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FILED
FEB 14 1990
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	No. A-88-115 Civil
	)	(Consolidated)
the GLACIER BAY	)	(Relates to all Glacier Bay
	)	Civil Actions)

MOTION OF THE TRANS-ALASKA PIPELINE LIABILITY FUND TO DISMISS CLAIMS OF FISH TENDERS AND PROCESSORS FOR FAILURE TO STATE A CLAIM

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Trans-Alaska Pipeline Liability Fund (the "Fund") moves to dismiss the claims of certain plaintiffs in this action on the ground that they fail to state a claim on which relief can be granted.

The plaintiffs that are the subject of this motion to dismiss are identified in the following list, which sets out the

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name of each plaintiff and the paragraph of the First Consolidated Complaint on Behalf of All Private Plaintiffs that identifies each:

Plaintiff	Paragraph of Complaint
Robert Hunt	6
Larry Bennett Powers	7
Eric Conner	518
Dorius D. Carlson (Carlson Enterprises)	519
D&G Enterprises	520
Duane F. Edelman	521
Cindy Epperson and Julie Ferlitsch	522
Mark Allen Fortune	523
Mark Laukkanen	524
Al McNamara	525
Randy Meier	526
Randy and Rosemary Renner	527
Will J. Satathite	528
Sea-Nik Foods	529
Seasonal Seafoods	530
Paul K. Seaton	531
David Valaer	532
Allied Processing, Inc.	536
John Cabot Co., Inc.	537
Dragnet Fisheries, Inc.	538
Ed's of Kasilof Seafoods, Inc.	539
Keener Packing, Inc.	540
Inlet Fisheries, Inc.	541
Royal Pacific Fisheries, Inc.	542
Salamatof Seafoods, Inc.	543
Cook Inlet Processing, Inc.	550

As set forth in the accompanying memorandum of law, the identified claims should be dismissed because the fish tenders and processors who claim to have sustained economic losses as a result of the Glacier Bay spill do not complain of any physical injury to their person or property. Under traditional maritime law principles, a tort claimant (other than a commercial fisherman)

for economic losses in the absence of a physical injury to the claimant's person or property. Under well-established principles of statutory interpretation, this Court should read the TAPS Act as embodying the physical injury requirement. Congress incorporated that physical injury requirement into the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1651 et seq. ("TAPS Act") because it recognized that it was legislating against a backdrop of federal maritime law and chose to reject certain other features of maritime law while preserving the physical injury requirement.

Respectfully submitted,

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February 14, 1990

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	No. A-88-115 Civil
	)	(Consolidated)
the GLACIER BAY	)	(Relates to all Glacier Bay
	)	Civil Actions)

MEMORANDUM IN SUPPORT OF THE TRANS-ALASKA PIPELINE LIABILITY FUND'S MOTION TO DISMISS CLAIMS OF FISH TENDERS AND PROCESSORS FOR FAILURE TO STATE A CLAIM

Among the plaintiffs in this consolidated action are 26 fish tenders and processors who sustained no physical injury to their person or property and allege only that the GLACIER BAY oil spill caused them lost profits. The Trans-Alaska Pipeline Liability Fund (the "Fund") here moves to dismiss the claims of the tenders and processors, under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim on which relief can be

granted. Dismissal is warranted because (1) maritime tort law principles bar recovery by persons who have not sustained physical injury to their person or property, and (2) that rule of maritime law was incorporated into the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1651 et seq. (the "TAPS Act"), under which the claims against the Fund arise. Accordingly, the claims of those plaintiffs identified in the accompanying motion should be dismissed pursuant to Rule 12(b)(6).

BACKGROUND

On July 2, 1987, according to the First Consolidated Complaint on Behalf of All Private Plaintiffs ("Complaint"), the tanker S/T GLACIER BAY struck a submerged rock in Cook Inlet and began leaking oil. Complaint ¶ 565. The vessel ultimately spilled an estimated 150,000 to 207,564 gallons of oil. Id. ¶ 580. Numerous claimants are seeking damages from the Fund and other defendants under the TAPS Act; the claims have been consolidated in this action. This memorandum addresses only the TAPS Act claims of the fish tenders and processors, who are identified in the accompanying motion.

Plaintiffs allege that the GLACIER BAY spill diminished the total salmon harvest for 1987 compared to what it would have been but for the spill. Id. ¶ 617. They allege that oil contamination of salmon resulted in unusually time-consuming inspection of salmon processing operations by state officials, as

well as unusually slow processing. Id. ¶¶ 621-22, 624, 626, 631. They further allege that the fishing closures ordered by state fish and game officials not only reduced the overall number of fish caught for the season, but also "disrupted the pattern of the salmon harvest." Id. ¶¶ 617, 618. This disruption, they claim, occurred when the spill caused state officials to delay the harvest in such a manner that what normally would be two weeks' catch arrived at fish processors all at once and created a fish glut. Id. ¶ 635. Additionally, the complaint alleges that salmon prices dropped because the fish-purchasing public perceived that the fish would be contaminated and because the delayed harvest resulted in poorer meat quality. Id. ¶¶ 639-42.

The Complaint alleges that these events caused economic losses for fish tenders and processors. The processors allege that the glut-caused drop in price (along with other glut-caused inefficiencies) reduced their profits. Id. ¶ 650. The tenders allege that they did not receive payment for some of the fish they delivered to processors, because the processors were unable to use the fish as a result of the glut. Id. ¶¶ 647-48. The tenders and processors do not seek recovery because of any physical damage to their person or property. The only harm that they claim the GLACIER BAY spill caused them is a reduction in their profits.

ARGUMENT

The claims of the fish tenders and processors are precisely the sort of claims for which the TAPS Act provides no remedy. A longstanding rule of maritime law bars recovery for economic losses in the absence of physical injury to the person or property of the claimant. The rule has been vigorously enforced by several circuits in recent years, is recognized by the Ninth Circuit, and recently received an implicit endorsement from the Supreme Court. The TAPS Act incorporates this physical injury requirement. Congress consciously enacted the Act against a backdrop of federal maritime law principles. Those principles that Congress did not specifically eliminate in the TAPS Act, it intended to retain under the Act. Since the physical injury requirement is a part of the TAPS Act, the claims of the fish tenders and processors, who sustained no physical injury from the GLACIER BAY spill, should be dismissed.

I. TRADITIONAL MARITIME LAW PRINCIPLES BAR RECOVERY BY THE FISH TENDERS AND PROCESSORS.

A. A Maritime Tort Claimant Cannot Recover Damages Absent Physical Injury to the Claimant's Person or Property.

Maritime law has long employed a bright-line rule to determine who can recover when a tortious act is alleged to have set off a chain-reaction of economic effects causing numerous plaintiffs to sustain losses. The rule is that a plaintiff cannot

recover damages for economic injury, even if foreseeable, in the absence of physical injury to the person or property of that plaintiff. Getty Refining & Marketing Co. v. MT Fadi B, 766 F.2d 829, 833 (3d Cir. 1985); Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 51 (1st Cir. 1985); State of Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1023 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986).1/

The leading maritime case barring recovery of purely economic damages is Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). Plaintiff Flint chartered a ship, agreeing with the owners that it could be drydocked periodically for repairs and that Flint would not pay charter hire during those periods. Defendant dry dock company negligently damaged the ship, delaying its return to service and depriving Flint of its use for two weeks. Since Flint had no property interest in the vessel, the only damages he sought were economic damages for loss of use. Justice Holmes, writing for a unanimous Court, held that Flint, having suffered no physical injury to himself or his property, could not recover, because "[t]he law does not spread its protection so far." Id. at 309. Over the years, Robins Dry Dock

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1/ See also Hercules Carriers, Inc. v. State of Florida, 720 F.2d 1201 (11th Cir. 1983), aff'd on rehearing by an equally divided court, 728 F.2d 1359 (11th Cir.) (en banc), cert. denied, 469 U.S. 835 (1984); In re Carlson, 1989 WL 105177, Civ. A. No. 88-9882 (E.D. Pa. Sept. 7, 1989); Holt Hauling & Warehousing v. M/V Ming Joy, 614 F. Supp. 890, 895 (E.D. Pa. 1985) (Pollack, J.); Pruitt v. Allied Chemical Corp., 523 F. Supp. 975, 981-82 (E.D. Va. 1981).

has come to stand for the broad proposition that "claims for economic loss unaccompanied by physical damage to a proprietary interest [are] not recoverable in maritime tort." M/V Testbank, 752 F.2d at 1021; see MT Fadi B, 766 F.2d at 833; M/V Donau Maru, 764 F.2d at 51-52.

Although Justice Holmes' opinion framed the issue as whether a party who has contracted to use the property of another can sue a third party (who is ignorant of the contract) for negligently damaging that property, the Robins Dry Dock rule is not confined to circumstances where a contractual relationship exists between the plaintiff and the directly injured party. M/V Donau Maru, 764 F.2d at 51; M/V Testbank, 752 F.2d at 1023. "Robins Dry Dock represents more than a limit on recovery for interference with contractual rights." M/V Testbank, 752 F.2d at 1023. If anything, the absence of a contract renders the plaintiff's claimed damages even more remote. Id. at 1023-24. Most courts considering Robins in recent years have recognized that the rule of law established is not limited to its particular facts and that "the case casts a longer shadow." M/V Ming Joy, 614 F.2d at 894.

The federal courts have applied the Robins Dry Dock rule broadly, and in particular have denied recovery to fish wholesalers and processors who suffered economic losses but no damage from physical injury as a result of marine chemical spills.

Thus, shipping companies, marina and boat rental operators, wholesale and retail seafood enterprises, seafood restaurants, tackle and bait shops, and recreational fishermen could not recover economic damages incurred when a chemical spill closed a shipping channel and shut down all fishing in the area. M/V Testbank, 752 F.2d at 1032. Similarly, seafood wholesalers, retailers, processors, distributors, restaurateurs, and owners of boats, tackle and bait shops, and marinas could not recover under maritime law for losses resulting from the alleged contamination of seafood by the defendant's discharges of chemicals. Pruitt, 523 F. Supp. at 982. Thus, the courts have squarely held that Robins Dry Dock bars recovery in circumstances exactly like those in the present case.2/

2/ The physical injury requirement has been applied broadly to deny recovery in numerous other contexts, as well. See M/V Donau Maru, 764 F.2d at 57 (absent physical injury, vessel owner could not recover for additional costs incurred when a spill from defendant's vessel prevented plaintiff's vessel from docking at a nearby berth); MT Fadi B, 766 F.2d at 833, 835 (absent physical injury, marine terminal operator could not recover for losses incurred when defendant's vessel was forced to remain at the terminal for three days due to a crack in its deck and hull); Hercules Carriers, 720 F.2d at 1202 (absent physical injury, owners of vessels whose passage was blocked to and from port for several days due to a bridge collision could not recover for resulting economic damages); In re Carlson, 1989 WL 105177 (absent physical injury, gasoline stations could not recover lost profits resulting from closure of bridge damaged by defendant vessel); M/V Ming Joy, 614 F. Supp. at 899-900 (stevedore company could not recover damages for loss of use of pier damaged by defendant unless it could show at trial that it exercised virtually unlimited control over the pier, which it leased from the pier owner, and thus had sustained physical injury to a proprietary interest).

In short, there is a body of federal maritime law, developed over a long period of time, that sets out a strict bar against recovery of purely economic losses. The rationale of the physical injury requirement is a "pragmatic" one. W. Prosser & W. Keeton, The Law of Torts § 129 at 1001 (5th ed. 1984). The motivating principle is that

> while physical harm generally has limited effects, a chain reaction occurs when economic harm is done and may produce an unending sequence of financial effects best dealt with by insurance, or by contract, or by other business planning devices.

Id.

The courts have refused to allow maritime tort recovery for purely economic harm for two basic reasons. First, allowing such recovery raises problems of judicial administration. The number of people who complain of foreseeable financial harm is likely to be vastly greater than those who complain of physical harm. Additionally, some of those economically injured by an event will have suffered harm that is difficult to distinguish from the normal ups and downs of the economy, raising tortuous issues of causation-in-fact and proximate cause. Thus, courts and litigants would be burdened by the task of sorting out compensable from noncompensable economic injuries. M/V Donau Maru, 764 F.2d at 55. Second, allowing recovery for purely economic losses can impose liability disproportionate to a party's fault. The costs of such liability "would reflect not only the costs of the harm inflicted; they would also reflect administrative costs of law

[illegible] jury verdicts in uncertain amounts, some percentage of unbounded or inflated economic claims, and lessened incentive for financial victims to avoid harm or to mitigate damage." Id. (emphasis in original); see MT Fadi B, 766 F.2d at 832.

Judge Louis Pollak of the Eastern District of Pennsylvania persuasively summed up the pragmatic rationale for Robins:

> Many accidents produce economic ripples which affect a theoretically infinite number of parties, each of whom may have to alter his behavior to his detriment because of the negligence of the party who brought about the initial injury. Each of these injured parties suffers a real loss for which tort law ought, in a perfectly just world, to provide redress. Yet compensating everyone who suffers some economic disadvantage from an accident would require both a staggering commitment of judicial resources -- as courts struggle to determine the connection between the accident and each claimant's monetary loss -- and a consequent risk of increasingly arbitrary, ad hoc decisionmaking at the margins.

M/V Ming Joy, 614 F. Supp. at 895.

The Robins Dry Dock rule has withstood the test of time, proving that it has much to commend it. As the Third and Fifth Circuits have noted, it is significant that the Supreme Court decided Robins, announcing a bright-line rule of limitation, at the same time as the courts generally were expanding tort liability. See MT Fadi B, 766 F.2d at 831; M/V Testbank, 752 F.2d at 1023. And, as the years went by, Robins was left in place by the same judges who wrote other recovery limitations out of

existence. See M/V Donau Maru, 764 F.2d at 53; M/V Testbank, 752 F.2d at 1023. The rule's survival and broad present-day acceptance testifies to its firm policy foundations.

In short, rather than decide case-by-case whether to allow recovery, the courts in maritime cases have recognized a bright-line rule and have carved out a few exceptions for broad categories of cases where the administrability or disproportionality rationales are less pressing or a strong countervailing consideration militates in favor of liability. M/V Donau Maru, 764 F.2d at 55-56. The one such exception that has any relevance to this case, as the following discussion will show, does not apply to the fish tenders and processors that are the subject of this motion.

B. Strict Application of the Physical Injury Requirement Is Consistent with Ninth Circuit Precedent.

The strict application of the physical injury requirement illustrated by the First, Third, Fifth, and Eleventh Circuits is fully consistent with Ninth Circuit precedent. The only Ninth Circuit cases that permit recovery for solely economic losses do so based on the long established exception permitting commercial fishermen to recover damages for lost fishing profits even absent physical injury to their property. Emerson G.M. Diesel, Inc. v. Alaskan Enterprise, 732 F.2d 1468, 1472 (9th Cir. 1984); Union Oil Co. v. Oppen, 501 F.2d 558, 565-66 (9th Cir.

1974); Carbone v. Ursich, 209 F.2d 178, 182 (9th Cir. 1953). Permitting commercial fishermen to recover reflects the long-recognized tradition that commercial fishermen are the "favorites of admiralty" -- a tradition that has been held to outweigh the Robins rationale. Union Oil, 501 F.2d at 567; Carbone, 209 F.2d at 182.3/

The fishermen exception has been strictly limited to commercial fishermen and cannot provide any basis for recovery by wholesale buyers or processors of fish. The admiralty courts' special solicitude extends only to those people who make their living in and on the sea. For example, the Fifth Circuit in M/V Testbank recognized the fishermen exception but refused to permit recovery by wholesale and retail seafood companies, seafood restaurants, bait and tackle shops, and even recreational fishermen. 752 F.2d at 1027 n.10. Similarly, the Eastern District of Virginia in Pruitt recognized the fishermen exception but refused to permit maritime recovery by seafood wholesalers, retailers, processors and distributors, as well as restaurateurs and owners of boats, bait and tackle shops and marinas. 523 F. Supp. at 981 n.31. Other courts, in dicta, have referred to the exception as applying specifically to commercial fishermen. See

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3/ See also M/V Donau Maru, 764 F.2d at 56; M/V Testbank, 752 F.2d at 1027 n.10.; Pruitt, 523 F. Supp. at 981 n.31. For this reason, the fund believes that fishermen can, as in this case, sue for damages under the TAPS Act even if they do not complain of physical damage to property. The Fund therefore does not challenge the fishermen's claims on this basis.

East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 869 n.5 (1986); M/V Donau Maru, 764 F.2d at 56.

Similarly, the Ninth Circuit's explanation of the fishermen exception makes clear that the exception is limited to people who actually fish and does not extend to shoreside economic damages such as those asserted by the fish tenders and processors in this case.

In Carbone v. Ursich, crew members of a fishing vessel sued the owners of another vessel to recover for the loss of prospective catches of fish during the completion of repairs to the fishing net on the fishing vessel, which the other vessel had fouled. Although none of the plaintiffs owned any interest in the fishing vessel or in the net, they were permitted to recover the share of prospective fishing profits they would have received under their contract with the vessel owner. The court held that Robins Dry Dock did not bar recovery by commercial fishermen.

> It is quite evident that the [Robins] court, although dealing with a well established rule of law of torts, was not thinking of the special situation of the fishermen who, as we have here indicated, had long been recognized as beneficiaries under a special rule which made the wrongdoer liable not only for the damage done to the fishing vessel, but liable for the losses of the fishermen as well. This long recognized rule is no doubt a manifestation of the familiar principle that seamen are the favorites of admiralty and their economic interests entitled to the fullest possible legal protection.

209 F.2d at 182 (emphasis added).

In the Union Oil case, the Ninth Circuit drew on the fishermen exception in permitting recovery of economic damages caused by an oil spill. 501 F.2d at 567. Commercial fishermen sued the owner of the offshore oil rig that caused the spill, claiming lost fishing profits. The court distinguished Robins Dry Dock, citing both Carbone and a 1910 Scottish case that permitted tort recovery for fishermen who worked under a profit-sharing arrangement with the owner of a trawler damaged by the defendant's negligence. Id. The Union Oil court quoted the Carbone passage recognizing "seamen [as] the favorites of admiralty," id., and characterized commercial fishermen's losses as being "of a particular and special nature." Id. at 570. The notion that seamen only, and not second-, third- and fourth-hand users of the sea's resources, merit an exception to the Robins Dry Dock rule finds additional support in the court's closing passage:

> Finally, it must be understood that our holding in this case does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by the oil spill of January 28, 1969. . . . Both the plaintiffs and defendants conduct their business operations away from land and in, on and under the sea.

501 F.2d at 570 (emphasis added).

Of course, the long-recognized fishermen exception permitted every plaintiff in Union Oil to recover, obviating the need to examine the roots of Robins Dry Dock. Yet, the opinion

did go further than the facts before the court. The court stated that, in light of the existing exceptions to Robins, "we are not for[e]closed by precedent from examining on its merits the issue" of recovery of purely economic damages. 501 F.2d at 568. It went on to explore the approaches taken by California state courts in dealing with the problem of purely economic damages under land-based tort law. The Union Oil court noted that the California courts had (as of 1974) moved toward finding a duty on the part of the defendant in any case in which the plaintiff's injury was foreseeable. 501 F.2d at 568-69. Thus, obiter dicta in Union Oil arguably can be read to suggest that maritime law might reach the same conclusion.

But Union Oil's dicta about foreseeability, which were tentative statements in 1974, have been undercut by subsequent Circuit authority. The Ninth Circuit has since treated Union Oil as nothing more than a fishermen-exception case. In Emerson G.M. Diesel, Inc. v. Alaskan Enterprise, 732 F.2d 1468, 1472 (9th Cir. 1984), the court permitted owners of a fishing vessel to recover damages for lost fishing profits caused by the failure of a defective engine part. The Alaskan Enterprise court paraphrased the Union Oil holding as one favoring commercial fishermen and stated that the rationale for recovery was "'the familiar principle that seamen are favorites of admiralty.'" Id. (quoting

Carbone, 209 F.2d at 182).4/ In short, Union Oil and the other Ninth Circuit cases permitting recovery of purely economic losses are consistent with Robins Dry Dock and its bright-line-drawing progeny; they are fishermen cases and thus have no relevance to the claims that are the subject of this motion to dismiss.

C. The Supreme Court Has Implicitly Endorsed Strict Application of the Physical Injury Requirement.

In East River S.S. Co. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), the Supreme Court quoted Robins Dry Dock with approval and confirmed the view that Union Oil establishes only a right of recovery by commercial fishermen. First, the East River Court characterized Carbone and Alaskan Enterprise as representing a narrow class of fishermen-exception cases. Referring to a line of cases that had allowed products liability recovery for product defects that injure only the product itself, the Court stated that

> [m]ost of the admiralty cases concerned fishing vessels. See Emerson G.M. Diesel,

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4/ Other courts have likewise treated Union Oil as a fishermen-exception case. See M/V Testbank, 752 F.2d at 1026 ("Union Oil's holding was carefully limited to commercial fishermen, plaintiffs whose economic losses were characterized as 'of a particular and special nature.'") (quoting Union Oil, 501 F.2d at 570); M/V Donau Maru, 764 F.2d at 56 (Union Oil carved out an exception for fishermen as "'favorites of admiralty'") (quoting Union Oil, 501 F.2d at 567); Pruitt, 523 F. Supp. at 981 (citing Union Oil for the proposition that maritime law provided recovery of purely economic damages only to those plaintiffs who were commercial fishermen). See also Schoenbaum, Liability for Spills and Discharges of Oil and Hazardous Substances from Vessels, XX Forum 152 (1984) (citing Union Oil as an example of a fishermen-exception case).

> Inc. v. Alaskan Enterprise, 732 F.2d 1468, 1472 (CA9 1984) (relying on solicitude for fishermen as a reason for a more protective approach). [Defendant] Delaval concedes that the courts, see Carbone v. Ursich, 209 F.2d 178-182 (CA9 1953), and Congress . . . at times have provided special protection for fishermen. This case involves no fishermen.

476 U.S. at 869 n.5.

Second, while the East River Court expressly declined to "reach the issue whether a tort cause of action can ever be stated in admiralty when the only damages sought are economic," 476 U.S. at 871 n.6, the reasoning of the opinion gave implicit endorsement to the strict application of Robins Dry Dock by the First, Third, Fifth, and Eleventh circuits. East River held that no products liability claim lies in admiralty when a commercial party alleges that a product defect caused injury only to the product itself resulting in purely economic harm; such a claim is properly understood as a warranty claim. Id. at 876. In his opinion for a unanimous Court, Justice Blackmun observed that, while warranty law has built-in limitations on liability, products liability law, "where there is a duty to the public generally," exposes an actor to potentially unbounded liability. Id. at 874. As a means of limiting that liability, he wrote, foreseeability alone is "an inadequate brake." Id. He continued:

> Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product. In this case, for example, if the charterers -- already one

> step removed from the transaction -- were permitted to recover their economic losses, then the companies that subchartered the ships might claim their economic losses from the delays, and the charterers' customers also might claim their economic losses, and so on. "The law does not spread its protection so far." Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 309 (1927).

476 U.S. at 874. Justice Blackmun went on to observe that when the courts allow tort recovery for purely economic losses but try to place limits on such recovery, "they do so by relying on a far murkier line." 476 U.S. at 875. The Court's endorsement of bright-line rules and its criticism of recovery based solely on foreseeability were thus stated in clear terms.

The Supreme Court's approving citation to Robins Dry Dock furnishes even further proof of its vitality. No case of which we are aware has held that fish tenders or processors can recover purely economic losses under maritime law: Union Oil dealt solely with fishermen, and both M/V Testbank and Pruitt squarely hold that maritime law barred recovery by wholesale buyers of fish. Union Oil and the other Ninth Circuit precedents are entirely consistent with the strict application of the physical injury requirement favored by the other circuits. In short, application of maritime law principles to this case bars recovery by the processor and tender claimants.

II. THE TAPS ACT INCORPORATES TRADITIONAL MARITIME LAW PRINCIPLES.

The maritime law rule barring recovery of damages for economic losses absent physical injury to the person or property of the claimant is incorporated into the TAPS Act. Congress was well aware that it was legislating against a backdrop of maritime law principles when it enacted the liability provisions of the Act. Congress expressly rejected some of those principles and established rules peculiar to the TAPS Act context. As to matters on which Congress was silent -- including the bar against recovery of purely economic damages -- traditional maritime law supplies the rule of decision.

When Congress enacted the TAPS Act in 1973, it had long been settled that ship-to-shore pollution cases such as the present one fall within the admiralty jurisdiction. Admiralty jurisdiction reaches cases of damage or injury caused by a discharge of oil or other hazardous substance from a vessel on navigable water, even if the "damage or injury [is] done or consummated on land." 46 App. U.S.C. § 740.5/ Before the enactment of the TAPS Act, such suits were governed by federal maritime law, regardless of whether they were brought in a federal court or were brought in a state court under the "saving

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5/ See M/V Testbank, 752 F.2d at 1031; Petition of New Jersey Barging Corp., 168 F. Supp. 925, 932 (S.D.N.Y. 1958); G. Gilmore & C. Black, The Law of Admiralty 23 n.75 (2d ed. 1975).

to suitors" clause of the Judiciary Act, 28 U.S.C. § 1333(1).6/ Thus, the TAPS Act Congress was indisputably aware that liability for oil spills, which was the subject of its legislation, was a matter theretofore governed by federal maritime law.

Indeed, the legislative history of the TAPS Act confirms that Congress knew it was legislating against a backdrop of maritime law. In its discussion of liability for spills, the Conference Report described preexisting law. It observed:

> State governments and private parties are still obliged to proceed under maritime law, subject to the limits of liability contained in that body of law.
>
> The Conferees concluded that existing maritime law would not provide adequate compensation to all victims . . . in the event of the kind of catastrophe which might occur.

H.R. Conf. Rep. No. 617, 93d Cong., 1st Sess. 28 (1973). In short, Congress assumed that, before enactment of the TAPS Act, the remedy for ship-to-shore pollution was supplied by maritime law.

Well-established principles of statutory construction dictate that, since Congress knew it was legislating against a backdrop of maritime law, and since it voiced no objection to the physical injury requirement, the TAPS Act should be interpreted as

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6/ See Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 222-23 (1986); Floyd v. Lykes Bros. S.S. Co., 844 F.2d 1044, 1046-47 (3d Cir. 1988).

incorporating that requirement.7/ When it passed the TAPS Act, Congress enumerated those few principles of maritime law that it wanted to replace with more generous liability provisions. Thus, the TAPS Act dispensed with two principal limitations on maritime law recovery: the fault requirement and the 1851 Limitation of Liability Act. Neither of these changes has any connection with the physical injury requirement; Congress' dissatisfaction with maritime law centered on issues other than Robins Dry Dock. On this basis, congressional silence as to the physical injury requirement reflects Congress' understandable satisfaction with that maritime law principle.

CONCLUSION

For the foregoing reasons, the claims of the fish tenders and processors are not cognizable under the TAPS Act. The claims should therefore be dismissed under Rule 12(b)(6) for failure to state a claim on which relief can be granted.

7/ See Norfolk Redev. & Housing Auth. v. C&P Tel., 464 U.S. 30, 35 (1983) (recognizing the "well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose'") (quoting Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 623 (1813)); 2A N. Singer, Sutherland on Statutory Construction § 50.05 at 440 (4th ed. 1984) (where a statute affects common-law rights and duties in a few specified particulars, the common law governs as to all other matters).

Respectfully submitted,

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February 14, 1990

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FILED
FEB 14 1990
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA AT ANCHORAGE

In re	)	
	)	
the GLACIER BAY	)	No. A88-115 Civil
	)	(Consolidated)
	)	

RE: A89-100 Civil
A89-454 Civil

TRINIDAD, WEST, HAWKER, KEE, MATHIASEN'S AND GBTC'S RULE 12(b)(6) MOTION TO DISMISS CLAIMS OF TENDERS, FISH BUYERS, FISH SPOTTERS, FISH PROCESSORS, AND OTHER SHORESIDE BUSINESSES

Pursuant to Fed. R. Civ. P. 12(b)(6), defendants Trinidad, West, Hawker, Kee, Mathiasen's and GBTC move the court to dismiss the economic loss claims, asserted under the strict liability provisions of 43 U.S.C. § 1653(c) and A.S. 46.03.822, of the following plaintiffs:

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A. McGahan Plaintiffs

1. Tenders/Fish Buyers

Robert Hunt
Larry Bennett Powers
Eric Conner
Dorius D. Carlson
Duane F. Edelman
Cindy Epperson and Julie Ferlitsch
Mark Allen Fortune
Mark Laukkanen
Al McNamara
Randy Meier
Randy and Rosemary Renner
Sea-Nik Foods
Paul K. Seaton

2. Fish Processors

Allied Processing, Inc.
John Cabot Company, Inc.
Dragnet Fisheries, Inc.
Ed's of Kasilof Seafoods
Keener Packing, Inc.
Inlet Fisheries, Inc.
Royal Pacific Fisheries, Inc.
Salamatof Seafoods, Inc.
D & G Enterprises

3. Miscellaneous Shoreside Businesses

Will J. Satathite
Seasonal Seafoods, Inc.
David Valaer
Rocky Seaman
Eldridge Walker
Jamie Wilson

B. Woods Plaintiffs

1. Fish Processing

Cook Inlet Processing, Inc.

The basis of defendants' motion is that the economic loss strict liability claims asserted by these plaintiffs are not legally cognizable because the law does not permit recovery of

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pure economic losses not directly attributable to physical damage. This motion is supported by the accompanying memorandum of law.

DATED this 14th day of February, 1990 at Anchorage, Alaska.

BRADBURY, BLISS & RIORDAN
Lawyers for Defendants
Trinidad, West, Hawker, Kee,
Mathiasen's and GBTC

By: _____
(FOR) Michael H. Woodell

CERTIFICATION OF SERVICE

I, Violet M. Drew, certify that on this 14th day of February, 1990, service of TRINIDAD, WEST, HAWKER, KEE, MATHIASEN'S AND GBTC'S RULE 12(b)(6) MOTION TO DISMISS CLAIMS OF TENDERS, FISH BUYERS, FISH SPOTTERS, FISH PROCESSORS, AND OTHER SHORESIDE BUSINESSES has been made upon all counsel of record based upon the Master Service List of October 5, 1989.

_____
Violet M. Drew

JEK/vmd
581-4\Mot-Dis

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FOR THE DISTRICT OF ALASKA AT ANCHORAGE

In re	)	
	)	
the GLACIER BAY	)	No. A88-115 Civil
	)	(Consolidated)
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RE: A89-100 Civil
A89-454 Civil

MEMORANDUM IN SUPPORT OF TRINIDAD, WEST, HAWKER, KEE, MATHIASEN'S AND GBTC'S RULE 12(b)(6) MOTION TO DISMISS CLAIMS OF TENDERS, FISH BUYERS, FISH SPOTTERS, FISH PROCESSORS, AND OTHER SHORESIDE BUSINESSES

INTRODUCTION

Defendants Trinidad Corporation et al. (hereafter Trinidad) move to dismiss the statutory strict liability claims for economic losses asserted by 31 non-fishermen plaintiffs seeking recovery of lost profits allegedly caused by the GLACIER BAY oil spill. These plaintiffs, who include fish tenders, buyers,

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processors, spotters and certain shoreside businesses (hereafter collectively referred to as "processors"), seek to recover for pure economic losses which are not attributable to physical damage to property they owned. Their strict liability claims are brought under the Trans-Alaska Pipeline Authorization Act ("TAPAA"), 43 U.S.C. §§ 1651-55, and Alaska Statute 46.03.822.

The processors' economic loss strict liability claims are ripe for dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Dismissal is required because long-established maritime tort law principles, which were incorporated into TAPAA, deny recovery of economic damages other than those flowing from personal injury or physical damage to property owned by the plaintiff. Similarly, Alaska law does not extend strict liability to encompass recovery of pure economic losses. Even if Alaska law could somehow be construed to permit such a recovery, it would be preempted by federal maritime law. Accordingly, the court should dismiss the economic loss strict liability claims of the 31 plaintiffs identified in the accompanying motion.

FACTS

On July 2, 1987 the GLACIER BAY struck an uncharted submerged obstruction in Cook Inlet and began leaking oil. Numerous plaintiffs who allege they lost profits as a result of the oil spill have sued Trinidad under TAPAA and Alaska Statute 46.03.822. The claims have been consolidated in this action.

While most of the plaintiffs are commercial fishermen, the "processor plaintiffs" whose claims are at issue in this motion

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are not commercial fishermen. Several processor plaintiffs allege they were fish tenders or fish buyers in Cook Inlet in 1987. Consolidated Complaint ¶¶ 6-7, 518-519, 521-524, 526-27, 529, 531. Another group alleges they operated fish processing businesses in the region. Complaint ¶¶ 520, 536-543, 550. A third group allegedly operated a variety of shoreside businesses which were somehow connected to the fishing industry. Complaint ¶¶ 520, 525, 528, 530, 532, 533-535. This memorandum addresses only the claims of these processor plaintiffs.

The processor plaintiffs allege the GLACIER BAY spill diminished the total Cook Inlet salmon harvest for 1987. Complaint at ¶ 618. They also allege that the presence of oil-tainted salmon resulted in time-consuming inspections of the salmon processing operations by the State of Alaska and unusually slow processing. Id. ¶ 618. Additionally, they claim the spill caused the State to delay openings so that all of the salmon were caught in an abbreviated period of time. As a result they claim the salmon arrived at fish processors all at once and created a fish glut. Id. ¶ 635. Plaintiffs also allege the market price of Cook Inlet salmon dropped because of public perception that the fish were contaminated and that the delayed harvest had resulted in poorer quality fish. Id. ¶¶ 639-42. All of the processor plaintiffs allege these events caused them to lose profits they would otherwise have made.

Specifically, the tenders allege that:

1. The reduction of the total fish harvest for 1987 reduced tender profits;

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4. Processors refused to pay them for fish delivered because of the contamination of fish and the fish glut. Id. ¶¶ 647-48.

The processors allege that:

1. The reduction of the total fish harvest for 1987 reduced their profits;

2. They suffered reduced processor capacity and increased labor costs;

3. They purchased contaminated fish which they had to discard;

4. Fish spoiled during the fish glut before they could be processed;

5. They had to turn their profitable custom-processing operations over to other processors;

6. The drop in the price of their product reduced profits;

7. During the years since the spill the number of fishermen selling to the processors has decreased, reducing the processors' profits;

8. They had to pay to transport fish to other processors during the fish glut;

9. The decreased fish quality reduced their profits. Id. ¶ 650.

The complaint does not explain how the remaining processor plaintiffs lost profits. However, none of the processor plaintiffs allege that oil from the GLACIER BAY spill damaged property they owned at the time they owned it, nor do they allege their lost profits resulted from any such damage to their property.

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ARGUMENT

I. THE PROCESSOR PLAINTIFFS ARE NOT ENTITLED TO RECOVERY UNDER TAPAA.

Among the various claims asserted by the processor plaintiffs is a strict liability claim brought under 43 U.S.C. § 1653(c), a provision in TAPAA which subjects certain parties to strict liability for damages resulting from oil spills. The processors seek recovery of pure economic losses they allege resulted from the GLACIER BAY oil spill, but not from damage to the processors' property. As detailed below, the general maritime law's standards of recovery are incorporated into TAPAA and govern the damages recoverable under the statute. Since the maritime law only allows recovery for economic losses resulting from damages to a plaintiff's person or property, and the oil spill did not injure the processor plaintiffs or damage their property, they cannot recover their economic losses under TAPAA.

A. The general maritime law was incorporated into TAPAA and governs the recovery of damages under the Act.

The strict liability provision of TAPAA provides in relevant part:

> Notwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and the operator of the vessel (jointly and severally) and the Trans-Alaska Pipeline Liability Fund established by this subsection, shall be strictly liable without regard to fault in accordance with the provisions of this subsection for all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as the result of discharges of oil from such vessel.

43 U.S.C. § 1653(c)(1) (emphasis added). Nowhere does the statute define what "damages" are compensable. Nor does the

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Act's legislative history provide any guidance. In light of Congress' silence regarding the scope of recoverable damages, the court must presume that Congress intended the general maritime law to be incorporated into TAPAA and to govern the determination of damages under TAPAA.

1. TAPAA and its legislative history are silent regarding what constitutes recoverable damages.

In determining Congress' intent in enacting legislation, the court must examine the statutory language and its legislative history.[1] Middlesex County Sewerage Authority v. National Sea Clammers Assoc., 453 U.S. 1, 13, 101 S. Ct. 2615, 2623 (1981). The language of TAPAA does not define what constitutes compensable damages nor specify what classes of claimants are entitled to recover.

Nor does TAPAA's legislative history instruct the court as to what constitutes recoverable damages under the strict liability provision. In fact, there is very little legislative

[1] As a matter of statutory construction, courts have also examined the comprehensiveness of a statute to determine if an intent on the part of Congress to preempt the common law may be implied. See, e.g., Milwaukee v. Illinois, 451 U.S. 304, 317-18, 101 S. Ct. 1784, 1792-93 (1981) (noting the comprehensiveness of the regulatory scheme under the 1972 amendments to the Clean Water Act); Middlesex, 453 U.S. at 13-15, and 20, 101 S. Ct. at 2623 (noting that the comprehensiveness and "elaborate enforcement provisions" under the Federal Water Pollution Control Act and the Maritime Protection, Research, and Sanctuaries Act evidence Congress' intent that these acts abrogate supplemental judicial remedies). This principle of statutory construction does not apply in this case because Congress has not spoken to the question of what constitutes recoverable damages. Cf. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 98 S. Ct. 2010 (1978) (since the Death on the High Seas Act expressly provided that only pecuniary loss is recoverable, court not free to supplement act by allowing recovery for loss of consortium).

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history regarding section 1653(c)(1), in part because TAPAA's incorporation of strict liability for damages to private parties was a late development in the Act's evolution and was not well documented.[2] Indeed, the sparse discussion in the legislative history of the strict liability provision indicates that Congress' attention was focused on other matters. The issues which preoccupied Congress during the enactment of TAPAA were whether to build the pipeline to Valdez or across Canada to the mid-West and whether to make the decision to build a pipeline subject to the provisions of the National Environmental Policy Act.

As noted, very little of the Act's legislative history bears on the strict liability provision. TAPAA originated as a Senate bill (S. 1080) which focused on the creation of rights-of-way in which to construct the pipeline. Recoverable damages against right-of-way holders were limited to those incurred by the United States and the Senate bill did not even include an absolute liability provision. The bill was amended in the House to include a provision imposing strict liability on right-of-way holders.[3] The strict liability provision later was modified by House-Senate conferees, who acted without the benefit of a published hearing. Nothing in the legislative history which is available indicates that Congress specifically focused on the

---

[2] For a comprehensive discussion of the legislative history of TAPAA, see Trinidad et al.'s Memorandum in Opposition to Motions to Dismiss Limitation Complaint, filed January 31, 1990, at pp. 3-19.

[3] See H.R. Rep. No. 617, 93rd Cong., 1st Sess. 12 (1973).

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scope of recoverable damages under TAPAA. Furthermore, the legislative history is devoid of any suggestion that Congress intended to abrogate the general maritime law principle limiting recovery of pure economic losses.

2. The agency interpretation of TAPAA deserves no deference.

When legislative history is lacking, courts occasionally turn to administrative interpretations of statutes, as evidenced by regulations, for guidance. See, e.g., Adamo Wrecking Co. v. United States, 434 U.S. 275, 287 n. 5, 98 S. Ct. 566, 574 n. 5 (1978). Here, the Interior Department regulations promulgated four years after the enactment of TAPAA define recoverable damages under TAPAA as follows:

> (e) "Damage" or "damages" means any economic loss, arising out of or directly resulting from an incident, including but not limited to: (1) Removal costs; (2) Injury to, or destruction of, real or personal property; (3) Loss of use of real or personal property; (4) Injury to, or destruction of, natural resources; (5) Loss of use of natural resources; or (6) Loss of profits or impairment of earning capacity due to injury or destruction of real or personal property or natural resources, including loss of subsistence hunting, fishing, and gathering opportunities.

53 Fed. Reg. 3396 (1988).

This regulation is not helpful for several reasons. First, like the statute, the regulation does not address the key issue of who is entitled to recover under the Act. That is, it does not define what classes of claimants are entitled to recover. Second, there is nothing in the Act to provide the agency with a standard or any guidance for defining damages. Thus, absent specific indication to the contrary by Congress or the agency,

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well-settled principles of maritime law governing the claimants who may recover economic losses should be deemed to apply.

In any event, in view of the way the regulations were promulgated and the case law discussed below, the regulation deserves no deferencc. The case law reflects that before giving any weight to an agency's construction courts require, among other considerations, (1) actual construction of the statute by the agency, (2) a continuous and consistent agency interpretation, and (3) a construction which is contemporaneous with the enactment of the statute. See, e.g., National Muffler Dealers Assoc., Inc. v. United States, 440 U.S. 472, 477, 99 S. Ct. 1304, 1307 (1979). Applying these prerequisites, the court should disregard the Interior Department's interpretation of recoverable damages.

At no time has the Interior Department expressly construed TAPAA, or its legislative history and enactment against a backdrop of established maritime law, in order to justify the agency's interpretation of recoverable damages under TAPAA.[4] In adopting the current regulation's definition, the agency merely borrowed the definition of damages from the Outer Continental Shelf Lands bill being considered by Congress at the time the regulation was being drafted in 1977. See 43 U.S.C.A. § 1813(a). Thus, far from attempting to examine TAPAA to determine Congress' intent, the agency formulated its definition of recoverable

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[4] The agency did not even follow its regular procedures and publish the commentary it received prior to issuing the final regulation.

damages under TAPAA by borrowing language from a separate act considered by Congress four years after TAPAA. It is difficult to conceive how such drafting could possibly be considered an "express construction of a statute." The Supreme Court has repeatedly held that a mere promulgation of a regulation without an accompanying explanation of the statutory authority for doing so lacks the power to persuade. See, e.g., Adamo Wrecking, 434 U.S. at 287 n. 5, 98 S. Ct. at 574 n. 5.

Furthermore, the regulatory definition of damages currently in effect was not a contemporaneous or consistent agency interpretation of damages. The Interior Department did not even promulgate proposed regulations until approximately four years after the Act's passage.[5]

In light of the method the Interior Department employed in promulgating a definition of recoverable damages under TAPAA, the agency's "interpretation" of the Act should be afforded no weight. The court's attention should focus on the general maritime law's ability to fill the gap left by Congress' silence.

3. The court must presume Congress intended TAPAA to retain general maritime law governing the scope of recoverable damages.

If a statute and its legislative history are silent regarding Congress' intention to change general maritime law, a pre-

[5] In addition, the current regulation's definition represents a significant (and unexplained) departure from the agency's initial attempt to define the scope of recoverable damages under TAPAA. The agency's first proposed draft regulations limited recoverable damages under TAPAA to "all legally compensable injuries or losses." See 42 Fed. Reg. 3661 (1977). This indicates the agency initially construed damages under the Act to be consistent with those recoverable under the general maritime law.

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sumption arises that the general maritime law remains in force and the statute should be read consistent with the general maritime law. As explained by the Supreme Court: "Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." Isbrandsen Company, Inc. v. Johnson, 343 U.S. 779, 783 (1952). Legislative approval of pre-existing common law rules is presumed in light of Congress' failure to explicitly repeal the common law, particularly if the common law principles are well established. Klicker v. Northwest Airlines, Inc., 563 F.2d 1310, 1314 (9th Cir. 1977) (nothing in Civil Aeronautics Act affected common law rule that exculpatory clauses favoring carriers are void under public policy).

This presumption has been repeatedly recognized in cases where courts held that pre-existing judge-made maritime law remained in force notwithstanding the enactment of statutes which appellants argued preempted the general maritime law. See, e.g., The KENSINGTON, 183 U.S. 263, 268-69 (1902) (well-settled general maritime law remained in effect when not expressly changed by Harter Act); The CHATTAHOOCHEE, 173 U.S. 540, (1899) (common law preventing vessels from contracting away their liability for negligence remained in force as to luggage even though Harter Act altered the rule as to cargo); Gardiner v. Sea-Land Service, Inc., 786 F.2d 943 (9th Cir. 1986) (federal labor legislation establishing exclusive grievance procedure under collective

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bargaining agreement did not preempt seaman's common law claim for maintenance).

For example, in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 99 S. Ct. 2753 (1979), the Court considered whether Congress, by its 1972 amendments to the Longshore and Harbor Workers' Compensation Act ("LHWCA"), intended to impose a proportionate-fault rule and thereby abrogate the general maritime law rule that a shipowner can be made to pay all damages not due to the longshoreman's own negligence. The Fourth Circuit, sitting en banc, admitted that nothing in the statute or its legislative history expressly indicated Congress intended to modify the general maritime law, but nonetheless found preemption. 577 F.2d 1153, 1155-56 and n. 2. The Supreme Court reversed. 443 U.S. at 263-64, 99 S. Ct. at 2758.

The Supreme Court noted that nothing in the 1972 amendments either expressly or impliedly purported to overrule or modify the traditional rule regarding a shipowner's liability. The legislative history of the amendments made no mention of preemption. The Court concluded that Congress' silence regarding its intent to preempt the general maritime law was "most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." Id. at 266-67, 99 S. Ct. at 2759. See generally, Crescent Wharf & Warehouse Co. v. Barracuda Tanker Corporation, 696 F.2d 703, 706 (9th Cir. 1983) (citing Edmonds with approval in case in which a common law cause of action was permitted notwithstanding the LHWCA).

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Another maritime case in which the Supreme Court presumed that Congress' silence regarding preemption reflected an intention to retain the general maritime law is Robert C. Herd & Co., Inc. v. Krawill Machinery Corporation, 359 U.S. 297, 79 S. Ct. 766 (1959). In Herd & Co., the Court considered whether the Carriage of Goods by Sea Act's ("COGSA") limitation of liability applied to stevedores or agents notwithstanding silence in the Act and its legislative history regarding these parties. Id. at 301-02, 79 S. Ct. at 769. The Supreme Court reasoned:

> It must be assumed that Congress knew that generally agents were liable for all damages caused by their negligence. Yet Congress, while limiting the amount of liability of 'the carrier [and] the ship,' did not even refer to stevedores or agents of a carrier. 'We can only conclude that if Congress had intended to make such an inroad on the rights of claimants [against negligent agents] it would have said so in unambiguous terms' and 'in the absence of a clear Congressional policy to that end, we cannot go so far.'

Id. at 302, 79 S. Ct. at 769 (quoting Brady v. Roosevelt Steamship Co., Inc., 317 U.S. 575, 581, 584 (1943)).

The presumption that Congress' silence evidences its intent that general maritime law is retained notwithstanding enactment of a statute is particularly strong in the maritime context. Matter of Oswego Barge Corp., 664 F.2d 327, 335-36 (2d Cir. 1981). This is due to the substantial law-creating role of federal courts in maritime law and because federal courts have a more expansive role to play in the development of maritime law than in the development of non-maritime federal common law. Id.

Courts' construction of the Carmack Amendment to the Interstate Commerce Act is instructive of how courts have presumed the

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continued efficacy of the common law and used it to "fill a gap left by Congress' silence." Mobil Oil Corporation, 436 U.S. at 625, 98 S. Ct. at 2015. The Carmack Amendment of 1906 codified the common law rule that a common carrier, although not an absolute insurer of goods transported, is strictly liable for damages to such goods, subject to certain defenses. Missouri Pacific Railroad Company v. Elmore & Stahl, 377 U.S. 134, 137, 84 S. Ct. 1142, 1144 (1964). Under the statute, a shipper is relieved of the burden of searching out whether the initiating, connecting or delivering carrier may have been negligent. The shipper may look to the carrier from whom the goods initiated for the full payment of the loss and no showing of negligence on the part of that carrier is required. 49 U.S.C. § 11707 (Supp. 1989) (previously codified at 49 U.S.C. § 20(11)).

When the Act was approved by Congress, there was virtually no debate or comment. Underwriters at Lloyds of London v. North American Van Lines, 890 F.2d 1112, 1116 n. 2 (10th Cir. 1989). Since the Act did not define the shipper's recoverable damages, courts were left with the problem of how to define the phrase "actual loss or injury" used in the statute.[6] Since the amend-

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[6] 49 U.S.C.A. § 11707(a)(1) provides in relevant part:

> A common carrier . . . shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier or freightforwarder and any other common carrier that delivers the property and is providing transportation or service . . . are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported. . . .

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ment was not designed to be comprehensive,[7] federal courts have proceeded to apply the federal common law definition of recoverable damages. See, e.g., Contempo Metal Furniture Co. v. East Texas Motor Freight Lines, Inc., 661 F.2d 761, 765 (9th Cir. 1981) (amendment has not altered common law rule regarding recoverable damages).[8]

Applying Isbrandsen's presumption that Congress intended general maritime law to remain in force absent express evidence to the contrary, 343 U.S. at 783, this court should construe the scope of recoverable damages under TAPAA as the courts have done with the Carmack Amendment -- by using well-established common law principles as guidelines. Employing this rule, "damages" under TAPAA is governed by general maritime law and its limitation, discussed below, that pure economic losses are not recoverable.

(Emphasis added).

[7] See Underwriters at Lloyds, 890 F.2d 1112 (Carmack Amendment not designed to comprehensively detail a carrier's legal obligation to a holder of a bill of lading).

[8] See also F.J. McCarty Co. v. Southern Pacific Co., Inc., 428 F.2d 690, 693 (9th Cir. 1970) (Carmack Amendment does not alter common law); Hiram Walker & Sons, Inc. v. Kirk Line, 877 F.2d 1508, 1512 (11th Cir. 1989) (federal common law principles dictate measure of damages under the Carmack Amendment); Hector Martinez and Company v. Southern Pacific Transportation Co., 606 F.2d 106, 108 and n. 1 (5th Cir. 1979) (statute read to incorporate common law principles for damages). Employing common law principles, courts have construed "actual loss or injury" under the Act to exclude those damages that the carrier did not have reason to foresee as ordinary, natural consequences of a breach when the contract was made. See, e.g., F.J. McCarty, 428 F.2d at 693; Contempo Metal Furniture, 661 F.2d at 765.

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B. **The general maritime law limits recovery for economic losses to persons who can show that such losses derive from damages to their property.**

1. **The discharge of oil from a vessel invokes maritime tort law.**

Article III, Section 2 of the United States Constitution provides that the judicial power of the United States extends "to all Cases of admiralty and maritime jurisdiction." Subsequent decisions have held that the general maritime law (GML) governs cases which fall within this admiralty jurisdiction.[9] Thus, if the processor claims are subject to the court's admiralty jurisdiction, they are governed by the GML.

Admiralty jurisdiction extends to torts which are maritime in nature. Torts are maritime in nature if the wrong occurs on navigable waters and has a significant connection with traditional maritime activities.[10] Plaintiffs allege that the discharge of oil from the GLACIER BAY onto state waters was the result of the grounding of the vessel, allegedly caused by negligence in its navigation. The negligent navigation of a vessel is a maritime tort since such negligence occurs on navigable waters and the navigation of a vessel is clearly a traditional maritime

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[9] East River S.S. Corp. v. Transamerica Delaval, 476 U.S 858, 863-65, 106 S. Ct. 2295, 2298-99 (1986); The LOTTAWANNA, 88 U.S. (21 Wall.) 558, 22 L. Ed., 654, 662-63 (1874); Southern Pacific Co. v. Jensen, 244 U.S. 205, 61 L. Ed. 1086, 1098 (1917); THOMAS BARLUM, 293 U.S. 21, 55 S. Ct. 31, 38 (1934); see also, T. Schoenbaum, Admiralty and Maritime Law, § 3-1, 4-1 (1987 ed.).

[10] Executive Jet Aviation Inc. v. City of Cleveland, Ohio, 409 U.S. 249, 93 S. Ct. 493, 497-504 (1972); Foremost Ins. Co. v. Richardson, 457 U.S. 668, 102 S. Ct. 2654, 2657-58 (1982); Complaint of Paradise Holdings, Inc., 795 F.2d 756, 759 (9th Cir. 1986).

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activity[11]. Similarly, the discharge of oil occurred on navigable waters. Such discharges and their prevention are intimately related to the operation of the vessel. It is not then surprising that every reported decision holds that a negligent discharge of oil compromises a maritime tort.[12] Accordingly, claims for damages resulting from the grounding and the discharge of oil are subject to the court's admiralty jurisdiction and governed by the GML.

2. Under maritime law, claimants cannot recover remote economic losses.

The maritime law recognizes no right of recovery for economic loss unless the loss derives from physical injury to the plaintiff's person or property. This "bright-line" rule precludes recovery for economic losses, even if foreseeable, unless

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[11] As the Supreme Court has noted:

> The law of admiralty has evolved over many centuries, designed and molded to handle the problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with the navigational rules -- rules that govern the manner and direction those vessels may rightly move upon the waters.

Executive Jet, 93 S. Ct. at 505.

[12] Louisiana ex rel Guste v. M/V TESTBANK, 752 F.2d 1019, 1031 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903, 106 S. Ct. 3271 (1986); Matter of Oswego Barge, 664 F.2d 327, 334 (2d Cir. 1981), Commonwealth of Puerto Rico v. S/S ZOE COLOCOTRONI, 628 F.2d 652, 672 (2d Cir. 1980); Union Oil Co. v. Oppen, 501 F.2d 558, 560-61 (9th Cir. 1974); Oppen v. Aetna Ins. Co., 485 F.2d 252, 256-57 (9th Cir. 1973); Burgess v. M/V TAMANO, 370 F. Supp. 247, 249 (D. Me. 1973); State of Maryland v. Amerada Hess, 350 F. Supp. 1060, 1064-65 (D. Md. 1972); American Waterways Operators, Inc. v. Askew, 335 F. Supp. 1241, 1247 (M.D. Fla. 1971), rev'd on other grounds, 411 U.S. 325, 93 S. Ct. 1590 (1973); California v. S/S BOURNEMOUTH, 307 F. Supp. 922, 926-28 (C.D. Cal. 1969).

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the loss directly results from injury to the plaintiff or damage to plaintiff's property.[13]

The origin of the bright-line rule is widely attributed to Justice Holme's opinion in Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). Since that decision, the rule has repeatedly been followed in maritime cases to limit the liability of shipowners for economic injury to those losses directly resulting from physical injury or damage to property.[14]

As the processor plaintiffs did not own the waters polluted by the GLACIER BAY spill or the fish and wildlife within those waters, the bright-line rule precludes them from recovering their lost profits. This is not the first case involving claims by shore-based businesses such as fish processors for lost profits following a water pollution incident. Courts have repeatedly dismissed such claims on the grounds that the law does not spread its protection to such shore-side businesses who suffer economic damages.

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[13] Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927); State of Louisiana ex rel. Guste v. M/V TESTBANK, 752 F.2d 1019, 1023 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986); Barber Lines A/S v. M/V DONAU MARU, 764 F.2d 50, 51 (1st Cir. 1985); Getty Refining & Marketing Co. v. MT FADI B, 766 F.2d 829, 833 (3d Cir. 1985); In re Bethlehem Steel Corp., 631 F.2d 441, 447-48 (6th Cir. 1980); Kingston Shipping Co. v. Roberts, 667 F.2d 34 (11th Cir. 1982); Holt Hauling & Warehousing v. M/V MING JOY, 614 F.Supp. 890, 895 (E.D. Pa.); Pruitt v. Allied Chemical Corp., 523 F. Supp. 975, 981-82 (E.D. Va. 1981); Burgess v. M/V TAMANO, 370 F.Supp. 247, 249 (D. Me. 1973); see also Restatement of Torts § 766C (no recovery for purely economic losses absent physical harm).

[14] See cases cited in note 13, supra, and pages 19-21.

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In Burgess v. M/V TAMANO 370 F. Supp. 247, 249 (D. Me. 1973), a tanker struck a rock and spilled oil into the waters off the coast of Maine. The court allowed commercial fisherman and clam diggers to recover on the grounds that the spill had interfered with their direct exercise of the public right to fish.[15] Id. at 250-51. The court dismissed the claims of shore-based businesses who claimed lost profits resulting from the spill because, absent a direct use of the public waters, they had no property interests damaged by the spill. Id.

Similarly, in Pruitt v. Allied Chemical Corp., 523 F. Supp. 975 (E.D. Va. 1981), the court dismissed the lost profits claims of fish processors, wholesalers and retailers following defendant's pollution of the Chesapeake Bay. The court recognized that if it allowed processors to recover their lost profits, it would have no principled way to deny lost profits claims of other components of the seafood industry who utilized the processed seafood. Id. at 979-80. Recognizing that the processors' losses were foreseeable, the court nonetheless held that their claims were not legally cognizable because insufficiently direct. Id.

In Louisiana ex rel Guste v. M/V TESTBANK, 752 F.2d 1019, 1031 (5th Cir. 1985) (en banc), cert. denied 477 U.S. 903 (1986), claims were brought by the shore-based fishing industry for lost profits following a spill of PCP on the Mississippi River. The

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[15] As discussed infra, the courts have generally allowed commercial fishermen who directly harvest the sea's resources to recover their lost profits.

Fifth Circuit affirmed the dismissal of all such claims under the bright-line rule.

In Bouquet v. Hackensack Water Co., 101 A. 379 (N.J. App. 1917), the owner of a shore-side lodge sued for lost profits after the defendant polluted the Hackensack river. The court held that since the owner of the lodge had no property rights in the water polluted, he could not recover for lost economic damages.

The Ninth Circuit also recognizes the bright-line rule. In Borcich v. Ancich, 191 F.2d 392, 396-97 (9th Cir. 1951), the court applied the rule and held that the crew of a fishing vessel damaged in a collision could not sue for their lost profits. Later, in Carbone v. Ursich, 209 F.2d 178 (9th Cir. 1953), the court overruled Borcich and held that the general maritime rule excluding recovery for pure economic damages does not apply to fishermen. The court explained that the basis for this fisherman exception was the "familiar principle that seamen are the favorites of admiralty and their economic interests are entitled to the fullest possible legal protection." Id. at 182.

In Union Oil Co. v. Oppen, 501 F.2d 558, 564-66 (9th Cir. 1974), the Ninth Circuit adopted this rule in the context of an oil spill. The court was faced with claims of commercial fishermen for lost profits resulting from the Santa Barbara oil spill of 1967. The court again recognized the "bright-line" limitation on recovery for economic losses absent physical damages. Id. at 563-65. Nonetheless, it found that its decision in Carbone controlled. Since the plaintiffs were all commercial fishermen,

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the court allowed them to pursue their lost profits claims. In doing so, however, the court cautioned that it was not opening the door to recovery by the shore-based fishing industry for their lost profits:

> [O]ur holding . . . does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by the oil spill. . . . Nothing said in this opinion is intended to suggest . . . that every decline in the general commercial activity of every business in the . . . area following the [spill] constitutes a legally cognizable injury for which defendants may be responsible.

Id. at 570. The court's admonition was clearly an attempt to keep its exception for commercial fishermen from eroding the general rule proscribing recovery for pure economic losses.

In this case, allowing processors to recover would erode this rule since, as discussed below, once the court allows one class of claimants to recover economic losses which are not tied to property damages, it opens the door to recovery by all such claimants.

a. Adherence to the "bright-line" rule is the only way to limit recovery for economic losses.

The above decisions denied recovery to shore-based businesses which suffered economic losses following the pollution of a waterway even though the losses were foreseeable. In each case the argument that it would be unfair to preclude recovery of such losses did not prevail. As one commentator has explained, the basis for this consistent result:

> [I]s a pragmatic one: the physical consequences of negligence have been limited, but the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended. As Cardozo put it in a passage

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> often quoted, liability for these consequences would be 'liability in an indeterminate amount for an indeterminate time to an indeterminate class.'

James, Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 Vand. L. Rev 43, 45 (1972) (hereafter "James") (quoting Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931)). The Supreme Court recently emphasized this concern when it applied the Robins rule in East River S.S. Co.:

> [W]hen there is a duty to the public generally, foreseeability is an inadequate brake . . . . Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. . . . [I]f the charterers --already one step removed from the transaction -- were permitted to recover their economic losses, then the companies that subchartered the ships might claim their economic losses from the delays, and the charterers' customers also might claim their economic losses, and so on. 'The law does not spread its protection so far.'

476 U.S. at 874.

The need to limit recovery is amply demonstrated in the case of an oil spill. If recovery for pure economic losses is allowed, then not only may the fish processors recover their lost profits, but fish buyers and sellers at the wholesale and retail level may also seek recovery. So too may fish spotters, fish forwarders, and freight companies which ship fish. In addition, the suppliers to these fishing businesses will be adversely affected. The sellers of cans, labels, ice and boxes to canneries will lose profits. The vendors of supplies to the fishing fleet will also seek recovery. In addition, the employees of these various businesses may suffer decreased wages as a result

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of the decline in business.[16] Nothing will prevent the sushi restaurant owner in Tokyo from also bringing a claim. Because each class of claimants will in turn do business with another class of claimants, it is apparent that the class of claimants who may seek lost profits will be vast if not "indeterminate."[17]

The First Circuit recently recognized this potential:

> [A]n oil spill foreseeably harms not only ships, docks, piers, beaches, wildlife, and the like, that are covered with oil, but also harms blockaded ships, marine merchants, suppliers of those firms, the employees of marine businesses and suppliers, and suppliers' suppliers, and so forth. To use the notion of 'foreseeability' that courts use in physical injury cases to separate the financially injured not allowed to sue would draw vast numbers of injured persons within the class of potential plaintiffs in even the most simple accident cases. . . .

Barber Lines, 764 F.2d at 54.

Allowing recovery for the seemingly limitless economic consequences of a spill is unfair to the vessel owner because the result is the imposition of liability completely out of proportion with the degree of culpability involved. Such a result all but guarantees the economic ruin of the unfortunate owner and creates a huge disincentive against engaging in activities which are beneficial to society as a whole. James, supra, at 48.

Recognizing that the need to limit such liability is a practical one, the courts have chosen to draw the line sooner

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[16] In addition to the lost profits of the various components of the fish industry, claims for lost profits from the tourism industry, including hotels, restaurants, travel agents and airlines could be expected.

[17] See also Pruitt, 523 F. Supp. at 979 ("In short the set of potential plaintiffs seems almost infinite."); TESTBANK, 752 F.2d at 1028-29.

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rather than later. The bright-line rule has served this purpos well because it limits recovery of lost profits to those profit lost due to physical injury to the person or physical damage to the person's property. The courts have recognized that once recovery is allowed for lost profits not based on injury or property damage, their is no principled way to draw the line:

> Plaintiffs concede, as do all who attack the requirement of physical damage, that a line would need to be drawn -- somewhere on the other side, each plaintiff would say in turn, of its recovery. Plaintiffs advocate not only that the lines be drawn elsewhere but also that they be drawn on an ad hoc discrete basis. The result would be that no determinable measure of the limit of foreseeability would precede the decision on liability.

TESTBANK, 752 F.2d at 1029. The simplicity of the bright-line rule provides courts with a discrete, precise method of limiting liability for the economic consequences of an act since the physical consequences of an act are limited. As the TESTBANK, Pruitt, Oppen, and TAMANO opinions illustrate, applying the rule to this case precludes the processor plaintiffs from recovering their economic losses.

C. Having suffered no physical damage, the processors' TAPAA claims must be dismissed.

As shown above, TAPAA incorporates the general maritime law's standards for recovering economic losses. Under the bright-line rule, a non-commercial fisherman plaintiff can recover economic losses only if the defendant injured the plaintiff or damaged his property and the economic loss resulted from that damage or injury. Since the processor plaintiffs were not commercial fishermen and the spill of oil from the GLACIER BAY did not injure any of the processor plaintiffs or damage their

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property, they cannot recover their lost profits under the bright-line rule. Their TAPAA claims must be dismissed.

II. THE PROCESSOR PLAINTIFFS ARE NOT ENTITLED TO ANY RECOVERY UNDER ALASKA'S STRICT LIABILITY STATUTE.

In addition to possible remedies under federal law, the processor plaintiffs assert a right to recover their claimed economic losses under A.S. 46.03.822, which imposes strict liability for damages caused by oil pollution. The processors did not own the waters polluted by the GLACIER BAY spill or the fish and wildlife within those waters, nor did the processors sustain any physical injury to their persons or to property they owned from which their alleged economic damages resulted. They seek to recover from Trinidad solely for lost profits allegedly caused by the GLACIER BAY spill. This motion seeks dismissal only of the statutory strict liability claim for economic losses; it does not address the processors' other state law claims such as those based on common law negligence and nuisance theories.

As discussed below, Alaska law traditionally has permitted recovery in strict liability for economic losses only if the claimant sustained physical harm to his person or property from which the economic losses flowed. Neither the legislative history of the oil spill statute nor any Alaska Supreme Court case before or since its enactment suggests a departure from the traditional rule. Just the opposite is true. In analogous cases involving strict liability for defective products and ultra-hazardous activities, the supreme court has repeatedly reaffirmed the traditional physical injury requirement and its public policy

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rationale. Like maritime tort law, Alaska law does not spread its protection so far as to impose strict liability for pure economic losses.[18]

A. The legislative history of A.S. 46.03.822 reveals no intent to depart from the traditional physical injury rule.

Alaska Statute 46.03.822 was enacted in 1972 to provide in relevant part:

> **Strict liability for the discharge of hazardous substances.** To the extent not otherwise preempted by federal law, a person owning or having control over a hazardous substance which enters in or upon the waters, surface or subsurface lands of the state is strictly liable, without regard to fault, for the damages to persons or property, public or private, caused by the entry.

Ch. 122, § 1, SLA 1972, codified as A.S. 46.03.822. The statute was amended in 1976 and 1989, but the amendments are not directly relevant to the issue raised by this motion or to the legislature's intent in enacting the strict liability statute. See Chugach Natives, Inc. v. Doyon, Ltd., 588 F.2d 723, 731 (9th Cir. 1978) (subsequent legislation considered inconclusive in determining legislative intent for the original enactment).[19] The

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[18] The limitation Alaska strict liability law places on recovery of pure economic losses would apply not only to the processor plaintiffs in this case, but also to any fishermen plaintiffs who suffered only economic losses not flowing from any damage to their persons or property. However, the fishermen plaintiffs' entitlement to recover such losses under state law is not addressed in this motion and is expected to be raised in other motions. This motion seeks dismissal only of the strict liability claims asserted by the processor plaintiffs to recover economic losses.

[19] The current version of A.S. 46.03.822 provides in part:

> **Strict liability for the release of hazardous substances.** (a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in

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definition of recoverable damages is contained in A.S. 46.03.82 and has remained unchanged since enactment in 1972. A.S. 46.03.824 provides:

> **Damages.** Damages include but are not limited to injury to or loss of persons or property, real or personal, loss of income, loss of the means of producing income, or the loss of an economic benefit.

No reported case has interpreted the strict liability statute or the legislature's intent in enacting it. However, research of the legislative history leading to the 1972 enactmer reveals no intent on the part of lawmakers to depart from the traditional common law rule, which has been applied in both strict liability and negligence actions, barring recovery of economic losses absent physical harm. A well-established principle of statutory construction recognizes that "'[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.'" Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Telephone, 464 U.S. 30, 35 (1983) (quoting Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 623 (1813)); see also 2A N. Singer, Sutherland on Statutory Construction §

> (b) of this section and the exception set out in (i) of this section, the following persons are strictly liable, jointly and severally, for damages to person or property, whether public or private, including damage to the natural resources of the state or a municipality, and for the costs of response, containment, removal, or remedial action incurred by the state or a municipality, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance: . . .

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50.05 at 440 (4th ed. 1984) (where a statute affects common-law rights and duties in a few specified particulars, the common law governs as to other matters).

Legislative proposals which are defeated may not be conclusive in determining legislative intent. However, it is worth noting a proposed amendment which was rejected when the strict liability bill came up for a vote on the floor of the Alaska House of Representatives. The proposed amendment would, among other changes, have added a finding that: "It is declared to be the policy of the state that each industry and resource in the state be developed in a manner so as not to cause injury to any person or injury, damage or disruption to any other industry or resource in the state." See 1972 House Journal 1378 (emphasis added). In this case, the crux of the processor plaintiffs' claims is that the oil spill caused disruption of the fishery, which allegedly caused plaintiffs to suffer lost profits.

Even if no absolute conclusion can be drawn from the rejection of the quoted amendment, it is undisputed that the legislature did not include language expressly permitting recovery for economic injury caused by such a disruption where no physical harm to the claimant or his property occurred. This fact alone should end the inquiry. See City and Borough of Sitka v. International Brotherhood of Electrical Workers, 653 P.2d 332, 336 (Alaska 1982) (starting point for construing a statute is the language of the statute itself, with reference to legislative history if necessary to provide insight helpful in determining the statute's meaning). But if any doubt remains about the scope

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of the statute, the court should look to common law to fill any voids where the statute did not by clear and explicit language repeal the common law. Norfolk, 464 U.S. at 35.

As the Alaska Court of Appeals has stated:

> Statutes or ordinances that establish rights or exact penalties that are in derogation of the common law are construed in a manner that effects the least change possible in the common law. If a statute is intended to change the common law, then "the legislative purpose to do so must be clearly and plainly expressed."

Hugo v. City of Fairbanks, 658 P.2d 155, 161 (Alaska App. 1983) (quoting 3C Sands, Statutes and Statutory Construction § 61.01, at 41 (4th ed. 1973)). See also First National Bank of Fairbanks v. Stout, 9 Alaska 400 (D. Alaska 1938) (statute should not be construed as changing the common law beyond what is expressly declared or necessarily implied).[20]

As discussed below, the common law followed by Alaska and most other states bars recovery of pure economic losses in the analogous contexts of strict liability for defective products and for ultrahazardous activities.

B. The Alaska Supreme Court has repeatedly reaffirmed the physical harm requirement in products liability cases.

Alaska law, like that of most states, holds the seller of a defective product strictly liable for personal injuries and property damage proximately caused by the defect, but not for mere economic loss. See, e.g., Northern Power & Engineering Co.

[20] See also A.S. 01.10.010, which provides that: "So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the legislature of the State of Alaska is the rule of decision in this state."

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v. Caterpillar Tractor Co., 623 P.2d 324 (Alaska 1981); Cloud v. Kit Mfg. Co., 563 P.2d 248 (Alaska 1977); Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976). In several cases, including Cloud and Morrow, the Alaska Supreme Court has reiterated this rule. The court also has discussed at length the policy rationale underlying the rule and analyzed what constitutes property damage.

Historically, the concept of strict liability, as applied in situations involving defective products and ultrahazardous activities, has been treated differently than general negligence law. Negligence law embodies the limiting concepts of foreseeability and duty owed to particular persons. In contrast, the duty implied in strict liability cases is to the general public and there is little emphasis placed on foreseeability. To hold a party strictly liable for pure economic losses would be to impose unpredictable and virtually unlimited liability. The Alaska court has specifically declined to extend strict liability that far. In restricting the economic damages recoverable under a strict products liability theory, the court has emphasized that warranty law as set forth in the Uniform Commercial Code affords sellers a necessary and "predictable definition of potential liability for direct economic loss."[21] Morrow, 548 P.2d at 286.

[21] Besides restricting recoverable damages, the Alaska court also has limited the applicability of the strict products liability doctrine. See, e.g., Kodiak Electric Association, Inc. v. Delaval Turbine, Inc., 694 P.2d 150 (Alaska 1984) (sellers of used products generally not subject to strict liability except where product has undergone extensive repair, inspection and testing by seller prior to resale); Pepsi Cola Bottling Co. v. Superior Burner Service Co., 427 P.2d 833, 839 & n. 21 (Alaska 1967) ("we do not believe that policy considerations justify

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Similarly, the United States Supreme Court recently recognized the need to avoid unbounded liability and to restrict the damages recoverable in maritime products liability actions. In East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), the Court approved of the same limitation applied by most state courts, including Alaska, in land-based product defect cases. The Court held that no strict liability claim (nor a negligence claim) lies in admiralty when a party alleges that a product defect caused injury only to the product itself, resulting in purely economic harm. Id. at 876.

The unanimous East River Court noted that products liability law exposes defendants to potentially unbounded liability. As the Court explained:

> In products-liability law, where there is a duty to the public generally, foreseeability is an inadequate brake. [Citations omitted.] Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product. In this case, for example, if the [plaintiff] charterers -- already one step removed from the transaction -- were permitted to recover their economic losses [for income lost while the chartered vessels were out of service undergoing repairs to defective turbines], then the companies that subchartered the ships might claim their economic losses from the delays, and the charterers' customers also might claim their economic losses, and so on. "The law does not spread its protection so far."

Id. at 874 (quoting Robins Dry Dock, 275 U.S. at 309).

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extension of strict liability to one rendering boiler repair services"); cf. Industrial Risk Insurers v. Creole Production Services Inc., 746 F.2d 526, 529 (9th Cir. 1984) ("Alaska does not impose strict liability upon mere sellers of services," such as providers of engineering services).

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The same is true for shipping companies subject to strict liability under Alaska's oil spill statute. Absent the limitation imposed by the physical injury requirement, a shipowner's liability would be essentially boundless. For example, claims for lost profits by marina operators, marine suppliers, seafood restaurants, bar owners, and various types of tourism businesses all would be potentially cognizable, as would a claim by a professional photographer asserting fewer sea otters to photograph. Shipping companies would face liability for "wave upon wave of successive economic consequences" to such claimants, to their customers, and to their customers' customers. M/V TESTBANK, 752 F.2d at 1029.

The physical harm rule imposed by Alaska law in products liability actions represents a pragmatic, policy-based decision to limit Alaska's common law strict liability doctrine. The same limitation is applicable to the strict liability imposed under A.S. 46.03.822.

C. The physical harm requirement also is incorporated in the common law doctrine of strict liability for ultrahazardous activities.

The rule of non-recovery for economic loss in the absence of personal injury or property damage has also traditionally been applied to the doctrine of strict liability for ultrahazardous activities. This common law doctrine, which may be traced to the landmark British case of Rylands v. Fletcher, is set forth in section 519 of the Restatement (Second) of Torts, which refers to "abnormally dangerous" activities. The Restatement expressly

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limits liability to damages for personal injury or property damage. Section 519 provides in part:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(Emphasis added.)

Alaska law recognizes the doctrine of strict liability for ultrahazardous activities. See Yukon Equipment, Inc. v. Fireman's Fund Insurance Co., 585 P.2d 1206 (Alaska 1978). In Yukon a strict liability recovery was permitted for property damage caused when thieves detonated some stored explosives. While the case did not require the court to address the issue of recovery for economic losses, the court made numerous references to the doctrine permitting recovery for physical harm to persons or property. The court relied upon and expressly approved Exner v. Sherman Power Construction Co., 54 F.2d 510 (2d Cir. 1931), which recognized the physical injury requirement. Exner stated the rule that one who stores dynamite

> is an insurer, and is absolutely liable if damage results to third persons, either from the direct impact of rocks thrown out by the explosion (which would be a common-law trespass) or from concussion.

Id. at 512-13.

Numerous other jurisdictions likewise have adopted the doctrine of strict liability for physical harm to persons or property resulting from ultrahazardous activities. See, e.g., Washington State University v. Industrial Rock Products, Inc., 681 P.2d 871, 873-74 (Wash. App. 1984); Correa v. Curbey, 605

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P.2d 458 (Ariz. App. 1979). In a case involving the accident at Three Mile Island nuclear facility, the court relied upon the Restatement (Second) of Torts to state that no recovery in strict liability would be permitted for pure economic loss in the absence of injury to "persons, land or chattels." In Re TMI Litigation Governmental Entities Claims, 544 F. Supp. 853, 858 (M.D. Pa. 1982), vacated on other grounds, 710 F.2d 117 (3rd Cir. 1983). As the court explained:

> Any additional damages, such as economic loss occasioned by employees who failed to show up for work, would have to flow from or be attendant upon the existence of one of the three enumerated harms.

544 F. Supp. at 858.

In summary, there are no cases interpreting Alaska's statute imposing strict liability for damages caused by oil pollution. However, in the analogous contexts of strict liability actions involving defective products and ultrahazardous activities, the traditional common law rule is that recovery of pure economic losses is not permitted absent physical harm to persons or property. The Alaska Supreme Court has consistently recognized the need for this limitation when imposing liability without fault.

D. The holding in Mattingly v. Sheldon Jackson College has no bearing on the strict liability recovery sought in this case.

Plaintiffs' counsel have advised they will take the position that Mattingly v. Sheldon Jackson College, 743 P.2d 356 (Alaska 1987), dictates that the processors' economic loss claims are cognizable. This contention fails to recognize that Mattingly was a negligence-based action. While Mattingly might bear on

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processors' common law negligence claims, it has no application to the strict liability claims at issue in this motion.

In Mattingly the court permitted a plumbing contractor to state a claim for negligently caused economic losses allegedly suffered when the contractor lost the services of three employees. The employees were injured in the collapse of a trench dug by the defendant college. The contractor suffered no physical injury or property damage. In permitting the contractor to state a negligence claim for pure economic loss the court emphasized the role of foreseeability as it relates both to the duty owed and to proximate cause. Id. at 360. The court stated that in order to recover for economic harm alone, a plaintiff would have to show the defendant knew or reasonably should have foreseen both that particular plaintiffs or an identifiable class of plaintiffs were at risk and the nature of the economic damages likely to be suffered.

Until Mattingly, Alaska law had precluded any recovery in negligence-based actions for pure economic loss. The scope of the modification made by Mattingly remains unclear. The case holding was a limited one and the court has not subsequently relied upon or cited Mattingly, except once with regard to the

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standard for motions to dismiss.[22] See Van Biene v. ERA Helicopters, Inc., 779 P.2d 315, 318 (Alaska 1989).

In any event, Mattingly involved a negligence action. The opinion in no way suggests the court intended its holding to extend to the strict liability context. Nor, of course, can Mattingly alter the legislative intent behind Alaska's strict liability oil spill statute. The statute was enacted at a time when the common law -- relating not only to strict liability, but also negligence actions -- clearly followed the bright-line rule that economic losses are not recoverable in the absence of physical harm. Alaska strict liability law still incorporates that bright-line rule. The Mattingly holding cannot breathe life into the strict liability economic loss claims asserted in this case. They are ripe for dismissal for failure to state a claim.

III. EVEN IF STATE LAW IS CONSTRUED TO ALLOW STRICT LIABILITY RECOVERY FOR PURE ECONOMIC LOSS IN THE ABSENCE OF PHYSICAL DAMAGE, IT IS PREEMPTED BY MARITIME LAW.

Even if the state statute is construed to permit recovery against vessel owners for economic losses which the bright-line rule would bar, it conflicts with the maritime law and must be disregarded. Although courts may apply state law to admiralty matters, they may not do so if the application of that law would

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[22] Mattingly has been cited twice by courts in other jurisdictions, and both rejected its holding. Both cases dealt with the same issue of economic loss suffered by an employer as the result of injury to a key employee. See Champion Well Service, Inc. v. NL Industries, 769 P.2d 382 (Wyo. 1989) (refusing to "erase the bright line which 'has traditionally marked negligence claims for economic harm as off limits'"); Heimbrock Co. v. Marine Sales and Service, Inc., 766 S.W.2d 70 (Ky. App. 1989). There is no indication that either court interpreted Mattingly to apply to anything but negligence actions.

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either: 1) prejudice the characteristic features of the maritime law; or 2) disrupt the harmony it seeks to bring to international and interstate relations. Sewell v. M/V POINT BARROW, 556 F. Supp. 168, 169-70 (D. Ak. 1983); Just v. Chambers, 312 U.S. 383, 388, 61 S. Ct. 687, 691 (1941) (state may modify or supplement maritime law provided the state action is not hostile "to the characteristic features of the maritime law"); Romero v. International Terminal Operating Co., 358 U.S. 354, 373, 79 S. Ct. 468, 480 (1959) reh'g denied 359 U.S. 962, 79 S. Ct. 795 (1959) (state laws may be applied in admiralty unless they contravene a rule of maritime law requiring uniformity); see also Southern Pacific Co. v. Jensen, 244 U.S. 205, 61 L. Ed. 1086, 1098 (1917); St. Hilaire Moye v. Henderson, 496 F.2d 973, 979-81 (8th Cir. 1974). Since allowing recovery of the processors' claims under state law would both prejudice a characteristic feature of maritime law and disrupt its uniformity, the statute is preempted.

A. Allowing recovery of remote economic losses under a state statute would be repugnant to and contravene the bright-line rule, which is an essential feature of maritime law.

As shown above, allowing recovery for remote economic losses would expose the vessel owner to liability for damages to the State's entire fishing and tourism industries and perhaps beyond. To read the statute to impose such potential liability would convert the vessel owner into an insurer of the economy of the State of Alaska in the event of an oil spill. Because liability is unlimited, the vessel owner would called on to pay anyone who could prove lost profits resulting from a spill.

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While such a result might be politically popular within the State of Alaska, its affect on maritime commerce would be devastating. Except for those shipping companies which are subsidiaries of the large oil companies, no shipping company could even begin to afford to satisfy such claims in the event of a large spill like the EXXON VALDEZ. Such liability would be imposed on top of the already formidable liabilities facing a ship owner in the event of a spill: the shipper's cleanup costs, the costs for reimbursing the U.S.Coast Guard for its response to the spill, the cost of the State's statutory fines and penalties resulting from such a spill, the liability to property owners damaged by the spill, as well as the owner's liability to fishermen for their lost profits. These costs are all borne by the shipowner, subject to the right to limit liability under federal law.

To add to these liabilities the cost of satisfying the potentially limitless claims for lost profits under the state statute would create a huge disincentive against investing in the tanker industry. Because no insurance underwriter will issue a policy giving unlimited cover in the event of a spill,[23] the shipowner must take the risk that his entire investment will be wiped out in the event his tanker strikes an uncharted rock or some other unforseen calamity occurs.[24] The bright-line rule

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[23] The limits on pollution cover are $300 million dollars in this case.

[24] While exposure to liability can be beneficial when it prompts the owner to take prudent measures to guard against an oil spill, such in terrorem benefits have an optimal level:

> Presumably, when the cost of an unsafe condition exceeds its utility there is an incentive to change. As

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serves to cut off the vessel owner's exposure to unlimited and unpredictable liability because it limits claims for economic loss to those arising from property damaged by the oil spill.

The rule is an integral part of maritime law in that it furthers the law's objective of placing limits on the liability of a shipper following calamities. The policy of limiting liability stems from the need to foster shipping and the realization that ships can cause enormous losses following a grounding, collision or allision. The Limitation of Liability Act, 46 U.S. 183 et seq., is one manifestation of this policy. The Act allows the shipowner to limit its liability, following a marine casualty, to the value of the vessel and pending freight. As the Supreme Court has noted:

> [T]he great object of the statute was to encourage shipping and to induce the investment of money in this branch of industry, by limiting the venture of those who build the ship to the loss of the ship itself or her freight then pending . . . .

Hartford Accident & Indemnity Co. v. Southern Pacific Co., 273 U.S. 207, 214, 47 S.Ct. 357, 358 (1927).[25]

The need to foster shipping stems from the fact that much of the interstate and international trade of our nation depends on

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> the costs of an accident become increasing multiples of its utility, however, there is a point at which greater accident costs lose meaning, and the incentive curve flattens. When the accident costs are added in large but unknowing amounts the value of the exercise is diminished.

TESTBANK, supra, 752 F.2d at 1029.

[25] See also Robinson, Robinson on Admiralty, 875-80 (1939); The Recent Amendment to the Maritime Limitation of Liability Statutes, 5 Brooklyn L. Rev., 42, 43 (1935).

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the shipping industry. The "Lower 48" depends on tankers to carry Alaska crude oil to their refineries while Alaska depends on the shipping industry to carry a large percentage of the food and consumers goods bought and sold within the state. Our nation's trade with foreign nations is also largely dependent on a sound shipping industry. In addition to trade, our nation depends on the merchant marine, including its oil tankers, to supply our military forces abroad during times of war.

Enormous sums of capital are required to build, man, and maintain a shipping fleet. Attracting the capital necessary to maintain a strong shipping fleet has been a national priority for generations. Despite intense criticism of the Limitation Act by courts and commentators, Congress has refused to repeal the Act, thus evincing the importance of the goal of limiting the vessel owners liability.

The bright-line rule is yet another manifestation of this policy. It too serves to limit the liability of the vessel owner or operator and thus encourages investment in the maritime industry. One risk to the capital invested in the shipping industry arises from the great potential which vessels have to do damage when they collide, allide or ground. Large commercial vessels are of great mass and require great distances to brake. Since such vessels are called on to traverse large uninhabited reaches of the oceans, they must carry with them large supplies of fuel. In addition to the risks of spilling such fuel following a calamity, vessels may block busy waterways, destroy important bridges, or tie up important docking areas. Inevitably, the result of

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such events will be interruptions in the stream of commerce and the loss of profits. Yet consistently, the courts have held that the bright-line rule shields the vessel owner from liability for such loss of profits claims.[26]

Additionally, allowing recovery of remote economic damages would threaten the financing necessary for the construction of large tankers because plaintiffs with such remote claims could assert their claims as liens against the vessel ahead of secured creditors. This court has already held that claims for damages resulting from an oil spill are cognizable in rem. Alyeska Pipeline Service Co. v. BAY RIDGE, 509 F. Supp. 1115 (D. Alaska 1981), appeal dismissed, 703 F.2d 381 (9th Cir. 1983). Under the Ships Mortgage Act, 46 U.S.C. §§ 31301 et seq., preferred ships mortgages do not have priority over preferred maritime liens. 46 U.S.C. § 31326(b)(1). Preferred maritime liens include liens for "damages arising out of a maritime tort." 46 U.S.C. § 31301(5)(B). Thus in rem claims for remote economic losses

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[26] See, e.g., Barber Lines A/S v. M/V DONAU MARU, 764 F.2d 50 (1st Cir. 1985) (economic losses following closure of wharf due to oil spill not recoverable.); Getty Refining & Marketing Co. v. MT FADI B, 766 F.2d 829 (3d Cir. 1985) (dock owner not entitled to recovery of economic losses from vessel owner whose vessel blocked access to dock); Kingston Shipping Co. v. Roberts, 667 F.2d 34 (11th Cir. 1982) (no recovery for economic losses incurred as result of closure of shipping lanes following sinking of vessel in navigable channel); Hercules Carriers, Inc. v. State of Florida, 720 F.2d 1201, 1203 (11th Cir. 1983) (economic losses due to closure of waterway after vessel struck bridge, which collapsed, not recoverable); Louisville and Nashville R.R. Co. v. M/V BAYOU LACOMBE, 597 F.2d 469 (5th Cir. 1979) (railroad not entitled to recover lost profits resulting from inability to use railroad bridge following allision); Federal Commerce & Navigation Co v. M/V Marathonian, 528 F.2d 907 (2d Cir. 1975) (time charterer not entitled to lost profits resulting from collision).

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resulting from an oil spill, if legally compensable, would be entitled to preferred maritime lien status. Obviously no one will wish to finance the purchase of tanker vessels if their mortgage is subordinated to the indefinite number of potential lost profit claims which could result from an oil spill. The bright-line rule prevents this result and thus fosters investment in shipping.

Thus to allow recovery for remote economic claims under a state statute would destroy the bright-line rule and threaten investment in the shipping industry. As noted above, the political equation at the state level will always favor imposing liability on the foreign shipowner for damages to the local economy. Allowing Alaska to impose such liability would open the door to the imposition of such liabilities by all coastal states and would gut the maritime law's protection of ship owners and investors from such claims.

B. Allowing recovery for remote economic damages under the state statute would undermine the uniformity of maritime law.

A second basis for refusing to allow recovery of remote economic damages under the state statute is that doing so would undermine the uniformity of maritime law. The adoption and preservation of the maritime law arises from a need for a uniform federal maritime law which will govern the conduct of ships, their owners and crews in each state:

> One thing, however, is unquestionable: the Constitution must have referred to a system of law co-extensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the Rules and limits of maritime law under the disposal and regulation of the several states, as that would have

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> defeated the uniformity and consistency at which the Constitution aimed on all subjects affecting the intercourse of the states with each other or with foreign States.

The Lottawanna, 88 U.S. (21 Wall.) 558, 22 L. Ed. 654, 662 (1874).[27]

The federal courts have sought to maintain both national and international uniformity in the maritime law and have frequently refused to apply state laws which contravene the need for uniformity.[28] The need for uniformity arises from the commercial nature of the maritime industry. Ships travel from state to state and from nation to nation. It would be difficult, if not impossible, for vessel owners to know the variations in the law maritime if each port was free to vary it in accordance with the local populace's political whims.

While courts have occasionally applied state statues when they do not conflict with maritime law or when the statute's affect on the shipping industry or uniformity is not significant, these cases are all distinguishable.

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[27] See also Kossick v. United Fruit Co., 365 U.S. 731, 81 S. Ct. 886, 892-93 (maritime law rather than state statute of frauds applies to oral contract between seaman and his employer because such contracts may be made anywhere in the world and their validity should be governed by one law.) reh'g denied 366 U.S. 941, 81 S. Ct. 1657 (1961); Pope and Talbot v. Hawn, 346 U.S 406, 74 S. Ct. 202, 205 (1953); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S. Ct. 438 (1920); Southern Pacific Co. v. Jensen, 244 U.S. 205, 61 L. Ed 1086, 1098 (1917); Evich v. Morris, 819 F.2d 256, 257-58 (9th Cir. 1987); Nelson v. United States, 639 F.2d 469, 473 (9th Cir. 1980); Kalmbach v. Insurance Co. of State of Pennsylvania, 422 F. Supp. 44, 45 (D. Alaska 1976); Anderson v. Alaska Packers Assoc., 635 P.2d 1182 (Alaska 1981).

[28] See cases cited at note 14.

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Some of these cases have concerned injuries to shore personnel which fortuitously occurred on or near navigable waters. The rationale applying state workers' compensation statutes in these decisions has been that the effect on the shipping industry of allowing the state law to apply will be insignificant where the plaintiff and the defendant are local residents and the injury has not occurred aboard a commercial vessel in navigation. When the injury has occurred aboard a commercial vessel in navigable waters, the Courts have held that uniformity requires the application of maritime law.[29]

A second group of cases, mostly involving the application of state wrongful death statutes in admiralty, have allowed the application of state law on the theory that when a gap exists in the maritime law, state law may "fill in" this gap.[30]

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[29] Following the Court's decision in Southern Pacific v. Jensen, supra, in which the Court held that state workers compensation statutes could not be applied to seamen and longshoremen, the Court carved an exception to the rule in personal injury cases involving shore-side workers who are injured on or near the waters edge. The basis for this exception was the Court's determination that such a matter was of "local concern and its regulation by the state will work no material prejudice to any characteristic features of the general maritime law." Millers' Underwriters v. Braud, 270 U.S. 59, 64, 46 S. Ct. 194, 195 (1926); see also Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 66 L.Ed 321 (1922). The Court narrowly construed the "local" exception to the uniformity rule and refused to extend it to injuries actually occurring aboard a vessel in navigable waters since such injuries had an "intimate connection with navigation and commerce." Baizley Iron Works v. Span, 281 U.S. 222, 232, 50 S. Ct. 306, 74 L. Ed. 819, 822 (1930); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 628, 79 S. Ct. 406, 408.

[30] Prior to Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S. Ct. 1772 (1970), in which the Court created a maritime cause of action for wrongful death, state wrongful death statutes were applied to "fill in the gap." Just v. Chambers, 312 U.S. 383 (1941). Nelson v. United States, 639 F.2d 469, 472-73 (9th

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These rationale do not support the application of the state oil spill statute to this case. Because the statute applies to commercial vessels plying navigable waters and allows the recovery of a category of losses which has the capability of increasing the liability of the shipowner by several orders of magnitude, the law will significantly affect maritime commerce.[31] Nor does a "gap" exist in the general maritime law which the state law might arguably fill. To the contrary, as shown above, the state law is in direct conflict with the maritime law's bright-line rule. Application of state law in this situation will contradict this essential feature of maritime law, not supplement it. Given this conflict, the state law must yield.[32]

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Cir. 1980). Since Moragne, the Ninth Circuit has excluded the application of state wrongful death statutes from maritime cases based on the need to preserve the general maritime law's uniformity. Id; Evich v. Morris, 819 F.2d 256 (9th Cir. 1987); Nygaard v. Peter Pan Seafoods, 701 F.2d 77 (9th Cir. 1983).

[31] Indeed the statute's potential effect on maritime commerce is far reaching. The state law affects not only vessels operating in state waters but also those vessels plying the high seas which run aground or collide since oil from these vessels may eventually reach state waters. The GLACIER BAY, for example, grounded in federal waters more than three miles from the shoreline. Nonetheless, the state statute applies to the spill since oil from the tanker reached state waters.

[32] Askew v. American Waterway Operators, 411 U.S. 325 (1973) does not dictate a contrary result. Askew was a declaratory judgment action in which the Court merely held that absent conflict with maritime law, state oil pollution statutes were not unconstitutional.

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