



Troy A. Rafferty  
Levin, Papantonio,  
Thomas, Mitchell,  
Eschner, Rafferty &  
Proctor, P.A.

## THE BP OIL CATASTROPHE – AN INTRODUCTION TO THE OIL POLLUTION ACT AND RELEVANT STATE LAWS

Co-Authored by  
Amanda Slevinski

The explosion onboard and subsequent sinking of the Deepwater Horizon in the Gulf of Mexico has resulted in the worst environmental disaster in United States history. Approximately 4.1 million barrels of oil have leaked into the Gulf of

Mexico. This is more than 13 times the amount of oil that was spilled in the Exxon Valdez disaster. Over 1.8 million gallons of dispersant have been dumped into the Gulf of Mexico. Approximately one third of the Gulf of Mexico was shut down to fishing. The ecologic and economic damages stemming from the oil spill stretch from Texas to Florida. As the damage picture continues to unfold, so do the methods of potential recovery that are available to those injured by this catastrophic oil spill. The injured may have claims under both federal and state law. In addition to traditional tort remedies, some claimants may also be able to recover their losses from the \$20 billion oil spill compensation fund that will be administered by Kenneth Feinberg. However, the eligibility requirements and the compensation available through this fund are still unknown. The catastrophe’s impact on Florida is undeniable, however, the path to recovery for injured Floridians may not be as obvious because of the application of and interaction between traditional tort law, state statutory law and federal law. In reviewing and evaluating a potential claim, an analysis of each of these areas of law is critical. This article will give a broad outline of both the federal and state laws that may apply to a potential claim.

### Oil Pollution Act of 1990

The Oil Pollution Act of 1990<sup>1</sup> (“OPA”) was passed in response to the Exxon Valdez oil spill and provides the federal framework under which damages incurred as a result of an oil spill may be recovered. Under the OPA, claims may be filed for a broad spectrum of economic damages, including lost profits and earning capacity, cleanup costs, and damage to property.<sup>2</sup> The “responsible party” as defined by the statute, is held strictly liable for the “...discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone...[.]”<sup>3</sup> The “responsible party” in the case of a vessel is defined as any individual or entity “owning, operating or demise chartering the vessel” that discharged the oil.<sup>4</sup> Pursuant to the OPA, the federal government identified BP as the

“responsible party” liable for removal costs and damages under the statute.<sup>5</sup>

Generally, federal maritime law does not allow claims for purely economic losses unaccompanied by any physical injury to the claimant’s property or person, this is known as the *Robins Dry Dock* rule.<sup>6</sup> Over time, exceptions to the *Robins Dry Dock* rule have evolved, however, the OPA may be the only viable method of recovery for many individuals and businesses that do not fit into one of the exceptions. For example, the OPA permits recovery of damages for actual injury to, or purely economic losses to real or personal property by the owner or lessee of the property.<sup>7</sup> This provision significantly broadens the class of persons or entities that may state a claim for damages in two important ways. First, it does not require a physical impact to the property in order to recover economic losses. Second, it permits recovery by a claimant “who owns or leases” the property.<sup>8</sup> Property owners who believe their property has suffered a diminution in value due to the oil spill may be able to state a claim under the OPA regardless of whether the oil has physically impacted their property. The OPA also allows “any claimant” to recover for lost profits or impaired earning capacity due to the “injury, destruction or loss of real property, personal property, or natural resources...[.]”<sup>9</sup> This particular provision covers those persons or entities that derive income from real or personal property, in which they have a proprietary interest, that has been damaged by the oil. It also encompasses those whose livelihoods depend on property or natural resources that have been damaged despite the claimant’s lack of ownership. Examples of claimants falling into this category include commercial fisherman, commercial shrimpers, and seafood wholesalers and distributors.

Although the OPA opens the door for many claimants, who would not otherwise have a cause of action under traditional maritime law, to recover damages resulting from an oil spill, it also contains some limiting provisions.<sup>10</sup> Prior to filing an action in court, the claimant must first comply with the OPA’s presentation requirement. The claimant must present “all claims for removal costs or damages” to BP, the responsible party, and if the claim is denied or the parties are unable to reach a settlement within 90 days, then the claimant may elect to file suit or seek recovery from the Oil Spill Liability Trust Fund.<sup>11</sup> Failure to comply with the presentation requirement as described in Section 2713 will result in a dismissal without prejudice.<sup>12</sup> At first glance, the presentation requirement may not seem to be a particularly onerous step. However, because the claimant must present to BP their *total* damage claim, many claimants will find it difficult to currently quantify their ultimate damages due to the continuous nature of this spill and the vast amount of oil that remains in the Gulf even now that the well appears to have been capped.

Although there is no case law from the 11<sup>th</sup> Circuit directly on point, a Southern District of Texas court held that plaintiffs could not file suit and later amend the complaint to add their OPA claims once they complied with the presentation requirement.<sup>13</sup> In that case, the plaintiffs initially asserted claims under the OPA as well as state law claims for negligence, gross negligence, strict liability, trespass, and nuisance.<sup>14</sup> The court granted the defendant’s motion to dismiss the OPA claims for failure to comply with the statute’s presentation requirement.<sup>15</sup> With the state law claims remaining, plaintiffs attempted to fulfill

OPA's presentation requirement by sending letters to the defendant.<sup>16</sup> After their attempt to cure the presentation defect, plaintiffs moved to amend the complaint to add back the OPA claims.<sup>17</sup> The court, relying in part on the Eleventh Circuit's opinion in *Boca Ciega Hotel, Inc. v. Bouchard Transportation Co., Inc.*, held that the plaintiffs' failure to present their OPA claims to the defendant before filing a lawsuit is not amenable to cure by amending his presentment of claims during the pendency of the proceedings.<sup>18</sup> This seems to suggest that plaintiffs seeking damages under the OPA as well as other state common and/or statutory laws should not file their complaint unless and until they comply with the presentation requirement of the OPA.

After fulfilling the presentation requirement, the claimant may choose to recover their damages from the Oil Spill Liability Trust Fund ("OSLTF"). The OSLTF was established by 26 U.S.C. §9509 and is designated in the OPA as the funding source for uncompensated damages.<sup>19</sup> The U.S. Coast Guard's National Pollution Funds Center ("NPFC") administers the OSLTF under the guidance of several federal laws and regulations.<sup>20</sup> Federal regulations govern the standards, details, evidence, and forms that must be submitted to the NPFC to support a claim for damages.<sup>21</sup> Those seeking to recover from the OSLTF may not also file a lawsuit to recover damages that are the subject of the claim to the OSLTF.<sup>22</sup>

Until now, the OPA's application has been relatively limited in scope. It has yet to be used in an oil spill as massive as the BP Oil Catastrophe. Much remains to be seen as to how the courts will handle these claims.

### Florida Statutory and Common Law

Recovery may also be premised on Florida statutory and common law. Traditional common law causes of action such as negligence, trespass, and nuisance may be applicable depending on the particular claimant's situation and damages. In order to sustain claims for trespass, negligence and nuisance, the plaintiff must generally prove a physical impact to their property.<sup>23</sup> This requirement will substantially limit the universe of claimants permitted to recover under Florida common law. Because the oil may not physically impact the real property of the potential claimants, it makes their chance for recovery under these theories much more difficult. To the extent one can prove a physical impact to their property, the next issue to contend with is the measure of damages permitted by Florida law. In general, an award of damages to property under these theories is limited to the lesser of either the cost to restore the property or the diminution in value.<sup>24</sup> However, a recent landmark Florida Supreme Court case has held that a plaintiff may recover for purely economic losses where the plaintiff sustained no bodily injury or property damage. In *Curd, et al. v. Mosaic Fertilizer, LLC*, the court recognized an exception to the general rule preventing recovery for purely economic losses in the absence of bodily or property damage under a negligence theory. In *Curd*, the defendant's wastewater storage facility, which contained pollutants and hazardous constituents, spilled into Tampa Bay killing the marine life.<sup>25</sup> The plaintiff fishermen did not claim an ownership interest in the damaged marine life, but rather that the discharge resulted in damage to the reputation of the fishery products they were able to catch and attempt to sell.<sup>26</sup> The court agreed that commercial fishermen fall into a recognized exception

because they have an economic expectation in the marine life in the waters upon which they make their living.<sup>27</sup> The court held that the defendant owed a duty of care to the commercial fishermen and that they have a cause of action sounding in negligence.<sup>28</sup> Although it may be argued that this exception is limited to commercial fishermen, other aspects of the *Curd* opinion addressing individual causes of action under Florida's Pollutant Discharge Prevention and Removal statute provide a basis to argue for its applicability to plaintiffs other than just commercial fishermen.

Florida's Pollutant Discharge Prevention and Removal statute, found in chapter 376, Florida statutes (2010), regulates the discharge of pollution. Section 376.205 provides "any person may bring a cause of action against a responsible party in a court of competent jurisdiction for damages...resulting from a discharge or other condition of pollution..."<sup>29</sup> This particular section allows any person to bring an individual cause of action for the pollution of coastal waters and lands of the state.<sup>30</sup> The statute creates a strict liability cause of action, therefore the plaintiff "need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it occurred."<sup>31</sup> Plaintiffs must still prove damage which is defined in the statute as "the documented extent of any destruction to or loss of any real or personal property, or the documented extent pursuant to s. 376.121, of any destruction of the environment and natural resources, including all living things except human beings, as the direct result of the discharge of a pollutant."<sup>32</sup>

The Florida Supreme Court discussed a similar section of chapter 376 in its recent *Curd* decision that provides some insight into how §376.205 can be used by plaintiffs to recover oil spill damages. The *Curd* opinion focused on §376.313, which provides a strict liability cause of action for pollutive discharges into state surface and groundwaters.<sup>33</sup> The language in §376.313 that the court held created an individual cause of action in strict liability also appears in §376.205. The court specifically held that the lack of property ownership is not a defense available under chapter 376.<sup>34</sup> In summing up the rationale for the holding in *Curd*, the court said, "the Legislature has enacted a far-reaching statutory scheme aimed at remedying, preventing, and removing the discharge of pollutants from Florida's waters and lands. To effectuate these purposes, the Legislature has provided for private causes of action to any person who can demonstrate damages as defined under the statute."<sup>35</sup> Although the *Curd* plaintiffs were commercial fishermen, the court's analysis is logically applicable to other types of plaintiffs who have suffered economic losses as a result of the BP Oil Catastrophe. The statute also allows the court, in its discretion, to award attorney's and expert witness fees to any party.<sup>36</sup>

The statutory provisions in chapter 376 may permit recovery by those plaintiffs who cannot prove a physical impact to person or property, but nevertheless can demonstrate economic damages. Potential categories of victims that may benefit from chapter 376 are real property owners who have suffered a diminution in value of their property but have no physical damage from the oil. Businesses who depend on the health and productivity of the coastal waters but that do not own the property physically impacted by the oil (i.e. the waters and marine life, beaches, etc.) may also find protection in these statutory provisions.

## Conclusion

The unfortunate reality of this situation is that despite the fact that people have already sustained substantial harm, the full impact of the oil spill may not be realized for several months or years. The topics discussed in this article represent some preliminary issues to be considered in determining the best approach to handling clients' oil spill related claims. However, it is by no means an exhaustive analysis. The much anticipated Gulf Coast Claims Facility administered by Kenneth Feinberg as well as the Judicial Panel on Multidistrict Litigation's decision regarding the MDL court will likely play a role in determining the best course of action for a particular client. Although there are outstanding factors that may change the legal picture, as it currently exists, the basic issues presented here are a good starting point for understanding and evaluating oil spill related claims.

<sup>25</sup> See, *Curd, et al. v. Mosaic Fertilizer, LLC* (Fla. June 17, 2010).

<sup>26</sup> See, *id.*

<sup>27</sup> See, *id.*

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

<sup>29</sup> Fla. Stat. Ann. §376.205 (2010).

<sup>30</sup> See generally, Fla. Stat. Ann. §376.041 (2010) (discharge of pollutants into coastal waters, beaches prohibited).

<sup>31</sup> §376.205.

<sup>32</sup> § 76.031(5).

<sup>33</sup> See *Curd*, (Fla. June 17, 2010).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> §376.205.

<sup>1</sup> 33 U.S.C.A. §§2701-2761 (West 2010). This article focuses primarily upon the Oil Pollution Act and its applicability to the BP Oil Catastrophe. There are of course other aspects of admiralty and maritime law that may apply to these claims. This includes the possible application of the Limitation of Liability Act of 1851 for other parties that may be involved in the cause of this catastrophe such as Transocean, the owner of the Deepwater Horizon.

<sup>2</sup> 33 U.S.C.A. §2702.

<sup>3</sup> 33 U.S.C.A. §2702(a).

<sup>4</sup> See 33 U.S.C.A. §2701 (providing that a "mobile offshore drilling unit" like the Deepwater Horizon is considered a "vessel" for purposes of the OPA).

<sup>5</sup> 33 U.S.C.A. §2714.

<sup>6</sup> *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927).

<sup>7</sup> 33 U.S.C.A. §2702(b)(2)(B).

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

<sup>9</sup> 33 U.S.C.A. §2702(b)(2)(E).

<sup>10</sup> Although §2704 of the OPA provides for a \$75 million liability cap, the fact that BP has agreed to the \$20 billion compensation fund, in addition to public comments that it would not assert the liability cap, indicates an implicit acknowledgement that the cap is not applicable.

<sup>11</sup> 33 U.S.C.A. §2713.

<sup>12</sup> *Boca Ciega Hotel, Inc. v. Bouchard Transportation Co., Inc.*, 51 F.3d 235 (11<sup>th</sup> Cir. 1995) (presentation requirement is a mandatory condition precedent to filing of private lawsuits under the OPA).

<sup>13</sup> See *Abundiz, et al. v. Explorer Pipeline, Co.*, No. 300-CV-2029-H, 2003 WL 23594054 (N.D. Tex. March 7, 2003).

<sup>14</sup> See *Abundiz, et al. v. Explorer Pipeline Co.*, No. 300-CV-2029-H, No. 303-CV-0508-H, No. 303-CV-0787-H, 2003 WL 23096018 (N.D. Tex. Nov. 25, 2003).

<sup>15</sup> See *Abundiz*, No. 300-CV-2029-H, 2003 WL 23594054 (N.D. Tex. March 7, 2003).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 33 U.S.C.A. §2712(a)(4).

<sup>20</sup> See, e.g., 33 C.F.R. §136, et seq. (2010).

<sup>21</sup> 33 U.S.C.A. §2713(e); 33 C.F.R. § 136, et seq.

<sup>22</sup> 33 U.S.C.A. §2713(b)(2).

<sup>23</sup> See *The St. Joe Company v. Rawlis Leslie, et al.*, 912 So.2d 21 (Fla. 1<sup>st</sup> DCA 2005).

<sup>24</sup> See *Courtney Enterprises, Inc. v. Publix Supermarkets, Inc.*, 788 So.2d 1045 (Fla. 2<sup>d</sup> DCA 2001).