OPA 90:
Twenty-Five Years of Judicial Interpretation

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I. PROLOGUE

The Oil Pollution Act of 1990[1] (Act) was signed into law on August 18, 1990, and with it began a new paradigm in oil pollution prevention, response, and liability. This statute has been in force for nearly twenty-five years and endured regulatory implementation, statutory amendments, executive branch interpretation, and ultimately judicial branch interpretation. The Act also survived major oil spills such as DEEPWATER HORIZON and M/V ATHOS I, which may have stressed and strained the sinews that bind the Act together. In short, the Act continues to govern the oil pollution landscape. This Article will explore whether the intricate system developed by the drafters of the Act remains

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1. Pub. L. No. 101-380, 104 Stat. 484 (1990) (codified as amended 33 U.S.C. §§ 2701-2762 (2012)).

intact and how judicial interpretation of the Act has strengthened the system or weakened its application.

This analysis will specifically examine particular issues that repeatedly arise in applying the Act and are frequently encountered by our courts. The Article will examine the issue of punitive damages in the realm of pollution response costs and damages. Punitive treatment for spillers of oil was a major issue in developing the Act and now is a primary issue for both litigants and courts to address as the role of punitive damages in the general maritime law expands. Also of interest to courts in recent years is the recovery of purely economic losses in the context of oil pollution damages. The original text of the Act addresses the issue of purely economic damages, and courts are now confronting the context and limitations of these damages.

Finally, the Act established the National Pollution Funds Center (NPFC), and in its role of arbiter and trustee of the preexisting Oil Spill Liability Trust Fund (Fund), NPFC implemented regulations and policies regarding the administration of the Fund and payment of claims. Frequently, courts are asked to address appeals from disappointed claimants or responsible parties who fail to obtain relief from the Fund. Moreover, the NPFC, in its role as litigant, also uses courts to force responsible parties to pay removal costs or damages or to argue that the responsible party is required to pay in excess of the statutory limitation of liability. As such, courts are frequently asked to interpret the Act and its implementing regulations to determine whether the NPFC is acting in accordance with the law or instead in an arbitrary and capricious manner.

Reviewing judicial interpretations over the last twenty-five years reveals several challenges presented by the Act. As will be discussed below, the Act is a complicated creature extending into several areas of the law, amending existing statutes, and creating entirely new rights and responsibilities. The legislative objectives and compromises embedded in the Act are not always obvious from its plain language, nor are they found in the legislative history. Often, courts are not sufficiently apprised how interpretations of the existing language may upset the balance of compromise.

Judicial interpretation of the Act is further complicated by regulatory implementation of certain provisions of the Act by the NPFC, interpretations that are either ignorant of the delicate balance established in the legislation or willfully and openly hostile to that balance. Finally, courts are continually confronted with the changing textures and contours of the general maritime law that litigants use as leverage and justification for rewriting OPA 90's provisions through judicial

interpretation. This Article will examine judicial interpretations that strengthen and enhance the Act, as well as those that challenge and threaten the very foundation of the response and liability system.

The personal bias of the author must also be disclosed. As the primary United States Coast Guard (Coast Guard) and Department of Transportation negotiator of OPA 90, the struggles and compromises necessary to produce a "passable bill" were a substantial part of my daily existence for two years. As such, I see OPA 90 as a vehicle for balance, moderation, and certainty in a pollution response system that was broken and unmanageable prior to 1990. It is against this backdrop that this Article is written for the purpose of examining the judicial interpretation of the federal oil pollution management system.

II. THE BEGINNING: THE OPA 90 OBJECTIVES

Any current confusion and consternation regarding OPA 90 may in large part be traced back to its objectives. OPA 90 modified and largely replaced a pollution system codified in the Clean Water Act[2] and Federal Water Pollution Control Act.[3] The Coast Guard, often using federally appropriated funds, conducted many oil spill responses under the pre-OPA regime. The spiller was expected to remove oil from the navigable waters of the United States at its own expense; however, the law permitted the spiller to limit some of its liability for reimbursement of removal costs performed by the Coast Guard. As a result and as a cost-saving measure, some spillers purposefully failed to remove the oil and would instead pay the Coast Guard for its response up to the spiller's limit of liability. In most cases, the Coast Guard was tasked with finding and hiring spill response resources to remediate large oil spills that would cost more than a spiller's limitation of liability.[4] Accordingly, clean-up costs fell to the government rather than the spiller.

Even before the M/T EXXON VALDEZ disaster, which acted as the congressional catalyst to implement oil pollution response and liability reform, the Coast Guard and Congress were examining ways to modify the response system to limit Coast Guard involvement to monitoring and coordinating major spill responses. As flesh was added to these bones during the OPA 90 negotiating process, it became clear the pollution response and liability system would be changed forever. The negotiating parties, both formal and informal, included the oil industry,

2. 33 U.S.C. §§ 1251-1387.

3. Pub. L. No. 95-217, 91 Stat. 1566 (1977).

4. *See* David H. Sump, *The Oil Pollution Act of 1990: A Glance in the Rearview Mirror*, 85 TUL. L. REV. 1101, 1103 (2011).

the oil transportation industry, clean environment advocates, fiscal conservatives, the insurance industry, international maritime organizations, mariners, and ultimately those business concerns that stood to benefit from the new legislation. Although it was difficult to meet the expectations and "demands" of all of the interest groups attempting to influence the final legislation, the final text of OPA 90 represents the compromises and agreements necessary to produce legislation that would pass the U.S. House of Representatives and U.S. Senate and be signed by President George H.W. Bush in August 1990.

Jurists, scholars, and practitioners struggle to understand and interpret OPA 90 in part because it is a complicated beast. OPA 90 states as its purpose, "*To establish limitations on liability for damages resulting from oil pollution, to establish a fund for the payment of compensation for such damages, and for other purposes*."[5] The primacy of limitation of liability and a fund to pay for the payment of compensation in the statement of purpose is not serendipitous; it in fact was the cornerstone of the reformed system. During negotiation sessions to develop the text of OPA 90, the following bedrock principles were necessary to ensure passage:

- the spiller of oil must be strictly liable for removing the oil from navigable waters (or remediate a substantial risk of a spill) absent proof of a solely responsible third party;
- the spiller is responsible to have under contract sufficient commercial resources to respond to a worst case discharge;
- the spiller is responsible for providing proof of financial responsibility equal to the maximum amount of liability established by the Act, as reduced by the limitation of liability;
- the spiller must be permitted to limit its liability subject to certain conditions;
- the spiller must be liable for a wide variety of claims for damages caused by the spill;
- persons injured by oil pollution must have a prompt and easy means of making claims and adjudicating those claims;
- a significant pool of money funded by the oil industry must be immediately available to cover all costs associated with oil pollution remediation and damages; and
- perhaps most importantly, the financial risk and exposure of importing and transporting oil in the United States as a result of this legislation must not exceed the financial benefit of doing so.

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5. Pub. L. No. 101-380, 104 Stat. 484 (emphasis added).

As is obvious to some degree by the principles set forth above, the entity that owns, operates, or demise charters the vessel or that owns or operates the facility from which oil is discharged is identified as the "responsible party."[6] A key to understanding OPA 90 is grasping the principle that all obligations and responsibilities thrust upon the responsible party are contained in the Act, primarily in subchapter I, "Oil Pollution Liability and Compensation."[7] OPA 90 imposed strict liability on the responsible party,[8] required the responsible party to prove its financial responsibility,[9] required the responsible party to fund all cleanup operations without regard to limitation,[10] and required the responsible party to pay all third-party damages that result from the incident.[11]

The obligations imposed on the responsible party were far greater than any previous remedial environmental statute imposed upon private industry. In addition to paying for the cost of removing the discharged oil, OPA 90 also required the responsible party to pay "for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage."[12] This was soon determined to be a huge financial liability because natural resource trustees required expensive assessment reports and because the cost of replacing depleted natural resources could be significant.

Concerns legitimately arose during the negotiation process as to whether the costs and liability imposed upon the responsible party were practical or financially survivable. Although drafters were confident that Exxon and Shell Oil could support the costs and damages imposed by the legislation, concerns grew that oil transportation companies in domestic service could not withstand the financial burden. Battle lines were drawn between negotiators for lobbyists concerned with protecting the environment from irresponsible operators and negotiators for lobbyists concerned that even major U.S. tug and barge companies and inland tank barge operators could survive even a single major discharge. Proposed financial responsibility provisions requiring transportation operators to demonstrate the ability to pay to the full extent of statutory liability put into question whether these operators could ultimately obtain insurance to cover the liability.

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6. 33 U.S.C. § 2701(32)(A)-(C).
7. *Id.* §§ 2701-2720.
8. *Id.* §§ 2702-2703.
9. *Id.* § 2716(a).
10. *See id.* § 2702.
11. *See id.*
12. *Id.* § 2702(b)(2)(A).

As a result of these genuine concerns, compromises were reached to ensure that capable and responsible tank vessel/tank barge operators and facility operators could operate economically, while making it possible to *punish* irresponsible operators by increasing the costs associated with poor operation. The compromises created liability limits for all operators, but also identified those circumstances under which limitation of liability would not be available. Drafters described these circumstances as "gross negligence or willful misconduct" for much of the negotiation process.[13]

Just as the final version of the proposed legislation was being prepared, the Coast Guard requested inclusion of an additional "circumstance" that would defeat limitation: "violation of an applicable Federal safety, construction, or operating regulation by, the responsible party."[14] The Coast Guard was concerned about difficulty in "adjudicating" the gross negligence/willful misconduct standard and was also concerned that truly "bad actors" may escape liability under this standard. The simplicity of the additional standard proposed by the Coast Guard strongly weighed in its favor, and it was accepted into the final draft. The proposal was favored because violation of an applicable federal statute would be proven merely by the findings of the Coast Guard marine casualty investigative report or, even more persuasively, by civil penalty action taken against the vessel or facility operator for the violation. The NPFC would require no special adjudication of the violation of federal regulation standard in assessing the application of limitation.

The inclusion of circumstances under which limitation of liability protection would be lost to the spiller was ultimately a punishment provision. As negotiated, the drafters considered limitation of liability to be the normal situation; responsible parties would lose the right to limit only on rare occasions. Limitation of liability was considered such an important and valuable feature of the regime that the drafters used "loss of limitation" as leverage against uncooperative responsible parties.

In order to accomplish its goals, in addition to gross negligence, willful misconduct, and violation of federal regulations as grounds for losing limitation of liability, the drafters included three other grounds justifying loss of limitation: (1) failure to report the spill as required by law, (2) failure to cooperate with and assist the officer responsible for removal activities, and (3) failure to comply with an order of the federal on-scene coordinator.[15] Any one of these actions on the part of the

13. *See id.* § 2712(b).
14. *See id.* § 2704(c)(1)(B).
15. *Id.* § 2704(c)(2).

responsible party would result in the loss of the ability to limit liability, which was intended to be a severe consequence for an uncooperative responsible party.

I would note as an aside that were the NPFC to routinely deny limitation based on gross negligence, willful misconduct, and violation of federal regulations, responsible parties would eventually presume that limitation would be unavailable to them and be less deterred in behaving in an uncooperative fashion.

Underlying the negotiated compromises such as limitation of liability was the safety net called the Oil Spill Liability Trust Fund. The Fund preexisted OPA 90 and was previously authorized to collect taxes pursuant to an existing tax on petroleum.[16] OPA 90 provided statutory authorization to use the Fund for the purposes set forth in the Act.[17] In 1990, the Internal Revenue Service was directed to send to the Fund five cents of the tax on each barrel of refined or imported crude oil. Today that amount is eight cents per barrel and will be collected until such time as the balance in the Fund exceeds $2 million.[18] The tax is levied on oil producers.[19]

In 1990, several independent oil spill statutory regimes were in existence, including the Trans-Alaska Pipeline Act, the Outer Continental Shelf Lands Act, the Federal Water Pollution Control Act, and the Deepwater Port Act. Each of the pollution regimes operated an individual pollution fund account. OPA 90 provided that upon its enactment, the monies remaining in the preestablished accounts would be transferred to the Fund and all the existing liabilities from those funds would be transferred to the Fund as well.[20] As a result, "seed money" was deposited into the Fund upon enactment, and no further funds were collected from these various pollution accounts.

In addition to the five-cents-per-barrel tax on oil and the balances from the various funds identified above, the Fund was and is supplied with money collected for damages to natural resources,[21] any action for subrogation to recover claims paid by the Fund,[22] as well as any penalty paid pursuant to section 311 of the Federal Water Pollution Control Act. Finally, any reimbursement made by the responsible party for payments made by the NPFC pursuant to the Act is also deposited in the Fund. The

16. *See* 26 U.S.C. § 4611 (2012).
17. 33 U.S.C. § 2712.
18. 26 U.S.C. § 4611(c)(2)(B)(i), (f)(1).
19. *Id.* § 4611(d).
20. *Id.* § 9509(b).
21. 33 U.S.C. §§ 2706(f), 2702(b)(2)(A).
22. *Id.* § 2715.

most important thing to recognize in this list is that *no taxpayer funds* are deposited into the Fund, except for the taxes levied against oil producers for oil imported or refined in the United States.

The existence of the Fund and the sources of the monies entering the Fund proved important in the negotiation process. The Fund provided a nontaxpayer/nonpublic-funded safety net for spills where (1) no responsible party could be found, (2) the responsible party was deter-mined to be judgment-proof beyond its limit of liability, or (3) the responsible party was a responsible carrier or facility for which limitation of liability was a proper result and where incident removal costs and damages exceeded the limitation amount. The oil industry, the oil transportation industry, and oil facilities were more willing to accept strict liability and significant exposure to third-party damages claims and natural resource damage assessment claims with the knowledge that a reasonable limitation of liability was available and pollution insurance could be procured at those reasonable levels.

As a result, the oil industry was obligated to provide petroleum tax dollars to meet the $1 billion Fund limit, which would automatically replenish through oil taxes when necessary.[23] So even when the limitation of liability was properly invoked, the general revenue of the United States Treasury was not implicated because funds necessary to satisfy the costs were available through the Fund.

While this compromise was acceptable to oil and oil transportation industry interests, safety and environmental advocacy groups remained concerned that the price for spoiling the marine environment through reckless behavior was not sufficiently steep. Drafters inserted several provisions intended to punish responsible parties that did not use proper procedures, did not hire competent and safe crew, or did not do business with competent and safe business partners. The first punishment for reckless responsible parties is found in 33 U.S.C. § 2706(c)(1), which denies limitation of liability to responsible parties that evidence gross negligence or willful misconduct or that violate a federal statute applicable to the cause of the incident.

At the time of enactment, OPA 90 provided for administrative penalties not to exceed $10,000 per violation up to a maximum amount of $125,000, with due process hearings included in the scheme.[24] For discharging oil into the navigable waters of the United States, violators were subject to civil penalties of up to $25,000 per day of the violation or

23. 26 U.S.C. §§ 9509(b), 4611(c).
24. 33 U.S.C. § 1321(b)(6)(B).

up to $1,000 per barrel of oil discharged.[25] As further punishment, oil discharged into the navigable waters of the United States due to gross negligence or willful misconduct resulted in a "civil penalty of not less than $100,000, and not more than $3,000 per barrel of oil . . . discharged."[26] As a consequence, poor behavior by responsible parties could lead to a tripling of the civil penalty against them.

Finally, there were concerns during the drafting and negotiating process that responsible parties should not be held liable for discharges that were solely caused by a third party. As a result, drafters modified the liability provisions to provide a defense to all liability if a third party were solely responsible for the spill.[27] The drafters provided a complete defense to all liability for discharges caused *solely* by acts of God, acts of war, or acts of a third party, provided the responsible party exercised due care with respect to the oil concerned, took precautions against foreseeable acts or omissions of third parties, and took precaution against the foreseeable consequences of those acts.[28] In order to further guard against a responsible party's use of judgment-proof third parties to perform some of its high-risk operations, the Act was written to deny the third-party defense to any employee or agent of the responsible party and any third party whose actions were in connection with any contractual relationship with a responsible party.[29]

In sum, a primary purpose of the Act was to hold the responsible party entirely responsible for discharges or threats of discharge of oil into the navigable waters of the United States. The responsible party is obligated to create response plans setting forth how potential spills would be managed, with contracts demonstrating the persons or entities responsible for managing the spill and removing the oil.[30] The responsible party is obligated to obtain and produce evidence of financial responsibility to ensure the ability to properly respond to a spill should one occur.[31] Finally, the responsible party is responsible to pay for the entire spill remediation costs as well as a wide variety of damages to third parties up to its limit of liability, if not beyond.

In exchange for this significant responsibility, the responsible party was intended to be free of any further claims against it for oil spill remediation and damages. Although OPA 90 provided a savings clause

25. *Id.* § 1321(b)(7)(A).
26. *Id.* § 1321(b)(7)(D).
27. *Id.* § 2703(a).
28. *Id.*
29. *Id.*
30. *Id.* § 1321(j)(5).
31. *Id.* § 2716(a).

that preserved the rights of states to "impos[e] any *additional liability or requirements* with respect to . . . the discharge of oil" or "any removal activities in connection with such a discharge,"[32] it was widely regarded that there was little room for *additional liability or requirements* after the passage of OPA 90 because the Act addressed nearly every conceivable liability or requirement regarding the discharge of oil.

Most importantly, general maritime law claims against the responsible party for damages caused by discharges of oil, and additional punitive damages that may in fact undermine the financial ability of the responsible party to meet its obligations under OPA 90, were not envisioned. As stated previously, third parties were permitted to pursue claims for pollution damages as provided in the OPA 90 claims procedure, but only after proper presentation of claims to the responsible party or guarantor.[33] The statute properly establishes presentation of a third-party claim to the responsible party or its guarantor as a condition precedent to that third party's election to commence an action in court against the responsible party. This condition precedent was an important aspect of the oil spill remediation and liability regime because it protected the responsible party from an endless number of lawsuits without the opportunity to resolve as many as possible in the administrative claims procedure.

III. JUDICIAL INTERPRETATION: INTRODUCTION

The foregoing was provided as a means of understanding the guiding principles of the Act and how the various provisions were intended to work in concert to support these principles. However, nearly before the ink had dried on President Bush's signature, the Act was being interpreted and applied by those not privy to the inner workings of the various compromises and agreements set into OPA 90. In February 1991, the NPFC was created to implement Title I of OPA 90. Implementation included drafting regulations to implement various aspects of the liability, defenses, and limitation provisions found in 33 U.S.C. §§ 2702-2720.[34] Other Coast Guard programs were tasked with drafting implementing regulations for the prevention and removal provisions of OPA 90 found in Title IV and other conforming provisions. As is not unusual in these circumstances, few of the people directly involved in the drafting and negotiation of OPA 90 were involved in providing guidance and context

32. *Id.* § 2718(a)(1) (emphasis added).
33. *Id.* § 2713.
34. *See* 15 C.F.R. § 990 (2014); 33 C.F.R. §§ 133, 136-138 (2014).

to the many regulations that were drafted to implement the intentions of Congress. As a consequence, the negotiated principles that guided the framework of OPA 90 were often ignored or subjugated in the implementing regulations.

Eventually, responsible parties have discovered that the "holy compromise" that formed the foundation of OPA 90 no longer exists. In some cases, the very government that was a principal partner in the compromise adopted a different strategy after passage, a strategy that tends to sacrifice the well-being of the domestic oil transportation industry in favor of preserving the oil industry's Fund or earning credentials within the environmental community, which understandably has little or no regard for legislative agreements and compromises that do not benefit them. More often, slight shifts in the general maritime law or clever and logical arguments made by practitioners pleading for a more favorable interpretation of the Act's otherwise objective and unambiguous language have led to judicial interpretations that ultimately undermine the system engineered into OPA 90. This Article will look specifically at judicial interpretations of issues such as punitive damages, limitation of liability, and NPFC's arbitrary and capricious denial of responsible party reimbursement claims and purely economic damage claims.

IV. JUDICIAL INTERPRETATION: PUNITIVE DAMAGES

Because punitive damage awards are intended to treat the defendant as if he committed a crime, punitive damages are awarded to punish the defendant's conduct and to deter that same conduct in others.[35] As such, punitive damages are not intended to provide additional compensation to any particular litigant, but rather serve as retribution for the wayward defendant.[36] Any discussion involving punitive damages in the context of OPA 90 must concentrate on the party to be punished, the forum to provide the punishment, and the degree of punishment to be levied.

Punitive damages in the context of the Act were addressed for the first time in *South Port Marine, LLC v. Gulf Oil Ltd. Partnership*.[37] South Port Marine was a marina located adjacent to the Gulf Oil fuel terminal in Portland, Maine. The terminal was in the process of loading a fuel barge when, due to the absence of the tankerman overseeing the

35. Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc., 767 F.2d 1379, 1385, 1986 AMC 56, 64 (9th Cir. 1985) (citations omitted) (quoting WILLIAM L. PROSSER, THE LAW OF TORTS § 2, at 9 (1971)).

36. Exxon Shipping Co. v. Baker, 554 U.S. 471, 492, 2008 AMC 1521, 1535 (2008).

37. 234 F.3d 58, 2001 AMC 609 (1st Cir. 2000).

operation, the tank barge overflowed, discharging 23,000 to 30,000 gallons of gasoline into the harbor. As a result of this discharge, the marina waters were covered in a thick layer of gasoline that eventually deteriorated the Styrofoam floatation system beneath its docks, causing the docks to sink into the water.[38]

South Port Marine pursued its claim for damages in federal court, alleging claims under OPA and Maine pollution statutes, as well as punitive damages.[39] Prior to trial, the court dismissed South Port's claims under state law and determined that punitive damages were not available as a matter of law. The United States Court of Appeals for the First Circuit reviewed the trial court's denial of punitive damages and upheld the decision. The court examined the damages available to claimants pursuant to 33 U.S.C. § 2702 and determined that punitive damages were not specifically set forth as a basis for a damage claim.[40]

The court was next confronted with the issue of whether Congress intended to supplant previous punitive damage remedies available under the general maritime law.[41] The First Circuit's analysis in *South Port Marine* was directly on point. First, the court determined that no preemption issue was truly in play. Instead, the issue was whether Congress intended that OPA 90 be the sole basis for seeking damages against a responsible party.[42] The answer to this inquiry was clearly "yes." OPA was designed to provide a prompt and uncomplicated method by which to make a damages claim and receive compensation for that claim. OPA established a "mini-concursus" whereby all claims against the responsible party were required to be submitted to the responsible party before filing suit.[43] Further, if the responsible party did not pay the claim within ninety days, the claimant was permitted to pursue the claim in court or submit the claim to the NPFC for adjudication and payment.[44] The claim procedure was a compromise that allowed responsible parties the first opportunity to resolve claims, then provided claimants with a rapid means of obtaining adjudication of the claim without resorting to costly litigation, because the NPFC would simply pay the claim from the Fund and then pursue the responsible party for reimbursement.[45]

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38. *Id.* at 60-61, 2001 AMC at 610-11.
39. *Id.* at 61, 2001 AMC at 612.
40. *Id.* at 61, 64-66, 2001 AMC at 612, 617-19.
41. *Id.* at 64-65, 2001 AMC at 617.
42. *Id.* at 65, 2001 AMC at 617.
43. 33 U.S.C. § 2713 (2012).
44. *Id.*
45. *See id.*

As noted by the First Circuit, OPA 90 provided a contained system whereby any third party with a damage claim arising from the discharge of oil could present the claim and receive satisfaction.[46] If, as South Port Marine asserted, claimants could obtain punitive damages by pursuing litigation outside the OPA claims system, but could not obtain punitive damages through NPFC adjudication, the claims system would no longer operate as intended.

Once again, punitive damages are not intended to compensate claimants but instead are intended to act as a deterrent of certain behavior and punishment for a wrongdoer.[47] As previously discussed, OPA 90 is replete with examples of punishment and deterrent provisions intended to motivate the oil industry and oil transportation industry to comply with good management and operational practices. Awarding punitive damages to individual claimants is neither necessary nor intended by the Act. Also, all federal causes of action against the responsible party for claims involving oil pollution remediation and damages arising from the discharge of oil are intended to be pursued in accordance with the Act. General maritime law claims may be pursued against the responsible party only for claims not arising from the discharge of oil. As the First Circuit so wisely stated, "We think that the OPA embodies Congress's attempt to balance the various concerns at issue, and trust that the resolution of these difficult policy questions is better suited to the political mechanisms of the legislature than to our deliberative process."[48]

Punitive damages have been and continue to be a primary issue in the DEEPWATER HORIZON litigation.[49] Claimants in the "B1" pleading bundle (B1 claimants) asserted many claims, including claims for punitive damages under OPA 90 and general maritime law. The court addressed these issues in a series of motions to dismiss presented by the various defendants in its Order of August 26, 2011.[50] The court tangled with many interpretations of OPA 90 in presiding over the DEEPWATER HORIZON litigation and has done so with great insight and knowledge of the general maritime law and its history.

In its Order as to Motions To Dismiss the B1 Master Complaint (Order), the court walked through the limited history of OPA 90

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46. *See S. Port Marine*, 234 F.3d at 64-65, 2001 AMC at 617.

47. Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc., 767 F.2d 1379, 1385, 1986 AMC 56, 64 (9th Cir. 1985) (citations omitted) (quoting PROSSER, *supra* note 35, § 2, at 9.).

48. *S. Port Marine*, 234 F.3d at 66, 2001 AMC at 619.

49. *See In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, 808 F. Supp. 2d 943, 948, 962-63, 2011 AMC 2220, 2223, 2245-46 (E.D. La. 2011), *aff'd sub nom. In re* Deepwater Horizon, 745 F.3d 157, 2014 AMC 2600 (5th Cir. 2014).

50. *Id.* at 948, 2011 AMC at 2222.

interpretations with regard to both damages in general and to punitive damages specifically.[51] It is important when examining the various claims asserted in the B1 Master Complaint (B1 Complaint) to distinguish between those claims against designated responsible parties and claims against nonresponsible parties—a distinction that the court correctly identified repeatedly in its Order. The court recognized the First Circuit's rationale in denying punitive damages in *South Port Marine* and recognized the same result in *Clausen v. M/V New Carissa*.[52] Finally, the court expanded the analysis to include *Gabarick v. Laurin Maritime (America) Inc.*,[53] wherein the *Gabarick* court determined that OPA 90 preempted general maritime law claims for economic loss. The *Gabarick* court used a four-step evaluation process that considered (1) the legislative history, (2) the scope of the legislation, (3) whether judicial intervention would fill a gap in the legislation or rewrite the rules that Congress enacted, and (4) the likeliness that Congress attempted to preempt long-established principles of the general maritime law in deciding whether OPA 90 preempted general maritime law.[54]

At this point, the court's analysis parts company with what appears to be the intent of the Act as drafted.[55] The drafters and the negotiators intended that the OPA 90 claims procedure be the singular means for determining the extent and magnitude of responsible party liability. The court in *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010* instead added to its analysis two cases, *Exxon Shipping Co. v. Baker*[56] and *Atlantic Sounding Co. v. Townsend*,[57] which are instructive when assessing liability under the general maritime law, but do not apply to claims for punitive damages under OPA 90.[58]

In construing *Baker*, the court correlates a discussion of whether the Clean Water Act preempted general maritime punitive damages for economic loss with the analysis of whether OPA 90 intended to displace general maritime punitive damages.[59] In *Baker*, the United States Supreme Court determined that Congress, in enacting the Clean Water Act, did not intend to occupy the entire field of pollution remedies, that the Clean Water Act was silent as to punitive damages and as such could

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51. *Id.* at 958-62, 2011 AMC at 2238-45.
52. 171 F. Supp. 2d 1127 (D. Or. 2001).
53. 623 F. Supp. 2d 741, 2009 AMC 1014 (E.D. La. 2009).
54. *Id.* at 747, 2009 AMC at 1022.
55. *See In re Deepwater Horizon*, 808 F. Supp. 2d at 960, 2011 AMC at 2242.
56. 554 U.S. 471, 2008 AMC 1521 (2008).
57. 557 U.S. 404, 2009 AMC 1521 (2009).
58. *In re Deepwater Horizon*, 808 F. Supp. 2d at 960-61, 2011 AMC at 2242-43.
59. *Id.* (citing *Baker*, 554 U.S. at 489, 2008 AMC at 1532).

not abrogate a common law principle, and that permitting punitive damages for private harms would not have a frustrating effect on the Clean Water Act remedial scheme.[60]

The court then brings *Townsend* into the analysis.[61] The Supreme Court in *Townsend* determined that a federal statute (the Jones Act) governing the relationship between an employer and his seaman-employee injured or killed on the job, which clearly does not provide for punitive damages, is not an impediment to a seaman's assertion of punitive damages against a vessel and vessel owner for refusing to comply with the general maritime duty of maintenance and cure, which is not addressed in the Jones Act. This case stands for the principle that even in circumstances when Congress outlines the available damages for a particular cause of action, other causes of action in the general maritime law may not be restricted to the same defined damages.[62]

The court's argument continues with the determination that OPA 90 does not bar claims against nonresponsible parties and that all claims asserted under the general maritime law may proceed.[63] Further, the court determined that general maritime causes of action against responsible parties are not permitted and would frustrate the purposes of OPA 90. The court's analysis in this regard is entirely consistent with the guidelines and principles of the Act.[64] However, immediately after properly concluding that general maritime causes of action are not permitted against responsible parties, the court returned to the issue of punitive damages and determined: "OPA does not displace general maritime law claims for those Plaintiffs who would have been able to bring such claims prior to OPA's enactment. These Plaintiffs assert plausible claims for punitive damages against Responsible and non-Responsible parties."[65]

It is difficult to reconcile the court's determination that general maritime causes of action may not be asserted against a responsible party, but that it is proper to assert a general maritime law claim for punitive damages against a responsible party for the spill and resulting damage.[66] As previously discussed, punitive damages are not assessable by the NPFC, and therefore, the court may have established a more lucrative

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60. *Id.* (citing *Baker*, 554 U.S. at 489, 2008 AMC at 1532).
61. *Id.* at 961, 2011 AMC at 2243.
62. *Id.* (citing *Townsend*, 557 U.S. at 419-20, 2009 AMC at 1533-34).
63. *Id.* at 962, 2011 AMC at 2244-45.
64. *See id.* at 961-62, 2011 AMC at 2244.
65. *Id.* at 963, 2011 AMC at 2246.
66. The Act does not preempt punitive damages for other torts such as personal injury or wrongful death.

array of damages available if the claimant bypasses the NPFC's adjudication process and pursues general maritime law punitive damages in federal court. There is no evidence that Congress intended this result.

Further, Congress altered the liability scheme to make the responsible party strictly liable for discharges of oil and made the responsible party liable for damages that general maritime law does not provide, such as purely economic damages. The court seems to be advocating that B1 claimants be able to choose the best from both worlds—obtain rapid recovery for purely economic damages from the NPFC's application of strict liability to the responsible party, but preserve the right to pursue punitive damages against the responsible party in civil court for the spill and resulting damage. The court correctly recognizes that the punitive "behavior" that would justify the application of punitive damages will "also break OPA's limit of liability."[67] However, the balance established in OPA 90 between punishing the grossly negligent responsible party but preserving the ability to pay all claims may very well be frustrated by third-party claimants pursuing responsible parties in civil courts in an attempt to obtain additional punitive measures against a responsible party that has already been punished within the terms of the Act. B1 litigants, and any other third-party claimants against responsible parties, are not entitled to the "fruits" of punitive damages—those damages are assessed within the Act and returned to the Fund where they rightfully belong.

V. JUDICIAL INTERPRETATION: LIMITATION OF THE SHIPOWNER'S LIABILITY ACT

In circumstances where the source of discharged oil is a vessel, OPA 90 denies that vessel's owner the ability to assert limitation pursuant to the Limitation of Shipowner's Liability Act of 1851 (Limitation Act).[68] The Limitation Act permits the vessel owner to initiate a complaint in federal court asserting exoneration from or limitation of liability for claims arising from incidents involving the vessel.[69] The owner's liability may ultimately be limited to the value of the vessel after the incident.[70] OPA 90 specifically provides that each responsible party is liable for the elements of costs and damages set forth in 33 U.S.C. § 2702,

67. *In re Deepwater Horizon*, 808 F. Supp. 2d at 962, 2011 AMC at 2245 (citation omitted).

68. 46 U.S.C. §§ 30501-30512 (2012).

69. *Id.* § 30511.

70. *Id.* § 30505.

"[n]otwithstanding any other provision or rule of law."[71] The "[n]otwithstanding any other provision or rule of law" language was intended to prevent vessel owners from using the Limitation Act and the procedures found in Rule F of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions to adjudicate claims subject to the Act.

The interaction between the Limitation Act and OPA 90 created issues that were brought before courts in the early years after enactment. One of the first such cases was *Metlife Capital Corp. v. M/V Emily S*.[72] In this case, a towing wire between the tug M/V EMILY S and the tank barge MORRIS J. BERMAN broke, leaving the barge free to ground off Punta Escambron, San Juan, Puerto Rico. The MORRIS J. BERMAN's cargo discharged into the waters of Puerto Rico, requiring a massive oil spill cleanup operation pursuant to OPA 90. The Commonwealth of Puerto Rico filed suit against the owners, operators, and charterers of the two vessels and arrested the M/V EMILY S. Claims were brought pursuant to OPA 90, general maritime law, and Puerto Rican law. Other private third parties joined the litigation as well.[73]

Within six months of suit, Bunker Group, as owner of the MORRIS J. BERMAN, and Metlife Capital Corporation, as owner of the M/V EMILY S, brought independent actions under the Limitation Act to limit liability for the spill.[74] As is the procedure under Rule F, all potential claimants against these vessels were admonished to appear and file claims within the prescribed time period. After the prescribed time period for filing claims, the Commonwealth of Puerto Rico and the U.S. government filed claims in limitation, seeking recovery of damages pursuant to OPA 90, general maritime law, and other laws.[75]

Both the Commonwealth and the government asserted that their claims were not subject to the Rule F concursus.[76] In addition, private third-party hotel interests also filed claims for pollution damages after the submission period—claims that were also pending before the NPFC for adjudication.[77] The hotel interests also asserted that their claims were not subject to the concursus pursuant to OPA 90. The trial court issued an order stating, "[A]ny claims for oil spill removal costs or damages resulting from or in any way connected with the grounding of the barge

71. 33 U.S.C. § 2702(a) (2012).
72. 132 F.3d 818, 1998 AMC 635 (1st Cir. 1997).
73. *Id.* at 819-20, 1998 AMC at 636-37.
74. *Id.* at 819, 1998 AMC at 636.
75. *Id.* at 820, 1998 AMC at 637.
76. *Id.*
77. *Id.*

MORRIS J. BERMAN [were permitted] to be asserted independently of the limitation of liability proceedings."[78] The vessel interests appealed the trial court's ruling.[79]

The First Circuit examined the provisions set forth in the Act and reviewed prior district court rulings.[80] Metlife Capital asserted that while the Act set specific limitation amounts that did not align with the Limitation Act, there was nothing in the Act that specifically prevented vessel interests from using Rule F and limitation procedures. According to Metlife Capital, all parties with claims pursuant to OPA 90 were required to bring those claims in accordance with Rule F. The court, finding solace in similar "notwithstanding any other provision or rule of law" language present in the Federal Water Pollution Control Act, which was also exempt from the Limitation Act, determined that the Limitation Act and all procedures related to the Limitation Act were inapplicable to OPA 90 claims.[81]

The First Circuit properly determined that the claims procedures and limitation of liability provisions contained within the Act were so at odds with the procedures set forth in the Limitation Act and Rule F that it would be impossible to give any credence to the Limitation Act and still comply with the requirements of the Act. The court also clarified that the exemption from compliance with the Limitation Act applied only to oil spill removal costs and damages and not to general maritime causes of action for harms to persons or vessels.[82] Finally, Metlife Capital argued that even if the Limitation Act did not apply to OPA 90 claims, Rule F procedures should still be used to provide an opportunity for the responsible party to consolidate the OPA 90 claims against it. Once again, the First Circuit determined that the specific provisions of the Act, including venue and jurisdiction provisions as well as statutory deadlines for presenting claims to the responsible party and to the NPFC, were not consistent with Rule F procedures.[83] The First Circuit's interpretation of OPA 90 was important because it put to rest any attempt by vessel interests to use the Limitation Act and limitation procedures to limit or invalidate pollution claims.

The following year, the various parties struggled to determine how OPA 90 and the Limitation Act would interact, which gave rise to a new

78. *Id.* (internal quotation marks omitted).
79. *Id.*
80. *Id.* at 821-23, 1998 AMC at 637-41.
81. *Id.* at 821-24, 1998 AMC at 639-44.
82. *Id.* at 822, 1998 AMC at 641.
83. *Id.* at 823, 1998 AMC at 642.

issue regarding the Limitation Act. In *Bouchard Transportation Co. v. Updegraff*,[84] the United States Court of Appeals for the Eleventh Circuit was confronted with the government's role in limitation proceedings where its claims were not being adjudicated. In *Bouchard*, various vessel owners initiated a limitation proceeding seeking exoneration from, or limitation of, liability related to the collision of a freighter and two tugs pulling tank barges in Tampa Bay. A large and costly oil spill ensued. The owners of the tank barges sought limitation under the Limitation Act for claims brought against them under the general maritime law and other laws, as well as limitation under OPA 90 for all pollution claims. The owner of the freighter sought limitation under the Limitation Act for all claims brought against it.[85] The court, in accordance with Rule F, issued an injunction against all potential claims against the vessel owners and required that all claims, including OPA 90 claims, be filed with the court within sixty days or be forever barred. Ultimately, however, the trial court dismissed without prejudice the OPA 90 claims filed by the government and the various third parties in the action.[86]

Once again, the Eleventh Circuit grappled with the issue of whether Rule F properly applied to all cases of limitation, including OPA 90.[87] The court determined that the Act was not subject to Rule F because OPA 90 claimants were not faced with a limited fund of money from which to be paid and because Congress provided specific procedures for the processing of claims that were not consistent with Rule F procedures. The court observed that a "pro rata" disbursement of funds would not be necessary for pollution claimants because, although the responsible party may limit its liability pursuant to the Act, the Fund was available to pay all claims in full. Therefore, a concursus was not necessary. Further, the court determined that the Act provided specific, detailed procedures for presenting and adjudicating pollution claims and, therefore, the Rule F procedures were not only unnecessary, but also in conflict with the Act. Consequently, the court affirmed that Rule F had no role in the OPA 90 claims process.[88]

Judicial interpretation of the interplay between OPA 90 and the Limitation Act as implemented by Rule F was an important milestone. Although it was clear to the drafters and negotiators at the outset that the Limitation Act would not apply to pollution claims covered by the Fund,

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84. 147 F.3d 1344, 1998 AMC 2409 (11th Cir. 1998).
85. *Id.* at 1347, 1998 AMC at 2410.
86. *Id.* at 1348, 1998 AMC at 2412-13.
87. *Id.* at 1349-52, 1998 AMC at 2415-20.
88. *Id.* at 1349-50, 1998 AMC at 2415-17, *cert. denied*, 135 S. Ct. 1175 (2015).

such a result was not entirely obvious. The language of 33 U.S.C. § 2702 does not specifically reference the Limitation Act, and to some degree, there was reliance that the same language that averted application of the Limitation Act for the Federal Water Pollution Control Act would also avert application for OPA 90. Also, in the context of the procedures and the prospect of the Fund's availability to pay claims, there was little need for the Limitation Act and Rule F. Courts have generally understood congressional intent in this regard and have applied the law accordingly.

VI. JUDICIAL INTERPRETATION: NPFC REIMBURSEMENT DENIALS

Many recent cases involve district court oversight of decisions made by the NPFC, especially in adjudicating responsible party reimbursement requests or pursuing claims against the responsible party after paying damage claims. The NPFC is the clearinghouse for oil pollution removal cost claims and oil pollution damage claims. In circumstances where the responsible party does not pay a particular removal cost or damage claim presented by a third party, the NPFC is tasked with reviewing and adjudicating that claim and making payment from the Fund. If payments are made from the Fund, the NPFC is tasked with filing a claim for reimbursement from the responsible party, and if ignored or denied, the NPFC may file suit against the responsible party to recover the sums paid from the Fund.

The process described above creates claims issues neither envisioned during the drafting process nor by the regulations enacted to implement the claims procedures and liability provisions. These issues include disputes between responsible parties and their cleanup contractors, burdens of proof for applying the limitation of liability provisions set forth in 33 U.S.C. § 2703, and the application of the exceptions to limitation set forth in the same provision. It is instructive to review some cases demonstrating how the NPFC executes its claims adjudication function and how courts have modified the claims procedures.

United States v. American Commercial Lines, L.L.C.[89] presents a rather interesting set of facts that demonstrate the interplay between the responsible party's obligation to contract for and retain spill response resources and the NPFC's role in adjudicating claims for oil pollution removal costs. According to the facts of this case, American Commercial Lines (ACL) was the responsible party for an oil spill in the Mississippi River near New Orleans. Due to a collision in the river, a large quantity

89. 759 F.3d 420, 2014 AMC 2400 (5th Cir. 2014).

of oil was discharged, and ACL retained its contracted spill responders to remove the discharged oil. ES&H, the spill responders, filed a claim with the responsible party for pollution removal costs as permitted by OPA 90 claim procedures. ACL paid $10.6 million of the removal claim, but did not pay the remaining $3.9 million. ACL paid another contractor, USES, $14 million, but withheld $4.4 million. ACL withheld these funds from ES&H and USES allegedly because the contractors failed to produce federally required I-9 forms establishing the legal entitlement to work, failed to produce HAZWOPER certificates indicating proper training of its labor force, and charged ACL incorrect rates for its workers and for "phantom labor and equipment that was never supplied."[90]

Because ACL refused to pay the entire amount of the invoice, ES&H and USES submitted their claim to the NPFC for payment.[91] The NPFC ultimately paid ES&H an additional $3 million and USES an additional $1.5 million in accordance with the claims procedures set forth in 33 C.F.R. § 136.105(a). The NPFC did not require ES&H or USES to provide training certificates or the I-9 forms as required in the contract, but rather accepted affidavits that all the laborers were properly trained and certificated workers.[92] The NPFC filed suit against ACL to recover the amounts paid to ES&H and USES out of the Fund.[93]

ACL attempted to seek indemnity by adding ES&H and USES as third parties to the NPFC action, but the government opposed this attempt on the basis that OPA displaces ACL's claims for indemnity and breach of contract against ES&H and USES.[94] ACL appealed and conceded in the appeal that, while OPA displaces federal common law and general maritime law such that it was strictly liable to the government for removal costs as a responsible party, OPA did not bar ACL's claims against ES&H and USES for violating the terms of the contract or otherwise indemnifying it for inappropriate costs paid by the NPFC.[95]

At issue in this case was the ability of the court to overturn the NPFC's decision to pay ES&H and USES despite ACL's refusal to do so due to contractual objections. Further at issue was ACL's right to separately enforce its contractual rights against ES&H and USES despite

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90. *Id.* at 422-23 & nn.3, 5, 2014 AMC 2400, 2403-05 & nn.3, 5.
91. *Id.* at 423, 2014 AMC at 2403.
92. *Id.* at 423 & n.5, 2014 AMC at 2403 & n.5.
93. *Id.* at 423, 2014 AMC at 2403.
94. *Id.* at 423-24, 2014 AMC at 2403-04.
95. *Id.* at 423, 2014 AMC at 2403.

payments made by the NPFC. In fact, ACL did have the ability to contest the NPFC's decision to make payments to ES&H and USES, but the standard applied to the review is "arbitrary and capricious," as set forth in the Administrative Procedure Act. In this case, the Fifth Circuit determined, "Nothing in OPA authorizes a responsible party to bring a third-party complaint against a claimant that has chosen, under § 2713(c)(2), to submit claims to the Fund after 90 days without payment."[96] The court understandably reasoned that to allow third-party actions against claimants would frustrate the strict liability scheme envisioned by Congress. The court further reasoned that the savings clause, 33 U.S.C. § 2751(e), did not permit ACL to "save" its claims against ES&H and USES because to do so would be to supersede OPA and its procedure for submission, consideration, and payment of cleanup expenses.[97]

The United States Court of Appeals for the Fifth Circuit's interpretation creates quite the dilemma for responsible parties. As mentioned previously, responsible parties are required by 33 U.S.C. § 1321(j) to contract with sufficient pollution response resources to respond to the worse case discharge. If those contracted resources submit an invoice for services to the responsible party and the responsible party challenges the amount or nature of the charges or otherwise has a contractual issue with the manner in which the services are provided, the responsible party has no recourse against the contractor. According to the Fifth Circuit, the only means of enforcing the contract is to rely upon the NPFC adjudicators, who may or may not honor or even contemplate the contract terms in making decisions as to the degree of reimbursement due to the claimant.[98] Perhaps a better result is to permit general maritime law causes of action for breach of contract to be pursued by the responsible party against third-party claimants to the Fund so as to avoid placing the NPFC in the position of interpreting and enforcing these contracts, with the review of such interpretation being "arbitrary and capricious."

Despite the restrictions placed on responsible parties attempting to enforce contracts with third parties as indicated in the *American Commercial Lines* case above, OPA 90 often uses a contractual relationship between the responsible party and third parties as a shield against limitation of liability and defenses to liability. In *Buffalo Marine*

96. *Id.* at 425, 2014 AMC at 2406.
97. *Id.* at 425-26, 2014 AMC at 2407-08 (citation omitted).
98. *See id.* at 424-25, 2014 AMC at 2405-06.

Services Inc. v. United States,[99] a barge owner brought an action against the NPFC seeking judicial review of its decision to deny reimbursement of cleanup expenses pursuant to OPA 90. Buffalo Marine owned a tug and barge used to deliver fuel to vessels along the Neches River in Texas. Buffalo Marine's fuel barge was delivering fuel to a tanker, the M/V TORM MARY, when she allided with the tanker while she was secured to its berth, causing a hole in the tanker and oil to be discharged into the river. Clearly, the allision and subsequent oil spill were solely due to the negligent operation of the tug and barge as it approached the berthed tanker.[100]

OPA 90 provides that a responsible party is not liable for removal costs or damages if the incident was caused solely by an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party.[101] In this case, the vessel owner or operator of the TORM MARY did not hire Buffalo Marine to provide the fuel. The vessel owner purchased the fuel from a fuel seller, which in turn used a broker to procure the fuel, and the fuel broker in turn hired Buffalo Marine to deliver the fuel purchased from the fuel seller. The owners of TORM MARY asserted to the NPFC, without success, and then to the trial court that it did not have a contractual relationship with Buffalo Marine and therefore should be absolved of all liability pursuant to 33 U.S.C. § 2703(a). On appeal, the Fifth Circuit was required to determine whether the NPFC was arbitrary and capricious in determining that Buffalo Marine had a contractual relationship with the vessel owners such that a defense to liability was not available pursuant to § 2703.[102]

In drafting § 2703, Congress was primarily concerned that responsible parties would hire less than responsible operators and "partners" in its oil operations. As originally crafted, § 2703 would have permitted responsible parties to avoid liability if a third party, even a business partner, was solely responsible for spill liability. Consequently, the drafters and negotiators determined that by preventing responsible parties from avoiding liability for the acts of their contract partners, the oil industry and marine transportation industry would be more attentive to the safety record and operations of their business partners. The NPFC, and ultimately the trial court and Fifth Circuit in this case, faced the issue

99. 663 F.3d 750, 2012 AMC 91 (5th Cir. 2011).
100. *Id.* at 751-52, 2012 AMC at 91-92.
101. 33 U.S.C. § 2703(a) (2012).
102. *Buffalo Marine*, 663 F.3d at 753-54, 2012 AMC at 94-95.

of whether the contractual relationship must be direct or whether any remote connection would be sufficient to defeat the exclusion to liability.[103]

In *Buffalo Marine*, the NPFC focused on the term "any contractual relationship" and determined that direct privity was not required to defeat the defense, that liability attaches even where "a chain of agents or contracts stands between the party delivering the fuel and the party receiving the fuel."[104] Although this was a broad interpretation of the statutory language, the NPFC was justified in interpreting the contracting third party exclusion broadly, such that the oil industry and the marine transportation industry are held to a high standard regarding who is contractually retained to provide services. The Fifth Circuit carefully examined the case law and the similarities between the language found in the Act and other similar provisions in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and determined that the NPFC was not arbitrary or capricious in its interpretation.[105] From a practical standpoint, the court isolated the most important reason to affirm the NPFC's interpretation: "[A]ppellants 'would allow contracting parties in cases such as this to avoid liability by the simple expedient of inserting an extra link or two in the chain of distribution.'"[106]

Perhaps the most frustrating aspect of NPFC claims adjudication and Fund management arises from requests by responsible parties for reimbursement of amounts paid in excess of the responsible party's limitation of liability. As noted previously, responsible parties are responsible for the entire cost of cleanup and damages associated with the discharge of oil, subject to the limitation of liability provision.[107] Typically, the responsible party and/or its insurer files a claim to the NPFC for reimbursement from the Fund for all amounts paid in excess of the limitation amount. The dispute arises in determining which party—the NPFC or the responsible party—has the obligation to prove the conditions for limitation of liability have been met. A sample of cases involving this dispute is set forth below.

Bean Dredging, LLC v. United States[108] is a typical case involving a denied reimbursement for recovery of sums paid in excess of the limitation of liability. Bean Dredging was involved in an oil spill in

103. *Id.* at 754, 2012 AMC at 95.
104. *Id.*, 2012 AMC at 96.
105. *Id.* at 756-59, 2012 AMC at 98-103.
106. *Id.* at 757, 2012 AMC at 100 (citation omitted).
107. 33 U.S.C. § 2703 (2012).
108. 773 F. Supp. 2d 63, 2011 AMC 2076 (D.D.C. 2011).

Humboldt Bay, California, in September 1999. Bean Dredging owned the dredge STUYVESANT, which was performing maintenance dredging in a channel when a fifteen-inch fracture occurred in the dredge's hull plate at a fuel tank. As a consequence, oil spilled out into the bay, leading to a multimillion-dollar oil spill recovery operation.[109]

Bean Dredging filed a claim with the NPFC, seeking reimbursement for removal costs and damages incurred in excess of the limitation amount set forth in 33 U.S.C. § 2704—approximately $11.7 million.[110] The NPFC denied the claim based on the statutory violation exception to limitation found in § 2704(c)(1)(B). Specifically, the NPFC determined that the STUYVESANT violated two operating and safety regulations—46 C.F.R. § 44.340 and 46 C.F.R. § 42.09-1. The regulations provide that each dredge assigned a working freeboard may be operated at drafts from the normal freeboard to the working freeboard provided the seas are not more than ten feet and that the master must operate in compliance with the load line certificate.[111] In this case, the load line certificate indicated the vessel could only operate in seas not more than three meters. Presumably, violations of these conditions were considered contributory causes of the cracked hull shell plate.[112]

Bean Dredging instituted an action in federal court to request a review of NPFC's administrative denial.[113] As stated previously, decisions made by the NPFC in these cases are reviewed in accordance with the Administrative Procedures Act using the "arbitrary and capricious" standard. Bean Dredging contested the NPFC's decision on two bases: (1) the term "seas" referred to "significant wave height," and the seas at the time of the incident were not above ten feet; and (2) the Coast Guard Marine Casualty Investigation Report did not identify any violations of federal operating or safety regulations, and the NPFC's determination was contrary to that report.[114] NPFC's response to Bean Dredging's allegations was essentially twofold: (1) to ignore the issue of how "seas" would be determined during adjudication and (2) to deny the fact that the Coast Guard "elected to institute an administrative penalty . . . in lieu of pursuing all possible regulatory violations did not establish the Stuyvesant's compliance with the applicable regulations."[115]

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109. *Id.* at 68-69, 2011 AMC at 2079.
110. *Id.* at 69, 2011 AMC at 2080.
111. 46 C.F.R. §§ 42.09-1, 44.340 (2013).
112. *Bean Dredging*, 773 F. Supp. 2d at 69 & n.3, 2011 AMC at 2080 & n.3.
113. *Id.* at 69, 2011 AMC at 2080.
114. *Id.* at 70, 2011 AMC at 2081 (citation omitted).
115. *Id.*

Upon initial review, the trial court determined that NPFC's failure to address Bean's interpretation of "seas" on the record was deficient, and the court required the NPFC to respond to the interpretation and then render a ruling on that issue. With regard to the Coast Guard investigation, the trial court determined that the NPFC was under no obligation to reach the same conclusions reflected in the Coast Guard investigation. As such, the NPFC was free to conduct a de novo review of the evidence and reach its own conclusions. As a result, the matter was remanded back to the NPFC to address the definition of "seas" in light of Bean's evidence.[116]

On remand, the NPFC reached the same conclusion—that the STUYVESANT operated in seas greater than ten feet in violation of safety regulations—and it again denied reimbursement. Despite the expert information provided by Bean regarding the weather onsite at the time of the casualty, the NPFC determined that Bean was correct in asserting that "seas" means "significant wave height" but that wave estimates would only be considered if provided by "the informed observations of a trained mariner."[117] Based on this interpretation, the NPFC only considered the wave estimates as reported by the STUYVESANT on the day of the casualty, even though the report was less than specific regarding the regularity of ten-foot waves.[118]

Bean Dredging returned to the district court once again, this time to assert (1) that the administrative proceedings on remand were procedurally defective because (A) it was not permitted to present evidence to rebut the NPFC's determination and (B) the NPFC went beyond the scope of the remand by adopting Bean Dredging's interpretation rather than justifying its own initial interpretation of "seas"; and (2) that a "new interpretation" applied to a prior offense is void ab initio. None of these assertions was successful.[119]

Of particular interest was the court's ruling that Bean Dredging was not entitled to due process rights upon NPFC's change in the basis for denying the claim. According to the court, nothing in OPA afforded Bean Dredging with the opportunity to submit any new information, evidence, or argument on remand.[120] One might consider that such due process rights could be best provided by the trial court upon remanding the matter to the NPFC—tailored to the circumstances of the remand. It

116. *Id.* at 71, 2011 AMC at 2082-84.
117. *Id.* at 72, 2011 AMC at 2084.
118. *Id.*
119. *Id.* at 74, 2011 AMC at 2087.
120. *Id.* at 75, 2011 AMC at 2089.

is not surprising that regulations drafted and implemented by the NPFC would not include due process rights for claimants who have succeeded in obtaining a remand from the trial court.

Even considering the "streamline process" sought by Congress in drafting the OPA claims procedures, due process rights would seem to be important when dealing with large claims. The court reached this finding despite the fact that the NPFC's regulations afford the right of reconsideration after the NPFC's initial determination.[121] However, when the NPFC makes a "new initial determination" on remand, no such rights accrue. The court, however, makes a pertinent point when it notes that Bean Dredging never attempted to seek a written reconsideration with the bases for such reconsideration.[122] Ultimately, the court determined "that the NPFC was permitted to exercise its discretion to adopt a new interpretation, explain the basis for that interpretation, and then proceed to decide how that interpretation applied to Bean Dredging's claim for reimbursement."[123]

Possibly even more egregious than denying simple, basic due process rights to claimants on remand, the NPFC posited, and the court accepted the assertion, that responsible parties are required to prove each and every element of the limitation provision, including that the responsible party is not liable for gross negligence, willful misconduct, or violation of a safety regulation. The court, specifically referring to language found in § 2704 that a responsible party is entitled to limit liability only if it demonstrates that it is entitled to limitation, determined that the burden was on Bean Dredging to prove that the Humboldt Bay oil spill was not proximately caused by the alleged violations of federal safety regulations.[124] Even after admitting that asking a claimant to disprove proximate causation is "somewhat anomalous," the court insisted that this burden is mandated by the plain language chosen by Congress and that the NPFC merely needs to find that Bean Dredging failed to carry the burden that it was entitled to limitation.[125]

Not every court concurs with the NPFC's interpretation of the limitation provision and the burden of proof analysis. In *Great American Insurance Co. v. United States*,[126] the trial court took the opposite position to the court in *Bean Dredging*. Great American insured a tank barge

121. 33 C.F.R. § 136.115(d) (2014).
122. *Bean Dredging*, 773 F. Supp. 2d at 75 & n.6, 2011 AMC at 2089 & n.6.
123. *Id.* at 79, 2011 AMC at 2095.
124. *Id.* at 86, 2011 AMC at 2107.
125. *Id.* at 86-87 & n.9, 2011 AMC at 2107-08 & n.9.
126. No. 12-CV-9718, 2014 WL 3359431 (N.D. Ill. July 9, 2014).

operator, Egan Marine, and paid significant oil spill removal costs and damages associated with a barge explosion in the Chicago Sanitary and Ship Canal. The NPFC filed suit against Egan Marine to recover sums paid by the Fund for Coast Guard monitoring costs and third-party damage claims asserting that Egan Marine was not entitled to limit its liability because the explosion was caused by violations of federal safety, construction, and operating regulations. The NPFC failed to prove the cause of the explosion and therefore was unable to prove a violation of a federal regulation, gross negligence, or willful misconduct. The trial court denied NPFC's request for reimbursement on the basis that Egan Marine, as the responsible party, had paid up to and beyond its limitation of liability.[127]

Eight months after the trial court's denial of NPFC's claim for reimbursement against Egan Marine, the NPFC denied Egan Marine and Great American's request for reimbursement for costs and damages incurred in excess of the limitation of liability. This time, the NPFC asserted that the responsible party had the obligation to prove what the NPFC could not—the cause of the explosion aboard the tank barge. According to the NPFC, because the responsible party did not prove to the NPFC why the barge exploded, the responsible party failed to meet its burden to "demonstrate" that it was entitled to limit its liability. Great American initiated suit in district court seeking a determination that the NPFC's decision was arbitrary and capricious.[128]

The court in this case recognized that NPFC's conclusion that the responsible party failed to prove an entitlement to limitation of liability deserved deference as a statutory interpretation of OPA 90. The court followed, however, by stating, "[C]ourts have the reserve of power to substitute their own judgment on all questions of statutory interpretation."[129] The court proceeded to analyze the plain language of OPA 90 and identified some rather important, and intended, differences in drafting. First, the court recognized that the provision regarding "Defense to Liability," 33 U.S.C. § 2703(a), requires that the responsible party establish its defense to liability "by a preponderance of the evidence."[130] The drafters and negotiators determined that the responsible party must prove the act of God, act of war, or act or omission of a third party that justified a complete defense to liability. Of course, these

127. *Id.* at *1-2.
128. *Id.* at *2-3.
129. *Id.* at *4 (citation omitted).
130. *Id.* at *5 (citation omitted).

factors are the kind that could be proven because they are affirmative acts or omissions.

Conversely, the "Limits on Liability" provision, 33 U.S.C. § 2704, says nothing about burden of proof—it merely sets forth the elements of limitation and what exceptions apply. The section "Recovery by Responsible Party," 33 U.S.C. § 2708, outlines what is required for a responsible party to request reimbursement from the Fund for sums paid in excess of limitation. This provision states that the responsible party may assert a claim for reimbursement "only if the responsible party demonstrates that—(1) the responsible party is entitled to a defense to liability under section 2703 of this title; or (2) the responsible party is entitled to a limitation of liability under section 2704 of this title."[131]

The court gave meaning to the different language used by Congress in establishing the opportunity to defend against liability versus the right to limit liability. In this case, the court noted that the NPFC denied the responsible party's request for reimbursement not because it found gross negligence, willful misconduct, or a violation of a Federal statute, but because it determined that the responsible party had the burden of proving the actual cause of the explosion by a preponderance of the evidence.[132] The court reviewed the statutory language and determined that only the right to a defense to liability under § 2703 must be proven by a preponderance of the evidence. Limitation of liability in § 2704, however, was a "General Rule" that did not contain the strict "preponderance of the evidence" standard required by § 2703.

The court determined that to demonstrate the right to limit liability a responsible party must show that the actions for which reimbursement is sought were necessary to prevent, minimize, or mitigate the incident and that the actions were consistent with the National Contingency Plan.[133] As a result of this analysis, the court determined, "A finding that requires a claimant to disprove all possible theories of gross negligence in order to obtain the benefit of the 'general rule' of limitation does not appear to advance Congress's intent."[134]

Clearly, there is an ongoing struggle to find the proper process for addressing responsible party reimbursements that will be resolved over time. These two cases highlight one other issue that must be addressed briefly. In both cases, the NPFC either denied limitation due to violations of federal safety regulations or demanded proof that the cause

131. 33 U.S.C. § 2708(a) (2012).
132. *Great Am. Ins. Co.*, 2014 WL 3359431, at *6.
133. *Id.* at *6-7.
134. *Id.* at *8.

of the discharge was not caused by a federal safety regulation. The Coast Guard, as a matter of course, investigates all oil pollution events using personnel in field operational units. Investigative reports, such as the Marine Casualty Investigation Report, are produced detailing the evidence collected, interviews conducted and regulations applied. The report ultimately makes findings as to how and why the discharge occurred. Due process rights are typically protected during these investigations, and major casualties involve public hearings with the right to examine and cross-examine witnesses.

These reports, and any civil penalty proceedings that arise from them, should be the foundation for the NPFC determination whether a violation of federal regulations has occurred. A system in which the NPFC performs a de novo review of the "facts" of the investigation and makes its own separate determination regarding violations of federal regulations—even where the "operational" Coast Guard has made no finding of such a violation and pursued no civil penalty—is not only frustrating for responsible parties, it is, honestly, a bit unfair. Due process rights that exist during marine casualty investigations and due process rights that exist during civil penalty proceedings resulting from the alleged violation of federal statutes are lost when the NPFC, with its limited due process considerations, makes de novo judgments about these matters. Strong consideration should be given to revise the responsible party reimbursement process to eliminate denial of reimbursement for violations of federal regulations when no such finding has been made by the primary Coast Guard investigation.

VII. CONCLUSION

OPA 90 was drafted as a complicated compromise solution to the oil pollution response problem in the United States. It was born in the crucible of competing interests where only the provisions with broad acceptance survived. The delicate system of balanced compromises has somewhat eroded over the years, both by the passage of time and the constant evolution of the general maritime law and federal statutes. Courts at times rightfully struggle with attempts to maintain the balance of the system, and protect the bedrock legal principles that are often not obvious in the compromise language of the Act or its legislative history.

Courts will continue to address issues such as punitive damages, economic damages, and NPFC management of the Fund. Courts will continue to use tried and true legal principles to interpret the statutes and affect the goals of the drafters. Perhaps of most importance is a consideration of how courts' legal interpretation will influence other

aspects of the Act. Accordingly, it is imperative that litigants and courts consider how the proposed interpretation of the Act may alter that balance of the complicated, compromise system that is OPA 90.