks of smaller companies without perpetuating the unfairness of leaving innocent victims uncompensated.

145. *Bailout Prevention Hearing, supra* note 144 (statement of Ron Baron, Executive Vice President, Willis of Texas, Inc.).
146. *Id.*
147. *Id.*
The initial problem with the claim about the impact of eliminating the limits on liability is the incorrect assumption that an exact correlation exists between the limits on liability and the financial responsibility provisions. The Oil Pollution Act does require responsible parties for deepwater ports and for some vessels to maintain evidence of financial responsibility equal to their liability under the Act, but even those requirements are not absolute. If a responsible party owns more than one vessel or deepwater port, the responsible party only has to establish financial responsibility equal to the liability limit for the deepwater port or vessel "having the greatest maximum liability." Moreover, the requirements for vessels only apply to vessels over 300 tons and vessels using the waters of the exclusive economic zone to transship oil to places subject to the jurisdiction of the United States. The liability for removal costs is already unlimited for the responsible party of an offshore facility, but those responsible parties only have to provide proof of financial responsibility of $150 million, an amount equal to twice the liability limit for damages. Finally, the Oil Pollution Act does not require onshore facilities to establish any evidence of financial responsibility.

The obvious solution for the possibility that the available insurance may be limited is to require the responsible party to prove financial responsibility in an amount equal to the insurance that is available. Because that amount is likely to change over time, Congress should not specify a particular amount in the statute. Instead, the Oil Pollution Act should require the President to establish the amount based on a survey on insurance limits and to update the amount on a regular basis.

Once the insurance issue is addressed, one might reasonably question the empirical claim that eliminating the statutory limit on damages would preclude smaller companies from bidding on projects on which they would have bid if a liability limit were continued. Given the huge capital and operating costs involved in offshore drilling and the lack of a liability limit on removal costs,

149. Id.
150. Id. § 1016(a).
152. Oil Pollution Act § 1016(c)(1), 104 Stat. at 503.
153. Id. § 1004(a)(3).
intuition suggests that the limit on liability for damages is a relatively small factor in the decision to bid on leases and to engage in exploratory drilling. Only the companies have the information that would support the premise that the damages limit is crucial, and they should be required to provide that information before the premise is accepted.

Even assuming that domination of offshore drilling activity by major companies could increase because of the liability risks associated with unlimited damages, a damages limit is a particularly inappropriate means of responding to that market imperfection. As explained above, that approach amounts to a hidden tax on innocent victims of the drilling activity, and other fairer methods of spreading the risk are available.

Of course, smaller companies could establish contractual arrangements that would share the risks that were greater than they could bear individually. If those private arrangements are inadequate, the government could create mandatory pooling arrangements to which all participants in drilling activities contributed in proportion to their involvement in the drilling activities.154 Alternatively, the government could create a more robust liability trust fund as recommended below.155

Voluntary or governmental pooling to spread risks is preferable to liability limits on both moral and economic grounds. If losses do occur, they will be shared among those who benefit from the economic activity rather than among innocent victims. If the industry as a whole has to bear risks, the industry may support stronger safety and environmental controls to minimize those risks.156

Others opposed responding to the BP Deepwater Horizon disaster with an initial focus on the limits on liability in the Oil Pollution Act on the ground that the liability limit is a minor aspect of the problems revealed by the release in the Gulf of Mexico. In


155. See infra Part III.C.

156. Of course, the pooling approach will not be as effective in encouraging increased safety and environmental protections, because it does not force the particular party responsible for a spill to internalize the costs. One way to minimize the problem is to adjust premiums in the pool according to the financial and safety risks presented by a particular responsible party. Nat’l Comm’n on the BP Deepwater Horizon Oil Spill & Offshore Drilling, supra note 154.
making this argument, they emphasized the several reasons that BP’s liability for the spill would have greatly exceeded $75 million even if the company had not established the Gulf Coast Claims Facility. First, the limit on liability for offshore facilities only applies to “damages,” not “removal costs,” and the Oil Pollution Act broadly defines removal costs. Second, the Oil Pollution Act limit does not apply at all when a company is guilty of willful misconduct, gross negligence, or the violation of a federal safety, construction, or operating regulation. Third, the limit only applies to damages awarded under the Oil Pollution Act, not those imposed under state law or admiralty or maritime law.

These opponents of efforts to change the liability limits for offshore facilities are correct that the $75 million limit is not an absolute limit on liability for the release in the Gulf of Mexico. However, they underestimate the potential impact of the liability limits and the benefits of abolishing those limits. Certainly, the exclusion of “removal costs” from the liability limit for offshore facilities means that the responsible party at a major oil spill from such a facility is likely to be liable for substantially more than $75 million. Moreover, some victims of a release may avoid the liability limit on damages after years of litigation regarding the definition of removal actions under the Oil Pollution Act, the applicability of the exceptions to the limit, and the reach of the savings clauses with respect to state law claims and admiralty claims. That delay, however, conflicts with a basic premise of the Oil Pollution Act, the idea that federal law should provide a relatively prompt and certain remedy for damages to natural resources and property as well as the economic losses that individuals and governments experience as a result of oil spills.

BP’s creation of a $20 billion fund to pay claims makes the liability limit far less significant for the BP Deepwater Horizon oil spill, but the responsible party for the next oil spill might not be so willing to ignore the damage limits. If a responsible party had

159. Oil Pollution Act § 1004(c)(1), 104 Stat. at 492.
160. Id. §§ 1018(a), 6001(e), 104 Stat. at 506–07, 554–55 (codified at 33 U.S.C. §§ 2718(a), 2751(e) (2006)).
fewer resources or faced less evidence supporting claims of gross negligence or the violation of regulations, the party might choose to litigate the applicability and scope of the limit on liability. Moreover, BP may still raise the limit on offshore facilities as a defense in litigation against claimants who are dissatisfied with settlement offers from the Gulf Coast Claims Facility.

The need for full and prompt recovery is particularly important with respect to major spills like the one that resulted from the BP Deepwater Horizon well blowout. Even if compensation is paid, restoration of natural resources and property that has been damaged will take considerable time. Failure to compensate the victims so the process of restoration and remediation may begin threatens the entire way of life for residents.163

Similar arguments apply to the liability limits applicable to vessels, deepwater ports, and onshore facilities. Like the liability limits for offshore facilities, these limits also transfer the cost of damages associated with highly profitable economic activity from those profiting from the activity to innocent victims. By doing so, the limits discourage expenditures for environmental and safety protections. Congress should also amend the Oil Pollution Act to eliminate these limits on the liability of responsible parties.

As with the limits on the liability of responsible parties of offshore facilities, the Oil Spill Liability Trust Fund lessens but does not eliminate the problems associated with the limits on liability for other responsible parties. A major spill would exhaust the $1 billion limit on payments from the fund and leave victims uncompensated. Moreover, having the fund pay for the claim lessens the incentive for the responsible party to pay for environmental and safety protections.

B. Attorney Fees

One notable omission in the Oil Pollution Act is the lack of any express provision allowing claimants to recover the costs of attorney fees.164 Given the traditional American rule that parties

163. For a moving description of the lasting impact of the Exxon Valdez spill on fishers in Alaska, see Bailout Prevention Hearing, supra note 144 (statement of R.J. Kopchak, Cordova Dist. Fishermen United & Prince William Sound Sci. Ctr.).

164. One might argue that the unusual statutory definition of “damages,” which includes the “cost of accessing the damages,”Oil Pollution Act § 1001(5), 104 Stat. at 486 (codified as amended at 33 U.S.C.A. § 2701(5) (West, Westlaw through Feb. 25, 2011)), is broad enough to allow recovery of attorney fees. That argument, however, is unlikely to prevail in view of the Supreme
are responsible for their own legal fees, the omission of a provision expressly permitting recovery of attorney fees is not surprising. However, the failure to allow recovery of attorney fees denies victims full recovery for their economic losses. Congress should, therefore, amend the Oil Pollution Act to include a provision specifically allowing claimants to recover reasonable attorney fees they incur in presenting their claims.

A person with a potential claim under the Oil Pollution Act can face a complicated set of legal alternatives. The potential claimant might file a claim under the Act or seek relief under admiralty or maritime law or state tort law. A claimant who decides to proceed with an Oil Pollution Act claim will have to follow the claims procedures established by the responsible party or those established by the federal government if the claimant proceeds against the Oil Spill Liability Trust Fund. In any event, the claimant will have to produce adequate evidence of a loss covered by the Oil Pollution Act. If a claim is denied, the claimant may have to file a judicial action to recover damages. Navigating this legal regime will require most claimants to secure legal assistance, and they must recover the reasonable value of this assistance if they are to be fully compensated.

Even if one concedes that a potential claimant under the Oil Pollution Act needs legal counsel, one might still ask why recovery of attorney fees should be allowed. After all, recovery of attorney fees is not generally permitted for contract or tort claims in the United States.

Recovery of attorney fees is appropriate under the Oil Pollution Act because neither the contract nor the tort model fits these claims. Both types of claims are easily distinguishable. Recovery in contract cases is generally limited to economic losses, but whether attorney fees are recoverable in a contract claim depends not on positive law but the agreement of the parties; and victims filing an Oil Pollution Act claim have had no opportunity to negotiate recovery of attorney fees. In tort cases, the allowance of general damages permits recovery of damages beyond the direct economic loss suffered by the victim. Recovery of these damages frequently means that a plaintiff’s recovery is greater than the direct economic loss suffered even after the attorney fees are paid.

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Court’s normal requirement for “explicit statutory authority” to award attorney fees. See, e.g., Key Tronic Corp. v. United States, 511 U.S. 809, 819 (1994).

Federal statutes protecting consumers and prohibiting denials of civil rights provide a better model for Congress to follow in the Oil Pollution Act. To ensure that an injured party recovers the full extent of his or her economic loss, the statutes frequently allow successful plaintiffs to recover attorney fees.\textsuperscript{166} The Oil Pollution Act also generally limits recovery to the economic value that a claimant has lost.\textsuperscript{167} Without a provision for attorney fees, a claimant who retains an attorney will recover less than the economic value of the damages suffered.

Fortunately, reasonable attorney fees should be fairly modest for most claims under the Oil Pollution Act. The combination of strict liability,\textsuperscript{168} easy identification of the responsible party,\textsuperscript{169} enumeration of the damages that can be recovered,\textsuperscript{170} and the possibility of filing an administrative claim rather than a judicial action if a responsible party fails to pay a claim\textsuperscript{171} means that recoveries should be common and litigation rare in oil spill cases.

One by-product of allowing recovery of reasonable attorney fees might be an increase in claims filed under the Oil Pollution Act rather than under state tort law.\textsuperscript{172} Currently, a claimant who


\textsuperscript{167}. 33 U.S.C. § 2702(b) (2006); \textit{see supra} notes 84–91 and accompanying text.

\textsuperscript{168}. \textit{See supra} note 31 and accompanying text.

\textsuperscript{169}. Oil Pollution Act §§ 1001(32), 1014(a), 104 Stat. at 488, 501 (codified as amended at 33 U.S.C.A. §§ 2701(32), 2714(a) (West, Westlaw through Feb. 25, 2011)).

\textsuperscript{170}. \textit{id.} § 1002(b) (codified at 33 U.S.C. § 2702(b) (2006)).

\textsuperscript{171}. \textit{id.} § 1017(d), 104 Stat. at 505 (codified at 33 U.S.C. § 2717(d) (2006)); \textit{see supra} notes 125–29 and accompanying text.

\textsuperscript{172}. The Administrator of the Gulf Coast Claims Facility appears to have reached this conclusion. After initially discouraging claimants from using attorneys, the Administrator has contracted with the Mississippi Center for Justice to provide free legal assistance to claimants, see Information Regarding Free Legal Assistance, GULF COAST CLAIMS FACILITY, http://www.gulfcoastclaimsfacility.com/legalassistance (last visited Feb. 23, 2011), and the Administrator’s final rule regarding payments permits payment of reasonable fees of accountants who assist claimants in preparing their claims, see Final Rules Governing Payment Options, Eligibility and Substantiation Criteria, and Final Payment Methodology, GULF COAST CLAIMS FACILITY, 8 (Feb. 18, 2011), http://www.gulfcoastclaimsfacility.com/FINAL_RULES.pdf.
needs the assistance of a retained attorney in an oil spill case will suffer an economic loss if the claimant files an Oil Pollution Act claim and has to pay the attorney out of the payment proceeds. To try to make the claimant whole, some attorneys may be more likely to file claims in admiralty or under state law in hopes of recovering additional damages for the client. If a reasonable attorney fee is payable under the Oil Pollution Act, the attorney may be more likely to recommend that the claimant pursue that relatively sure and swift remedy.

C. Improved Funding for the Oil Spill Liability Trust Fund

The elimination of liability limits does not guarantee that all claims will be paid. Most companies facing the claims that BP faced would not have funded a claims authority with $20 billion. Instead, they would have headed to court seeking a limit to their damages or the protections of the bankruptcy court. To protect victims in such cases, the Oil Liability Trust Fund can be used to pay removal costs and damage claims in an amount not to exceed $1 billion per incident. If the goal of full compensation for victims is to be achieved, the limit on payments from the fund for any particular incident needs to be eliminated. For the fund to remain solvent without that limit, Congress should increase both the revenue available to the fund and the fund’s borrowing capacity.

The BP Deepwater Horizon oil spill was not the first in which claims exceeded the liability limits established in the Oil Pollution Act. Indeed, a September 2007 study by the General Accountability Office reviewed 51 major spills in which the fund had paid between 22% and 28% of the removal costs and damages, and the study expressed concern about whether the revenues available to the fund were adequate to support the payments it is required to make. The solution to this potential problem is to increase the resources that the fund can use to pay claims.


174. Oil Pollution Act § 9001(c)(1), 104 Stat. at 574 (codified at 26 U.S.C. § 9509(c)(2) (2006)). Only $500 million of the $1 billion is available to pay natural resource damage assessments and claims. Id. § 9001(c)(2).

175. U.S. Gov’t Accountability Office, supra note 135, at 1.
The assets of the fund at the end of 2010 totaled approximately $1.7 billion.\textsuperscript{176} Originally, the fund had authority to borrow $1 billion, but that authority expired at the end of 1994.\textsuperscript{177} These amounts would have been grossly insufficient to cover removal costs and damage claims associated with the BP Deepwater Horizon spill. For the fund to respond to a major spill in the future, the fund's balance, its borrowing capacity, and the revenue stream that support the fund all need to be increased.

The fund balance needs to be substantially larger to ensure prompt payment of removal costs and initial damage claims in the event of a major spill. A fund balance of approximately $5 billion with authority to borrow an equal amount should be sufficient to permit a timely response to future spills. If a catastrophic spill in the future were to require a further infusion of funds, the $10 billion total should suffice to permit an initial response and to allow Congress to devise a permanent solution.

Because the size and timing of the next major oil spill are unknown, the fund needs to achieve the larger balance fairly quickly. A prudent approach would be to increase the current tax on oil to a level that would achieve the desired fund balance within three to five years. Once the $5 billion balance is reached, Congress could direct the President to suspend the tax or to reduce it to a level adequate to preserve the fund balance. If claims from one or more spills are likely to exceed the balance of the fund, the federal government could begin collecting the full amount of the tax until the threat to the solvency of the fund is eliminated.

\textbf{D. Better Definition of Claims Procedures}

Although the Oil Pollution Act imposes liability on responsible parties, it includes almost nothing about the standards or procedures for paying those claims. The result is uncertainty, ambiguity, and a lack of transparency regarding how and when claims will be paid. Before a spill occurs, the Oil Pollution Act should establish the parameters for the payment of claims.

Congress should amend the Oil Pollution Act to require every responsible party to submit a plan for paying claims in the event of a spill, to establish minimum requirements those plans must satisfy, and to authorize the President to issue regulations with

\begin{footnotesize}
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\item[] 177. Oil Pollution Act § 9001(d), 104 Stat. at 574 (codified at 26 U.S.C. § 9509(d) (2006)).
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\end{footnotesize}
detailed standards and procedures for the plans. The plans for paying claims should be part of the responsible party's proof of financial responsibility. The same official who is responsible for determining financial responsibility should also have the duty to determine whether the responsible party has a claims plan that is consistent with statutory and regulatory requirements.

The Oil Pollution Act itself should list the minimum requirements that a claims plan must satisfy. The statute should retain the existing requirements to pay interim claims, to advertise claims procedures following the President's designation as a responsible party, and to pay interest on claims beginning 30 days after the claim is filed. In addition, the statute should require that the plan identify the person or entity responsible for paying claims, the address to which claims can be submitted, the procedures for securing answers to questions regarding claims, and the method for seeking review of an adverse claims determination. The law should also specify the time periods within which the responsible party must pay interim and final claims.

Regulations should address the details of the claims procedure. The regulations should specify matters such as the forms that should be used to submit claims, the evidence necessary to prove a claim, and the method of submitting interim claims.

One additional procedural issue that needs clarification is the permissibility of both filing an Oil Pollution Act claim and pursuing a judicial action under some other law that authorizes recovery. Currently, the Oil Pollution Act says nothing about pursuing simultaneous claims and judicial actions against a responsible party, but section 1013 does limit claims against the Oil Spill Liability Trust Fund when a judicial action is pending. No claim against the fund "may be approved or certified" while an action is pending "in court to recover costs which are the subject of the claim."

178. Id. § 1016(a), 104 Stat. at 502 (codified as amended at 33 U.S.C.A. § 2716(a) (West, Westlaw through Feb. 25, 2011)) (vessels); id. § 1016(c), 104 Stat. at 503 (offshore facilities).
181. Id. § 1005(a), (b)(1), 104 Stat. at 493–94 (codified at 33 U.S.C. § 2705(a), (b)(1) (2006)).
182. The Coast Guard has already established regulations governing procedures for claims filed against the Oil Spill Liability Trust Fund. See 33 C.F.R. §§ 136.1–313 (2010).
This restriction on simultaneous claims and judicial actions seems unduly restrictive. Certainly, no claimant should receive double payment for the same costs or damages. Moreover, the fund’s right to subrogation when it pays damages should permit the fund to condition any payment on a requirement that the claimant dismiss any pending action for those costs and damages covered by the fund. However, filing a judicial action may be a necessity to preserve other claims while a claim against the fund is pending. Prescriptive statutes often require that tort claims be filed within a year, and a claim cannot ordinarily be filed against the fund until the responsible party has denied the claim or 90 days have elapsed after a claim has been presented to the responsible party. As a result, claims might be pending against the fund as the prescriptive period expires for a judicial action.

More reasonable limits on simultaneous claims could protect the interests of both the fund and the claimant. Congress should forbid double recovery of the same costs or damages in a judicial action and a claim against the fund, and it should require that any claimant who accepts a final payment from the fund to dismiss any pending judicial action to recover the damages that the fund has paid. Congress should not, however, force the claimant to choose between the judicial action and the administrative claim before the claimant knows whether the fund will pay the claim.

E. Preservation of Rights Under Other Laws

As federal liability for oil spills has expanded over the years, the federal statutes imposing liability have consistently preserved other bases for imposing liability. In the Oil Pollution Act, section 1018 continues the authority of states to impose liability for damages or to allow recovery of removal costs. Section 6001 preserves all admiralty remedies “except as otherwise provided.” Despite the breadth of these savings provisions, some questions have arisen regarding recovery under these laws.

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184. Id. § 1012(f), 104 Stat. at 499 (codified as amended at 33 U.S.C.A. § 2712(f) (West, Westlaw through Feb. 25, 2011)).
185. See, e.g., LA. CIV. CODE ANN. art. 3492 (1994).
186. Oil Pollution Act § 1013(c), 104 Stat. at 501 (codified at 33 U.S.C. § 2713(c) (2006)).
189. Id. § 2751(e).
Several uncertainties exist with respect to the preservation of state claims. First, the applicability of section 1018 to oil pollution originating from oil spills outside the territorial limits of the state is imperfectly stated. Second, the section does not include an express preservation of the right to recover punitive damages under state law. Third, when defendants can remove state claims to federal court is unclear.

Section 1018(a) preserves liability under state law for "the discharge of oil or other pollution by oil within such state." The language is broader than section 311's savings clause, which only applies to "discharges . . . into any water within [a] state." The apparent purpose was to cover the exact situation of the BP Deepwater Horizon oil spill—that is, to allow recovery of damages under state law when damages inside the state are the result of an oil spill that originates outside the territorial boundaries of the state. As presently written, however, section 1018 does not preclude the argument that admiralty preempts the claim even though admiralty law would not generally allow recovery of economic losses not directly connected to personal injury or property damage.

At least one circuit court has allowed recovery of economic damages under state law in a spill that occurred prior to the enactment of the Oil Pollution Act. Other courts should follow that approach to find that the current language of section 1018 is broad enough to allow state law to apply to claims originating from spills that occur outside the territorial jurisdiction of the state. Nonetheless, Congress should eliminate all ambiguity by amending the Oil Pollution Act to add an express provision permitting recovery under state law when damages occur within the state as a result of an oil spill outside the state's territorial jurisdiction.

Congress should also amend section 1018 to confirm that a state can impose punitive damages with respect to an oil spill. Even though the language of section 1018 preserving state claims does not distinguish between compensatory and punitive damages, defendants might still argue that admiralty law preempts punitive damages where they would not be allowed by

190. Id. § 2718(a).
191. Id. § 1321(o).
193. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623 (1st Cir. 1994).
admiralty law\textsuperscript{195} or limits them when maritime law would set a lower limit on the maximum punitive damages that can be awarded.\textsuperscript{196} Here again, Congress should amend section 1018 to add a provision expressly authorizing recovery of punitive damages under state law.

Finally, the Oil Pollution Act should protect more explicitly a plaintiff's option to pursue state law claims in state court. Defendants in litigation arising from the BP Deepwater Horizon oil spill have moved to remove cases to federal court even when the plaintiffs have relied only on state claims.\textsuperscript{197} Having made the substantive decision to preserve a plaintiff's right to recover under state law, no sound reason exists for denying the plaintiff the right to proceed in state court when the plaintiff has not asserted a claim based on federal law and no diversity of jurisdiction exists between the parties. Congress should amend the Oil Pollution Act to add an express provision preserving the right to proceed in state court when claims are based solely on state law and do not involve diversity of citizenship.

Congress should also act to resolve ambiguities regarding the preservation of admiralty and maritime claims. Despite section 6001, at least two federal courts have ruled that the Oil Pollution Act precludes the award of punitive damages in admiralty cases.\textsuperscript{198} Both of these cases preceded the United States Supreme Court decision allowing punitive damages in \textit{Exxon Shipping Co. v. Baker},\textsuperscript{199} the case arising from the \textit{Exxon Valdez} spill; and \textit{Baker} rejected the argument that section 311 of the Clean Water Act precludes an award of punitive damages for an admiralty claim.\textsuperscript{200} Given that the Oil Pollution Act—unlike section 311—contains a provision expressly disavowing any intent to affect admiralty or maritime law or remedies,\textsuperscript{201} federal courts should follow \textit{Baker} and hold that the Oil Pollution Act does not preempt the award of

\textsuperscript{195} See \textit{S. Port Marine, LLC v. Gulf Oil Ltd. P'ship}, 234 F.3d 58 (1st Cir. 2000).
\textsuperscript{199} 554 U.S. 471.
\textsuperscript{200} \textit{Id.} at 488–89.
punitive damages under admiralty law.\textsuperscript{202} To eliminate all ambiguity, however, Congress should amend the Oil Pollution Act to declare that nothing in the Act limits the availability of punitive damages for admiralty claims.

Despite the ruling on the preemption issue, the Supreme Court’s decision in \textit{Baker} is less than completely satisfactory on the punitive damages question. As noted earlier,\textsuperscript{203} the Supreme Court limited the punitive damages recoverable in \textit{Baker} to an amount equal to compensatory damages. Congress should enact new legislation to overrule this limitation and to allow juries to award punitive damages that are consistent with constitutional due process.\textsuperscript{204}

The provisions preserving the rights of plaintiff to recover under state law and the remedies available in admiralty and maritime law justify the decisions to limit recovery under the Oil Pollution Act to damages to natural resources and property and economic losses and to exclude any mention of personal injury or punitive damages. State law and admiralty law have well-developed systems governing those topics. Although those systems certainly have imperfections,\textsuperscript{205} reforming those existing systems is preferable to beginning anew under the Oil Pollution Act. Proper operation of those systems for recovery, however, requires acceptance of the central premise of sections 1018 and 6001: Allowing recovery of limited damages under the Oil Pollution Act should not have any impact on liability under either state law or admiralty and maritime law.

\textsuperscript{202} As is true with section 311, nothing in the Oil Pollution Act suggests that the statute “somehow preempts punitive damages, but not compensatory damages.” \textit{Baker}, 554 U.S. at 489. Moreover, the Act provides “no clear indication of congressional intent to occupy the entire field of pollution remedies, nor is it likely that punitive damages for private harms will have any frustrating effect on the CWA’s remedial scheme.” \textit{Id. See generally} John W. deGravelles, The British Petroleum Oil Spill, Punitive Damages, and the Oil Pollution Act (July 2010) (presentation to Admiralty Section Meeting of the American Association for Justice’s annual convention in Vancouver, British Columbia).

\textsuperscript{203} \textit{See supra} notes 59–63 and accompanying text.


F. Penalty for Late Payment of Claims

For the reasons outlined in the preceding subsection, Congress should not amend the Oil Pollution Act to allow punitive damages when a responsible party's egregious conduct causes an oil spill. Instead, Congress should amend the Oil Pollution Act to remove any doubt that it precludes awards of punitive damages under admiralty law or under state law, and Congress should enact legislation overruling the Supreme Court's decision limiting punitive damages in admiralty cases to an amount equal to compensatory damages. Congress should also amend the Oil Pollution Act to permit a different type of punitive damages, a penalty when a responsible party fails to pay claims in a timely fashion.

The Oil Pollution Act clearly defines responsible parties for oil spills and imposes strict liability on them for removal costs and certain economic damages that result from oil spills. That approach permits prompt payment of claims for damages to natural resources and property as well as claims for economic and subsistence losses suffered by individuals, businesses, and governments. The only incentive the Oil Pollution Act provides to encourage prompt payment is the duty to pay interest beginning 30 days after a claim is filed. A far stronger and more appropriate sanction would be to impose punitive damages if a claim is not paid within a reasonable time—perhaps 90 days—after proof of the loss is presented to the responsible party. If exceptional circumstances make the specified time period inappropriate, the statute could allow the President to extend the period for payment of final claims so long as interim claims are regularly paid on an ongoing basis.

This approach strikes a fair balance between the legitimate interests of the claimants and those of the responsible party. It provides claimants with a strong remedy if a responsible party fails to pay a claim within a reasonable period. At the same time, it requires the claimant to present adequate proof of loss before the duty to pay arises.

207. See supra notes 76–80 and accompanying text.
208. Under current law, if a responsible party fails to settle a claim within 90 days, the claimant can present the claim to the Oil Spill Liability Trust Fund. Oil Pollution Act § 1013(c), 104 Stat. at 501 (codified at 33 U.S.C. § 2713(c) (2006)).
209. See id. § 1005(a), 104 Stat. at 493 (codified at 33 U.S.C. § 2705(a) (2006)).
The idea for this type of penalty damages comes from insurance claim statutes rather than tort law. Like the Oil Pollution Act claims, first-party insurance claims involve clear principles of liability for sums that can normally be proved with documentary evidence. Thus, the insurance statutes provide an appropriate model for punitive damage claims under the Oil Pollution Act. In Louisiana, insurance statutes provide for penalties in a range from 50% of the claim to twice the amount of the claim. Under the Oil Pollution Act, a penalty of the greater of $1,000 or the amount of the claim should be sufficient to encourage the responsible party to pay claims in a timely fashion.

**CONCLUSION**

The Oil Pollution Act marked a significant advance for making those responsible for oil spills liable for cleanup costs and damages resulting from oil spills. It established a strict liability regime that covers removal costs and damages to natural resources and property as well as other economic losses that have traditionally been hard to recover under state tort law and admiralty law. Without the Oil Pollution Act, the likelihood that BP would have elected to litigate its liability in a variety of suits that stretched over a number of years would have been much higher.

Despite the improvements that the Oil Pollution Act made to prior law, the BP Deepwater Horizon oil spill has highlighted several shortcomings of the existing scheme of liability for oil spills. This Article identifies six weaknesses of the Oil Pollution Act—the statutory limits on the liability of responsible parties, the lack of an express provision allowing recovery of attorney fees, insufficient funding for the Oil Spill Liability Trust Fund, inadequate claims procedures, uncertainties in the preservation of rights under state law and admiralty law, and the need for a penalty provision applicable when responsible parties fail to pay claims in a timely fashion. It then suggests ways that Congress could amend the Oil Pollution Act or other statutes to redress these weaknesses.

Since 1970, Congress has gradually expanded the liability for oil pollution as oil spills revealed problems with existing laws. Following spills off the coasts of England and California, the

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210. See, e.g., LA. REV. STAT. ANN. § 22:1821(A) (Supp. 2011) (health and accident claims); id. § 22:1892(B)(1) (claims other than health and life claims).

211. See supra note 210 (double the amount of the claim for health and accident insurance, fifty percent of the claim for all other insurance).

212. Exxon followed such a strategy and the litigation extended until the Supreme Court decision in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), almost two decades after the spill that gave rise to the litigation.
Water Quality Improvement Act of 1970 made owners and operators liable for some of the removal costs of oil spills. Two years later, the Federal Water Pollution Control Act Amendments of 1972 extended the liability to spills of hazardous substances. In 1978, Congress enacted a cautious experiment in liability for damages from spills associated with offshore activities. Following the *Exxon Valdez* spill in 1989, Congress enacted the Oil Pollution Act. It expanded liability for removal costs and, for the first time, made responsible parties liable for some damages caused by oil spills. Now, the BP Deepwater Horizon oil spill has revealed weaknesses that remain in the compensation scheme established by the Oil Pollution Act. As it has done in the past, Congress should enact new legislation to address those weaknesses.