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## ARTICLES

### The Oil Pollution Act of 1990

Paul S. Edelman\*

*In response to several major oil spills, including the Exxon Valdez incident in 1989, the Oil Pollution Act of 1990 (OPA) was signed into law. The author reviews responses to various oil spills, and the inadequacy of legislation applicable to such responses prior to the OPA. This article reviews various sections of the OPA and the breadth of its coverage. The author points out that this new legislation expands liability with respect to oil spills, providing an incentive to potentially responsible tanker owners to take stronger measures to avoid such spills. However, as the author explains, the OPA may create as many problems as it solves. For example, insurers may have to provide new insurance coverage due to larger exposure under the OPA, or even stop providing such insurance altogether. The OPA requires that barges be double hulled, which is extremely costly to install and may be the cause of more explosions or extensive leaks than single hulls. The author also opines that the in-*

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*creased liability under the OPA may deter foreign oil importers from using the ports of the United States.*

Since the *Exxon Valdez* struck a reef in Alaska's Prince William Sound in March of 1989, the oil industry and environmentalists had been awaiting changes in oil pollution legislation. The *Valdez* incident caused eleven million gallons of crude oil to leak into the pristine Alaskan waters, creating the worst maritime environmental disaster in American history.<sup>1</sup> On August 18, 1990, the President signed the Oil Pollution Act of 1990<sup>2</sup> (OPA), which had been passed by Congress just before its summer recess.

## I. Other Major Oil Spills

### A. Tanker Related Spills

Other major disasters since the *Valdez* have added impetus to the general outrage for damage done to sensitive environmental areas by oil spills. Despite the attention given to the ecological disaster caused by Iraq in the Persian Gulf, our own problems have not been forgotten.<sup>3</sup>

In June 1990, the supertanker, *Mega Borg*, exploded and burned in the Gulf of Mexico while transferring some of its 41 million gallon cargo of oil to a smaller ship.<sup>4</sup> The blast, in which two seamen were killed, two others were listed as missing and presumed dead, and numerous other crew members were injured, occurred after approximately 3 million gallons of oil had been transferred.<sup>5</sup> Oil leakage created a slick thirty miles long and eight miles wide off the shore of Galveston, Texas.<sup>6</sup> If the remaining 38 million gallons had spilled out, the spillage would have been more than three times that of the *Exxon Valdez*.

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1. J. Com., Special Report, Mar. 9, 1990, at 3B.

2. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990) (codified as amended in scattered sections of 23, 26, 33, 43, and 46 U.S.C.) [hereinafter OPA].

3. N.Y. Times, Jan. 26, 1991, at 1, col. 3.

4. *Id.*, June 16, 1990, at 6, col. 4.

5. *Id.*, June 17, 1990, at 18, col. 1.

6. *Id.*, June 22, 1990, at 12, col. 1.

The details of this incident were dramatic. Fire raged for over a week, clouds rising to the skies. Attempts to skim the oil off the water were a minor success, and bacteria were then placed in the water with the hope that they would decompose the oil; the result was equally ineffective. The *Mega Borg* lost over 4 million gallons of oil, but much of that was burned off in the fire after the explosion. Response to the incident was criticized, but five fire boats, six oil skimmers, an aircraft to apply solvents to disperse the oil, and two work boats with foam arrived shortly after the fire began. Efforts were made to put out the fire as expeditiously as possible to prevent the vessel from sinking, and releasing even more oil into the Gulf. Miraculously, a repeat of the *Exxon Valdez* catastrophe was avoided.<sup>7</sup>

These disasters pale in comparison to the *Amoco Cadiz* incident which spilled 68 million gallons off the coast of northern France in 1978. The resulting oil slick was approximately eighteen miles wide and eighty miles long. In June of 1990, a judgment for damages was entered against Amoco for \$160 million dollars.<sup>8</sup>

New York harbor had its headaches in the spring of 1990. Since the first of the year, over one million gallons of oil have been spilled in the busy Kill Van Kull approaches to Port Newark. One of the five worst spills was due to the grounding of the tanker *B.T. Nautilus*, which spilled 260,000 gallons in the narrow waterway. The *B.T. Nautilus*' major insurer, Gard, is a Norwegian protection and indemnity insurer, which provides \$500 million in pollution liability coverage. (Ironically, Gard also insured the *Mega Borg* — a bad year!) When the ship was arrested, Gard posted a \$24.7 million guarantee. Although a local ship's pilot was probably at fault, for bringing the ship into port when the currents were too swift which pushed the ship out of its proper channel, the ship's captain

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7. N.Y. Times, June 13, 1990, at A27, col. 1; N.Y. Times, June 16, 1990, at 6, col. 4; N.Y. Times, June 17, 1990 at 18, col. 1; see generally J. Com., June 12, 1990; J. Com., June 14, 1990, at 3B.

8. J. Com., June 20, 1990, at 6B.

and the first mate were also under investigation.<sup>9</sup> The captain of the Port of New York, Captain North, has said that of the 28,000 vessel movements each year in the port of New York, seventy-five percent use the Arthur Kill and Kill Van Kull channels located between Staten Island and New Jersey.<sup>10</sup>

In June 1990, an oil spill off of Cape Cod fouled beaches in the area when the cruise ship, *Bermuda Star*, grounded.<sup>11</sup> Rhode Island also had a major oil spill when a similar grounding occurred, probably due to acute fatigue on the part of the master.<sup>12</sup>

### B. Barge Related Spills

A major oil slick in Galveston Bay resulted when a tanker collided with oil barges in the heavily-traveled Houston-Galveston ship channel in July of 1990.<sup>13</sup> However, in this accident, the oil spill was caused by barges, not by the tanker. This accident exemplifies the large number of oil spills from barges in coastal and port waters. In addition, this spill led observers to note the lack of regulation and inadequate training of tug and barge crews. Tugs, which guide barges, have not been subject to Coast Guard inspection. Qualifications for tug crews and barge crews are much lower than for tanker and larger vessel crews; in some cases crew qualifications are non-existent.

In the Houston channel collision, an outbound Greek tanker (with a double hull) struck an inbound trio of barges, hitting two and sinking one.<sup>14</sup> The accident occurred when the view of both the tanker and the barges was temporarily obscured by another ship passing between them in a narrow and

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9. N.Y.L.J., Sept. 7, 1990, at 3, col. 2.

10. J. Com., June 15, 1990, at 3B and 11B; J. Com., June 25, 1990 at 3B.

11. See J. Com., June 12, 1990, at 3B.

12. The findings of the National Transportation Safety Board concerning the Rhode Island spill was reported in the *Journal of Commerce* on December 19, 1990. Crew fatigue also figured in the *Exxon Valdez* spill. See also N.Y. Times, Dec. 18, 1990, at A20, col. 1.

13. See *id.*, July 31, 1990, at A13, col. 1.

14. J. Com., Aug. 6, 1990, at 3B.

crowded channel.<sup>15</sup> Some 500,000 gallons of oil spilled from the barges; one barge partially sank, blocking traffic in the channel which cuts through the Galveston Bay.<sup>16</sup> Closing the channel, among other restrictions, led to an estimated \$20 million loss in ship delays and other losses.

## II. Prior Legislation

### A. *The Clean Water Act*

Section 311<sup>17</sup> of the Clean Water Act (CWA) covers both oil pollution and pollution by hazardous substances. Under this provision, restoration cost<sup>18</sup> is the standard measure of damages for violations.<sup>19</sup> Superfund, created by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>20</sup> originally covered only hazardous substances and excluded oil and other forms of petroleum. The petroleum exclusion of section 9601(33) of CERCLA was reinforced in the Superfund Amendments & Reauthorization Act (SARA), and was confirmed by the EPA. Specifically, section 9614(c) exempted service stations from recovery of *any* CERCLA-based claim where recycled oil was released but contained no other hazardous substance.<sup>21</sup>

Damages for injury to natural resources may be recovered by a state, and in some cases by the federal government, as trustee.<sup>22</sup> A National Contingency Plan (NCP) was set up to coordinate federal agency responses to oil spills, including

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15. N.Y. Times, Aug. 2, 1990, at A10, col. 2.

16. *Id.*, July 31, 1990, at A13, col. 1.

17. Federal Water Pollution Control Act of 1972, § 311, 33 U.S.C. § 1321 (1988 & Supp. V) [hereinafter CWA].

18. Costs for the removal of the oil are mandated in § 311(f)(1)-(3), 33 U.S.C. § 1321(f)(1)-(3); costs for the replacement or restoration of natural resources are found in § 311(f)(4), (5), 33 U.S.C. § 1321(f)(4), (5).

19. *See generally* CWA § 311(f), 33 U.S.C. § 1321(f).

20. Comprehensive Environmental Response, Compensation, and Liability Act § 101, 33 U.S.C. § 9601 (1988 & Supp. V) [hereinafter CERCLA].

21. The July 1987 clarification memo preserves the exemption except where a specified listing for a petroleum constituent existed in the Resource Conservation and Recovery Act. CERCLA § 114(c), 33 U.S.C. § 9614(c).

22. *Id.* § 107(f), 42 U.S.C. § 9607(f). *See Ohio v. United States Dep't of the Interior*, 880 F.2d 432 (D.C. Cir. 1989).

those of the Coast Guard.<sup>23</sup> The CWA provides that when a spill or discharge occurs, a vessel owner or operator is liable to the United States up to the greater of \$125 per gross ton or \$125,000 for an inland oil barge, and \$150 per gross ton or \$250,000 against other vessels.<sup>24</sup> Liability under the CWA is divided into three categories: vessels,<sup>25</sup> onshore facilities,<sup>26</sup> and offshore facilities.<sup>27</sup>

The CWA also provides for civil penalties of up to \$5,000 per spill, with certain assessments being mandatory.<sup>28</sup> Civil actions may be brought to impose a penalty of up to \$50,000 for each violation.<sup>29</sup> Wilful negligence within the privity and knowledge of an owner, can result in penalties of \$250,000 for an individual.<sup>30</sup> Imprisonment is also possible for knowing offenders.<sup>31</sup> In some instances, corporate officials may be held criminally liable.<sup>32</sup>

The liability imposed by the CWA is strict and absolute, except for enumerated defenses, such as an act of God, or an act of war.<sup>33</sup> Other available defenses include negligence on the part of the United States,<sup>34</sup> and acts or omissions of a third party for an inland oil barge or for a vessel which does not carry oil as a cargo.<sup>35</sup> These defenses apply to all vessel-

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23. See 40 C.F.R. Part 300 (1990); see also Natural Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666 (1990).

24. CWA § 311(f), 33 U.S.C. § 1321(f).

25. *Id.* § 311(f)(1), 33 U.S.C. § 1321(f)(1).

26. *Id.* § 311(f)(2), 33 U.S.C. § 1321(f)(2).

27. *Id.* § 311(f)(3), 33 U.S.C. § 1321(f)(3).

28. *Id.* § 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A).

29. *Id.* § 311(b)(6)(B), 33 U.S.C. § 1321(b)(6)(B); see also *In re Exxon Valdez*, No. A89-095 (D. Alaska Feb. 9, 1991).

The decision was certified for an interlocutory appeal to the Ninth Circuit. Those plaintiffs who could not recover economic damages under maritime tort law can still claim against a \$100 million fund established by the Trans-Alaska Pipeline Authorization Act. 21 *Env'tl. L. Rep. (Env'tl. L. Inst.)* No. 6 (Feb. 25, 1991).

30. CWA § 311(b)(6)(B), 33 U.S.C. § 1321(b)(6)(B).

31. *Id.* § 309(c)(2), 33 U.S.C. § 1319(c)(2).

32. *Id.* § 309(c)(6), 33 U.S.C. § 1319(c)(6).

33. *Id.* § 311(f), 33 U.S.C. § 1321(f).

34. *Id.* § 311(f), 33 U.S.C. § 1321(f).

35. *Id.* § 311(f)(1), 33 U.S.C. § 1321(f)(1). This defense applies to onshore facilities and offshore facilities as well. *Id.* § 311(f)(2)-(3), § 1321(f)(2)-(3).

related discharges.<sup>36</sup>

Under the CWA<sup>37</sup> and Executive Orders,<sup>38</sup> the government is empowered to clean up the spill if the responsible party refuses. Case law has imposed third party liability for certain oil spills. For example, a shipowner may be held liable for the negligence of a compulsory pilot.<sup>39</sup> A third party which collides with an oil tanker and is solely responsible for the oil release from the tanker is also liable for cleanup costs.<sup>40</sup> The latter situation also presents a cause of action under the general maritime law. When maritime law is invoked, a shipowner or charterer can assert the defense of limitation of liability.<sup>41</sup> This defense allows a shipowner or charterer, without managerial complicity or "privity," to limit damages to the value of the vessel plus pending freight (the value of the cargo).<sup>42</sup> Under such an action, personal injuries or death can then be claimed against a separate fund based on tonnage.<sup>43</sup> Statutory authority for such claims is set forth in the Limitation of Liability Act.<sup>44</sup>

In cases involving inadequate or improper operational and/or training procedures, management may be implicated and the privity option will deny limitation of the management's liability.<sup>45</sup> Management is deemed to have privity with, and knowledge of, the operational and/or training procedures

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36. *Id.* § 311(f)(1), § 1321(f)(1). All four defenses are available for onshore and offshore facilities. *Id.* § 311(f)(2)-(3), § 1321(f)(2)-(3).

37. *Id.* § 311(c)(1)-(2), (d), 33 U.S.C. § 1321(c)(1)-(2), (d).

38. Exec. Order No. 11,735, 38 Fed. Reg. 21,243 (1973) (as amended by Exec. Order No. 12,418, 48 Fed. Reg. 20,891 (1983), reprinted in 33 U.S.C. § 1321 app. at 1042-43 (1988)); Exec. Order No. 12,418, 48 Fed. Reg. 20,891 (1983), reprinted in 33 U.S.C. § 1321 app. at 1043-44 (1988 & Supp. V).

39. *Burgess v. M/V Tamano*, 564 F.2d 964 (1st Cir. 1977); *United States v. Hollywood Marind, Inc.*, 625 F.2d 524 (5th Cir. 1980) (tug boat is not a third party if a barge it is towing leaks oil).

40. *United States v. M/V Big Sam*, 681 F.2d 432 (5th Cir. 1982) (there may also be liability for a maritime tort, but this liability may be limited by the Limitation of Liability Act).

41. *Id.* at 443; *Farrell Lines, Inc. v. Jones*, 530 F.2d 7 (5th Cir. 1976).

42. *Farrell Lines*, 530 F.2d at 10.

43. See *Kroemer v. Engliehno*, No. 89-7230 (2d Cir. filed Feb. 23, 1990).

44. 46 U.S.C. § 183 (1988).

45. See, e.g., *Farrell Lines*, 530 F.2d at 10-12; *Hercules Carriers, Inc. v. Florida*, 768 F.2d 1558 (11th Cir. 1985).

of its crews, which also results in the denial of limitation of liability where there are inaccurate charts or navigational aids.<sup>46</sup> This option is different from simple navigation error which will usually allow limitation of liability.<sup>47</sup>

The limitation of the liability of the shipowner may also be precluded if there is a known or obvious incompetence of officers or crew members.<sup>48</sup> In these cases, the burden is on the shipowner to show crew competence, or that crew incompetence did not cause the accident.<sup>49</sup> If the shipowner delegates authority for hiring, the owner must still take steps to ensure the competence of the crew.<sup>50</sup>

If both the discharging vessel and another vessel are liable for the accident, the discharging vessel alone is held responsible for all the cleanup costs.<sup>51</sup> However, the CWA does provide a right of contribution against the other vessel.<sup>52</sup> Even if the other vessel does not create the discharge, the government may bring an action against it for negligence as a maritime tort.<sup>53</sup> In these cases, defenses may be limited to those allowed by the Limitation of Liability Act.<sup>54</sup> Wilful misconduct or wilful negligence combined with managerial privity voids the penalty assessment limitations of both the CWA and Superfund.<sup>55</sup>

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46. See *Farrell Lines*, 530 F.2d at 7; *Hercules Carriers*, 768 F.2d at 1558; Complaint of Chevron Transport Corp., 613 F. Supp. 1428 (D.C. Fla. 1985), *aff'd*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988).

47. *Hercules Carriers*, 768 F.2d at 1558.

48. *Hercules Carriers*, 768 F.2d at 1558; *In re Ta Chi Navigation (Panama) Corp.*, 513 F. Supp. at 148 (E.D. La. 1981).

49. *Hercules Carriers*, 768 F.2d at 1564; *In re Ta Chi*, 513 F. Supp. at 148.

50. CWA § 311(f), 33 U.S.C. § 1321(f) (1988).

51. *Id.*

52. *Id.*

53. See 46 U.S.C. § 2302 (1988).

54. Limited Liability Act, ch. 13, 9 Stat. 635 (Mar. 3, 1951) (codified as amended in scattered sections of 46 U.S.C.).

55. Wilful misconduct with managerial privity was found in *Tug Ocean Prince v. United States*, 584 F.2d 1151 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979). See 33 U.S.C. § 1321(f) and 42 U.S.C. § 9607(c)(2). Only negligence was found in *Steuart Trans. Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir. 1979).

### B. Actions for Damage to Natural Resources

In addition to the CWA, several other acts entitle the federal and state governments to recover damages to restore or replace damaged natural resources.<sup>56</sup> Some states have legislation and case law that allow the state to sue as a trustee of its citizens.<sup>57</sup>

In *Commonwealth of Puerto Rico v. The S.S. Zoe Colocotroni*,<sup>58</sup> the court held that the measure of damages recoverable under state law was limited to the cost of restoration over time, so as not to be disproportionate to damages, rather than the diminution of the commercial value of the area damaged or for immediate and expensive "draconian" restoration.<sup>59</sup> The court ruled that, as a private landowner, the Commonwealth could recover for private economic loss.<sup>60</sup> However, the court awarded these damages to the Commonwealth of Puerto Rico as a private landowner notwithstanding the fact that the suit was brought under a statute of the Commonwealth of Puerto Rico for protection of land and wildlife by a governmental agency.<sup>61</sup>

One of the issues involved with the *Valdez* incident was whether the rule of the United States Department of the Interior, which had been attacked in the *S.S. Zoe Colocotroni*<sup>62</sup> case, would apply to damage in Prince William Sound. Environmentalists and members of Congress have sought to ensure that assigning dollar values to natural resources to determine environmental damage will not be the basis for claims against Exxon. According to one Interior Department official, these

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56. See, e.g., CERCLA § 111(i), 42 U.S.C. § 9611(i); Outer Continental Shelf Lands Act, 43 U.S.C. § 1813(b)(3) (1988); Deepwater Port Act, 33 U.S.C. § 1517(d) (1988); Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653(a)(1) (1988).

57. See *Maine v. M/V Tamano*, 357 F. Supp. 1097 (D.C. Me. 1973); *In re Stuart Trans.*, 495 F. Supp. 38 (D.C. Va. 1980).

58. 628 F.2d 652 (1st Cir. 1980). This case has a good discussion of the scope of the Clean Water Act's 1977 amendments and the Outer Continental Shelf Lands Act Amendments of 1978.

59. *Id.*

60. *Id.*

61. *Id.*

62. See *id.*

rules would not apply to *Valdez* damages.<sup>63</sup> Under the new legislation, damage to natural resources is an important provision.

### C. *International Protocols*

Recent congressional hearings considered adherence by the United States to the International Protocols of 1984 to the International Conventions on Civil Liability for Oil Pollution Damage of 1969,<sup>64</sup> and for the Establishment of An International Fund for Compensation for Oil Pollution Damage of 1971 (the Fund).<sup>65</sup> The Fund, which had a maximum of 135 million Special Drawing Rights in 1984,<sup>66</sup> was designed to provide additional compensation for victims of large scale oil pollution that were insufficiently covered by the 1969 Convention.<sup>67</sup> The Fund is financed through contributions by persons in a contracting state who receive significant oil cargoes.<sup>68</sup> Drafters of the OPA decided against adherence to these international protocols.

In 1975, the United States ratified one convention dealing with oil pollution on the high seas.<sup>69</sup> The United States ratified the Convention for the Prevention of Pollution from Ships (MARPOL) in 1980, and passed implementing legislation soon thereafter. Besides setting standards in construction and ship equipment, the Coast Guard was given broad powers to protect the marine environment.<sup>70</sup> Even before passage of

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63. 20 Env't Rep. (BNA) No. 9, at 485 (June 30, 1989).

64. Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 [hereinafter Civil Liability Convention], *reprinted in* 23 I.L.M. 177 (1984).

65. Protocol of 1984 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage [hereinafter 1971 Fund Convention], *reprinted in* 23 I.L.M. 195 (1984).

66. Civil Liability Convention, *supra* note 64, at art. VI, *reprinted in* 15 J. MAR. L. & COMM. 613, 616 (1984).

67. 1971 Fund Convention, Arts. 2-4, *reprinted in* 11 I.L.M. at 284-87 (1972).

68. *Id.* arts. 10-12; 11 I.L.M. at 290-93 (1972).

69. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, November 29, 1969, Brussels, *entered into force for United States*, May 6, 1975, 26 U.S.T. 765, T.I.A.S. No. 8068.

70. *See* Prevention of Pollution from Ships, 33 U.S.C. §§ 1901-1912 (1988).

the OPA, the United States and various states had enacted laws which were not completely in harmony with the proposed international protocols.

The 1969 Civil Liability Convention (CLC) provides a maximum liability of approximately \$17 million, under current values,<sup>71</sup> and allows for damages to private parties as well as government cleanup costs.<sup>72</sup> However, only the owner is liable under the CLC.<sup>73</sup> The 1971 Fund substantially increased the CLC amount to \$80 million.<sup>74</sup> If all provisions of the 1984 protocols were in force (which would assume adherence by nations of the major oil importers) up to about \$264 million would be available, including money from the Fund and amounts available under the CLC in certain cases.

The Maritime Law Association (MLA) has long supported the ratification of the proposed conventions to increase international uniformity by the United States and to do away with the hodgepodge of conflicting federal and state laws.<sup>75</sup> In the 1984 protocols, "pollution damage" was defined to include "economic loss," and the cost of preventive measures; an "incident" was defined as an occurrence not only causing dam-

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71. CIVIL LIABILITY CONVENTION, *supra* note 67, at art. V; 9 I.L.M. 45, 48 (1970). The convention provided for a maximum liability of \$210 million. See generally J. COM., June 14, 1990.

72. The decision of District Court Judge McGarr in the *Amoco Cadiz* litigation dealt with this Convention. Since not ratified by the U.S., the Convention was held inapplicable in the U.S. court. Even under French law including the Convention, the judge held that victims can sue in tort outside of the Convention against anyone other than the registered owner, its agents, or its servants (*i.e.*, master or crew). *In re Oil Spill By "Amoco Cadiz,"* 1984 A.M.C. 2123 (D.C. Ill. 1984). This decision is a brilliant dissertation on oil spill cases. Standard Oil Co. of Indiana and two of its subsidiaries were held liable for the spill. Claimants included fishermen, hotel owners, a region in Brittany, France and the owner of the oil cargo. Amoco Transport was to arbitrate its claim against the salvage company for its claimed negligence. The Amoco parties were given the right to recover over and against the Spanish builders. *Id.*

73. Civil Liability Convention, *supra* note 67, at art. V.

74. TOVALOP and CRISTAL, *A Guide to Oil Spill Compensation*, N.Y. Times, June 29, 1990, at A1, col. 3 [hereinafter TOVALOP and CRISTAL].

75. M.L.A. minutes of the May 4, 1984, Annual Meeting, cited in Paulsen, *Why the United States Should Ratify the 1984 Protocols to the International Conventions on Civil Liability for Oil Pollution Damage (1969) and the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971)*, 20 FORUM 164, 168-69 (1984-85).

age, but one which caused a grave and imminent or serious threat of damage.<sup>76</sup>

A major problem in drafting the OPA was whether the United States should ratify the international conventions.<sup>77</sup> Many legislators felt that the protocols would provide less coverage than the pending legislation, and would also limit state liability claims.<sup>78</sup> The recent legislation was enacted with full knowledge that the new Act made adherence to the international protocols impossible.<sup>79</sup> International insurers are disappointed that Congress has more draconian proposals than were agreed to in the protocols. The protocols would also override any inconsistent state legislation. When the President signed the new bill, he chastised Congress for refusing to endorse the international protocols which would have provided access to a maximum of \$260 million from the international Fund under the 1984 Protocols.<sup>80</sup>

In addition to the convention funding, there are private agreements which provide substantial funds for oil pollution damage. The Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP), a voluntary agreement of tanker owners, provides funds of up to \$16.8 million.<sup>81</sup> The Contract Regarding Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL), which includes oil cargo interests, provides for funds of up to \$135 million, including TOVALOP money.<sup>82</sup> These funds may be obtained through well-defined claims procedures.<sup>83</sup> One large oil spill off of France was successfully resolved under the claims procedures.<sup>84</sup> Under the OPA, one provision states that the United States favors participation in the international conventions,

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76. Civil Liability Convention, *supra* note 64, at art. II, para. 3, reprinted in 15 J. MAR. L. COMM. 613 (1984).

77. See J. COM., June 29, 1990; J. COM., July 24, 1990; J. COM., Oct. 22, 1990.

78. *Id.*

79. *Id.*

80. N.Y. Times, June 29, 1990, at A1, col. 3; J. COM., Aug. 21, 1990, at 1B.

81. TOVALOP and CRISTAL, *supra* note 74.

82. *Id.*

83. *Id.*

84. Address by Christopher B. Kende, *International Law Association* (Nov. 2, 1990).

but only if the conventions are as effective as the provisions of the OPA, including federal and state laws.<sup>85</sup>

### III. The New Legislation

#### A. *The Oil Pollution and Control Act of 1990*

The OPA, which took fifteen years to create, increases the cap on spiller liability eight-fold to \$10 million or \$1,200 per ton, whichever is greater.<sup>86</sup> There is no limitation of liability in cases of gross negligence, wilful misconduct, or violations of federal operating and safety standards under the OPA.<sup>87</sup> The OPA requires that incidents be reported or liability limitations will fail.<sup>88</sup> It also holds "bareboat charterers"<sup>89</sup> of oil responsible for damages, as well as vessel owners and operators.<sup>90</sup>

The elements of liability and damages under the OPA are most important:

1. Removal costs incurred by the United States and others must be consistent with the new National Contingency Plan;<sup>91</sup>
2. A United States trustee or other enumerated trustees, including a foreign trustee, may recover for damage to natural resources;<sup>92</sup>
3. Recovery is permitted for injury, including economic losses from destruction of real or personal property<sup>93</sup> (this ensures collection of losses generally excluded in other areas of maritime law by prior court decisions);
4. Damages include those for loss of subsistence use of natural

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85. OPA, Pub. L. No. 101-380, § 3001, 104 Stat. 484, 507-08 (1990).

86. *Id.* § 1004(a), 104 Stat. 484, 491-92 (to be codified at 33 U.S.C. § 2704).

87. *Id.* § 1004(c)(1), 104 Stat. 484, 492 (to be codified at 33 U.S.C. § 2704).

88. *Id.* § 1004(c)(2)(A), 104 Stat. 484, 492 (to be codified at 33 U.S.C. § 2704).

89. A bareboat or demise charterer leases and operates the vessel and employs its own crew. See *International Marine Towing, Inc. v. Southern Leasing Partners, Ltd.*, 722 F.2d 126 (5th Cir. 1983).

90. OPA, Pub. L. No. 101-380, § 2002, 104 Stat. 484, 507 (to be codified at 33 U.S.C. § 1321).

91. *Id.* § 1002(b)(1)(A), (B), 104 Stat. 484, 489 (to be codified at 33 U.S.C. § 2702).

92. *Id.* § 1002(b)(2)(A), 104 Stat. 484, 489-90 (to be codified at 33 U.S.C. § 2702).

93. *Id.* § 1002(b)(2)(B), 104 Stat. 484, 490 (to be codified at 33 U.S.C. § 2702).

resources, even though not owned;<sup>94</sup>

5. Damages for net loss of taxes, royalties, rents, fees, or net profit due to injury to property, recoverable by the United States, a state, or political subdivision;<sup>95</sup>

6. Loss of profits or impairment of earning capacity due to injury to property or natural resources, recoverable by any claimant;<sup>96</sup>

7. Damage for net costs of providing increased or additional public services caused by oil discharges, recoverable by a state or subdivision.<sup>97</sup>

Defenses include acts of God, war, or a third party.<sup>98</sup> However, no defense is permitted for the acts of a third party which had contracted with the responsible party.<sup>99</sup> Thus, pollution caused by a barge towed by a tug would not relieve the barge owner from liability because the tug was at fault or by claiming that the pilot was at fault. A claimant would also be denied recovery if the incident was caused by the claimant's own gross negligence or willful misconduct.<sup>100</sup>

Liability limits are set as follows under the OPA:

1. Tank vessels have a liability limit of \$1,200 per gross ton or if larger than 3000 gross tons, \$10 million, whichever is greater. For vessels of 3,000 gross tons or less, the outside figure is \$2 million. Other vessels are liable for \$600 per ton or \$500,000, whichever is greater;<sup>101</sup>

2. Onshore facilities and deep water ports are liable for removal costs plus \$350 million;<sup>102</sup>

3. Offshore facilities are liable for removal costs plus \$75 million.<sup>103</sup>

There are also provisions for the recovery of damages

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94. *Id.* § 1002(b)(2)(C).

95. *Id.* § 1002(b)(2)(D).

96. *Id.* § 1002(b)(2)(E).

97. *Id.* § 1002(b)(2)(F).

98. *Id.* § 1003(a)(1)-(3), 104 Stat. 484, 491 (to be codified at 33 U.S.C. § 2703).

99. *Id.* § 1003(a)(3).

100. *Id.* § 1003(b).

101. *Id.* § 1004(a)(1)(A), (B) & (a)(2), 104 Stat. 484, 491-92 (to be codified at 33 U.S.C. § 2704).

102. *Id.* § 1004(a)(4), 104 Stat. 484, 492 (to be codified at 33 U.S.C. § 2704).

103. *Id.* § 1004(a)(3).

where foreign claimants are involved.<sup>104</sup> For example, a vessel carrying oil as cargo between two places in the United States, which damages foreign interests, is liable for the foreign entity's removal costs and damages.<sup>105</sup> However, the OPA requires that the foreign country involved must provide a comparable remedy for American claimants.<sup>106</sup>

Penalties for violations of the OPA include up to three years imprisonment and fines of up to \$250,000 for an individual or \$500,000 for an organization for failure to report a spill.<sup>107</sup> Civil penalties are assessed at \$25,000 per day or \$1,000 per barrel of oil for a violation.<sup>108</sup> The minimum penalty is \$100,000 in cases of gross negligence, but no more than \$3,000 a barrel.<sup>109</sup> Despite some controversy over the dangers as well as the effectiveness of a double hull on a tanker, the OPA requires double hulls for tankers entering American ports by the year 2010 with the phase-out schedule beginning in 1995.<sup>110</sup>

A federal fund of \$1 billion has been established for spill cleanup costs and economic compensation.<sup>111</sup> The money comes from a five cent per barrel fee on both domestic and imported oil. Assets in the fund, would be available for cleanup costs when liability limits are met, as well as for payment for economic damages.<sup>112</sup> Funds are also available if the spiller cannot be found, or when a spiller and injured party cannot settle on damages within ninety days.<sup>113</sup>

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104. *Id.* § 1004(a)(4).

105. *Id.* § 1007(b)(3), 104 Stat. 484, 497 (to be codified at 33 U.S.C. § 2707).

106. *Id.* § 1007(a)(1)(B).

107. *Id.* § 4301(a)(2), 104 Stat. 484, 533 (to be codified at 33 U.S.C. § 1321(b)(5)).

108. *Id.* § 4301(b)(7)(A), 104 Stat. 484, 536 (to be codified at 33 U.S.C. § 1321(b)).

109. *Id.* § 4301(b)(7)(D), 104 Stat. 484, 537 (to be codified at 33 U.S.C. § 1321(b)).

110. *Id.* § 4115(c)(3)(A)(i), 104 Stat. 484, 518 (to be codified at 46 U.S.C. § 3703(a)).

111. *Id.* § 9001(d)(1), 104 Stat. 484, 574 (to be codified at 26 U.S.C. § 9509).

112. *Id.* § 1013(d), 104 Stat. 484, 501 (to be codified at 33 U.S.C. § 2713).

113. *Id.* § 1013(c)(1), (2).

## B. State Activities

States are permitted to enact laws that are even more stringent than federal regulations for oil spills. The Supreme Court has ruled that federal statutes have not preempted state oil pollution statutes.<sup>114</sup> Twenty-four states have some form of legislation dealing with rights of compensation due to oil spills, or liability for cleanup costs. As of August 1990, seventeen states had no liability limits. Since the *Exxon Valdez* incident, Alaska has had approximately 200 new bills under consideration. New York, New Jersey, Maine, and Florida all have significant anti-pollution statutes.<sup>115</sup>

Florida and Louisiana assess incoming oil products to finance a spill-cleanup fund.<sup>116</sup> In August, Texas authorities proposed a fee between one cent and ten cents on a barrel on incoming oil products to finance a Gulf Coast interstate oil-spill response cleanup fund.<sup>117</sup> An interstate body would be set up to administer the project, coordinate clean up efforts, and even set safety standards for tankers and personnel operating in the Gulf.

In September 1990, following the change in federal law, California passed a stringent law regulating prevention programs and oil response. The program was placed under the state Resources Agency. Provisions include a \$100 million emergency response fund and unlimited state borrowing authority for cleanups, funded by the oil industry.<sup>118</sup> Revenues are raised for the fund by taxing oil at twenty-five cents per gallon. An oil spill administrator, empowered to coordinate

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114. *Askew v. American Waterway Operators, Inc.*, 411 U.S. 325 (1973). The Court held that where no clear-cut conflict existed under the predecessor legislation to the Federal Water Pollution Control Act Amendments of 1972, the state law would have effect. Admiralty law under the Admiralty Extension Act, 46 U.S.C. § 740 (1988), was also implicated. Some 10 states hold shippers liable, a provision rejected in the 1990 Act. See J. COM., Feb. 13, 1991.

115. See, e.g., N.Y. UNCONSOL. LAW §§ 170-197 (McKinney 1989); N.J. STAT. ANN. § 48:13A-12 (West 1990). ME. REV. STAT. ANN. tit. 38, §§ 541-57 (Supp. 1973); FLA. STAT. §§ 376.011-21 (1970). New Jersey has fines up to 10 million dollars. See J. COM., July 24, 1990.

116. See J. COM., June 21, 1990.

117. See J. COM., Aug. 13, 1990.

118. CAL. GOV'T CODE § 8670.48 (West 1980 & Supp. 1991).

prevention and cleanup efforts, is established under the law.<sup>119</sup> It is expected that this administrator will head a new office of Spill Preparedness, combining the powers of fourteen state agencies.<sup>120</sup>

The California statute provides stringent cease and desist authority to enforce spill prevention measures. Strict tanker inspection and safety programs are authorized, which include tanker inspection and safety programs;<sup>121</sup> radar controls are set up for tanker traffic along the California coast;<sup>122</sup> the state has the authority to conduct surprise inspections of tankers and terminals;<sup>123</sup> refineries are required to have safety plans.<sup>124</sup> The law provides for sixty-day limited immunity plans after a spill, with a thirty-day extension to maximize the best possible response to large spills, while requiring responsible parties to indemnify for the cleanup.<sup>125</sup>

New York legislation, similar to that of California, authorizes the Commissioner of Environmental Conservation to establish standards covering petroleum shipments, to set minimum vessel standards for ships in New York waters, and to set tanker-free zones.<sup>126</sup> Virginia and the state of Washington are considering similar legislation.

### C. *Planning and Response Provisions*

A new era of spill prevention is also part of the OPA. One provision requires tanker operators to participate in the Coast Guard's vessel monitoring and tracking system, known as Vessel Traffic Service (VTS).<sup>127</sup> Before passage of the OPA, participation in this type of system was voluntary. The *Exxon Valdez* catastrophe might have been avoided if VTS had been

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119. *Id.* § 8670.4.

120. N.Y. Times, Sept. 23, 1990, at 26, col. 4.

121. CAL. GOV'T CODE § 8670.18.

122. *Id.* § 8670.21(a).

123. *Id.* § 8670.18.

124. *Id.* § 8670.17.

125. *Id.* § 8670.56.6(c)(1).

126. J. COM., July 5, 1990, at 4B.

127. OPA, Pub. L. No. 101-380, § 4107, 104 Stat. 484, 514 (to be codified at 33 U.S.C. § 1223(a)); J. COM., Aug. 9, 1990, at 3B.

operative in Prince William Sound in March of 1989. The National Transportation Safety Board concluded that one of the major causes of the disaster was the lack of an effectively equipped and adequately manned VTS system.<sup>128</sup> In light of its effectiveness, funds are budgeted to re-establish proper VTS systems in New Orleans and in New York harbor.<sup>129</sup> Recent reports indicate the Coast Guard is reinstating radar, a video camera system, and a VTS system on Governors Island in New York harbor.<sup>130</sup>

The United States Secretary of Transportation determines which ports and channels will have the VTS system. Priorities are established based on the risks in each area and volume of traffic. A similar nationwide planning and response system is established under the OPA.<sup>131</sup> The OPA also provides for a national response unit and ten regional response groups that will list the available spill removal resources, equipment, and personnel.<sup>132</sup> Under the system provided for in the OPA, the private sector supplies the bulk of equipment and personnel needed. Demonstration projects are authorized for three areas: New York/New Jersey, Los Angeles/Long Beach, and New Orleans. Each of the port areas will get as much as \$750,000 a year for four years, beginning in 1992, for the testing of cleanup techniques and response procedures.<sup>133</sup> These measures are reactive to inefficient oil spill responses, such as the *Mega Borg* accident, where fire fighting teams took two days to arrive at the scene, and much of the equipment had to be brought in from overseas.<sup>134</sup>

The OPA requires owners and operators of oil vessels and oil facilities to submit oil spill response plans within thirty months.<sup>135</sup> As a consequence of the OPA, the oil industry has

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128. N.Y. Times, Aug. 1, 1990, at A10, col. 1; J. Com., Aug. 2, 1990, at 8B.

129. J. Com., Aug. 9, 1990, at 3B; See J. Com., Dec. 6, 1990, at 8B.

130. J. Com., Dec. 5, 1990, at 8B; J. Com., Dec. 6, 1990, at 8B.

131. See OPA, Pub. L. No. 101-380, § 4202, 104 Stat. 484, 537-32 (to be codified at 33 U.S.C. § 1321).

132. *Id.* § 4202(b)(2), 104 Stat. 484, 531-32 (to be codified at 33 U.S.C. § 1321). See also Federal Water Pollution Control Act, § 311(j)(2), 33 U.S.C. 1321(j)(2) (1988).

133. See J. Com., Aug. 9, 1990.

134. N.Y. Times, June 13, 1990, at A26, col. 1.

135. See OPA, Pub. L. No. 101-380, § 4202, 104 Stat. 484, 527-32 (to be codified

set up a new industry pollution response organization. Some twenty major oil companies are funding the Marine Spill Response Corporation (MSRC), formerly the Petroleum Industry Response Organization. The MSRC will spend about \$800 million over the next five years to set up five regional centers and twenty-three equipment staging areas at the major port regions.<sup>136</sup> The cost is to cover spill equipment, maintenance, research, and personnel. Ten specialized spill response vessels will be built and other spill response companies will be included. The MSRC is expected to be fully operational by the beginning of 1993. In early 1991, a former head of the EPA was named chairman along with eight other board members.<sup>137</sup>

The Marine Preservation Association is to be the funding arm for the MSRC. The OPA requires petroleum companies to designate a cleanup organization and a response corporation to act as the designated party.<sup>138</sup> Dues must be paid on the basis of oil taken into the United States or transported within the country.<sup>139</sup> A research program is also contemplated. Regional centers cover New York, Florida, Louisiana, the Los Angeles area, and Seattle, with proposed sites to cover most of the major coastal and Gulf ports, and Alaska.

A revision is to be made with respect to the Coast Guard's program for issuing, renewing, suspending or revoking mariner licenses. The Coast Guard is to have access to the National Driver Register for the information on driving violations for applicants for Coast Guard licenses.<sup>140</sup> Captain Hazelwood of the *Exxon Valdez* had been convicted twice of charges involving drunk driving for which his driver's license had been suspended or revoked three times.<sup>141</sup>

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at 33 U.S.C. § 1321).

136. J. Com., Sept. 7, 1990, at 1B.

137. J. Com., Feb. 1, 1991, at 3B. A president and other officers were appointed in December 1990. See J. Com., Dec. 18, 1990.

138. See OPA, Pub. L. No. 101-380, § 4202, 104 Stat. 484, 527-32 (to be codified at 33 U.S.C. § 1321).

139. J. Com., Sept. 7, 1990, at 1A.

140. See OPA, Pub. L. No. 101-380, § 4105, 104 Stat. 484, 512 (to be codified at 23 U.S.C. § 401).

141. N.Y. Times, Mar. 25, 1990, at 26, col. 4. For an informative article on the

Manning requirements are mandated by the OPA: officers and crews may not work more than fifteen hours in any twenty-four hour period and not more than thirty-six hours in any seventy-two hour period.<sup>142</sup> These requirements will have an impact on the size of ships' crews.

#### IV. Problems for the Future

##### A. *Limits on Insurance Coverage*

The *Mega Borg* was insured for \$500 million in oil pollution liability coverage by Gard.<sup>143</sup> When the ship was arrested to assure payment, Gard posted a guarantee.<sup>144</sup> Exxon is said to have spent in the area of \$2 billion in clean up costs by the end of 1989, not including the 1990 seasonal activities.<sup>145</sup> In the summer of 1990, Exxon had a second season of cleanup.<sup>146</sup> There is some improvement in the environmental health of the area, but oil can remain in some areas for a decade before decaying.

One of the issues that came up in the Exxon civil suits is who may recover damages.<sup>147</sup> In February 1991, a federal judge in Alaska held that only those who suffered direct economic losses could recover.<sup>148</sup> Commercial fishermen could recover, but not sport fishermen, fish processors, boat charterers, and some other groups.<sup>149</sup>

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spill, see Behar, *Joe's Bad Trip*, TIME, July 24, 1989, at 42.

142. OPA, Pub. L. No. 101-380, § 4114, 104 Stat. 484, 517 (to be codified at 46 U.S.C. § 8104(n)).

143. N.Y. Times, June 12, 1990, at A19, col. 1. Additional coverage of \$200 million was also available.

144. See J. COM., June 20, 1990.

145. N.Y. Times, Mar. 8, 1991, at A12, col. 5.

146. See J. COM., Mar. 14, 1991.

147. *In re Exxon Valdez*, No. A89-095 (D. Alaska Feb. 9, 1991). The judge apparently relied on an older admiralty decision, *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927). Other cases have provided for recoveries by commercial fishermen for lost profits. *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974); *Louisiana (Guste) v. M/V Testbank*, 524 F. Supp. 1170 (E.D. La. 1981). In addition to private claims, reports in February 1991 noted the prospect of a \$1 billion settlement by Exxon with the U.S. and Alaska with payments over eight years. J. COM., Feb. 15, 1991, at 7B.

148. *In re Exxon Valdez*, No. A89-095 (D. Alaska Feb. 9, 1991).

149. *Id.*

Due to large exposure under the new Act, protection and indemnity insurers may place such limits on coverage that whole new insurance coverages may be required. Insurers of vessels coming to the United States may throw the whole industry into a crisis. As of February 1991, additional insurance premiums were assessed for tankers calling in the United States from ten to twenty percent over the prior year.<sup>150</sup>

### B. *New Tanker Requirements*

Under the new bill, new tankers and barges over 5,000 tons operating in U.S. waters will require double hulls. Single-hulled tankers, now the usual configuration, must be retrofitted or phased out within twenty years from 1995 to 2010.<sup>151</sup> Barges are to be double-hulled by the year 2015.<sup>152</sup> A Coast Guard study has shown definite decreases in spillage where tankers had double hulls.<sup>153</sup> They obviously limit the loss if a tanker is grounded. Even though the double hull would not have prevented some spillage from the *Exxon Valdez*, some studies say that the spill would have been significantly less.<sup>154</sup>

Some dangers from double hulls have been spoken about. Water can rush in between a ruptured hull and the inner hull causing the ship to settle lower, possibly exacerbating the leak. There is also talk of possible explosive vapors gathering between the hulls. Costs are also significant. A double hull on the *Exxon Valdez*, which cost \$125 million to build, would amount to ten to fifteen percent more to build.<sup>155</sup> Retrofitting the 153 tankers in the United States could cost about \$30 million each at a total cost of over \$4 billion.<sup>156</sup> So far, various major oil companies have ordered new tankers with double hulls including Conoco, which has already ordered two such

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150. J. Com., Feb. 20, 1991, at 1A.

151. OPA, Pub. L. No. 101-380, § 4115, 104 Stat. 484, 517-22 (to be codified at 46 U.S.C. § 3703(a)).

152. *Id.*

153. See N.Y. Times, Apr. 11, 1990, at D8, col. 3; J. Com., Aug. 9, 1990, at 3B.

154. Actually, the spill would have been approximately 25% to 60% less. N.Y. Times, Apr. 11, 1990, at D8, col. 3.

155. N.Y. Times, June 17, 1990, at 18, col. 1.

156. *Id.*; N.Y. Times, July 9, 1990, at A16, col. 5.

tankers. Statoil of Norway, also reported that it was ordering five new tankers, two with double hulls and three with double or partial double bottoms.<sup>157</sup>

Some legislators will be pressing in the future to require double-hulls on barges under 5,000 tons. In December 1990, the Coast Guard published its proposals on the technical specifications for double hull-designs.<sup>158</sup> One suggestion is a two foot separation between a cargo tank and the outer skin of the ship. Comments are due in April 1991. A marine board panel of the National Academy of Sciences is also expected to deal with the tanker design.<sup>159</sup>

### C. *Will Tankers Avoid U.S. Ports?*

Another worry is whether, despite insurance coverage, major oil suppliers will stop coming to the ports of the United States. We may face a rash of small companies, with older tankers and without adequate insurance, carrying the major part of the vast oil imports into the United States. When the Middle East crisis blew up, it was shown that almost half of the oil products consumed in the United States came from abroad, most of which would be delivered by ship. Shell has said that it will only visit the Louisiana Offshore Oil Port even though its tankers are insured for \$1 billion.<sup>160</sup> France's Elf Aquitaine will no longer send its tankers here, and Maersk, a major Danish company, announced a similar policy.<sup>161</sup> British Petroleum, Petrofina, A.P. Moller, Tee Kay, Bouchard Transportation, and Texaco have expressed reservations on sending ships to waters of the United States or to certain states. The fear is the large liability limits and the possibility of unlimited liability under both federal and state law.

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157. N.Y. Times, Apr. 11, 1990, at D8, col. 2; J. COM., Aug. 9, 1990, at 3B.

158. J. COM., Dec. 11, 1990, at 1B; See J. COM., Aug. 6, 1990, at 3B.

159. J. COM., Dec. 11, 1990, at 1B.

160. J. COM., June 12, 1990, at 9A; J. COM., June 14, 1990, at 8B.

161. J. COM., June 25, 1990, at 8B.