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# Making BP's Blood Curd-Le: Duty, Economic Loss, and the Potential Cardozian Nightmare after *Curd v. Mosaic Fertilizer*

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MAKING BP'S BLOOD *CURD*-LE: DUTY, ECONOMIC LOSS,  
AND THE POTENTIAL CARDOZIAN NIGHTMARE AFTER  
*CURD V. MOSAIC FERTILIZER*

*Benjamin J. Steinberg\** & *Dwayne Antonio Robinson\*\**

Abstract

The traditional economic loss rule precludes plaintiffs—such as those affected by the BP *Deepwater Horizon* oil spill—from recovering losses not resulting from damage to person or property. Most states have applied the rule to various circumstances and have carved out several exceptions over time, including one for commercial fishermen. In the Florida Supreme Court’s decision in *Curd v. Mosaic Fertilizer, LLC*,<sup>1</sup> the court expanded the duty element in negligence to new reaches for claims of pure economic loss. As a result, Florida now unquestionably promises the greatest opportunity compared to the other Gulf states for recovery of pure economic losses due to the negligence of a polluter such as Mosaic Fertilizer or BP. The issue that remains unclear after *Curd* is whether and how far this newly stated duty will extend beyond commercial fishermen to parties such as distributors, restaurants, fisheries, and fish brokers.

This Article provides a brief background of the pure economic loss rule and its application in Florida, pre- and post-*Curd*. The Article also provides the first in-depth analysis of the treatment of the pure economic loss rule in each of the Gulf states—Alabama, Mississippi, Louisiana, and Texas—as well as their applicable federal circuits. The analysis illustrates that Florida’s rule, following *Curd*, is the most amenable to plaintiffs. In the end, it is unclear just how far the holding in *Curd* may stretch or limit the economic loss rule in Florida and how much litigation will see the inside of a courthouse based on *Curd*’s precedent.

INTRODUCTION..... 1246

I. THE FOUNDATION OF THE PURE ECONOMIC LOSS RULE  
AND ITS HISTORY IN FLORIDA ..... 1249

A. AFM Corp. v. Southern Bell Telephone &  
Telegraph Co.: *Strict Adherence* ..... 1251

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\* J.D., University of Florida Levin College of Law; Associate, Avera & Smith, LLP. As with all I do, this Article is dedicated to Stacey, Mason, and Isaac. Thanks to the *Florida Law Review* and its honorable members; to my co-author, a brilliant man whose friendship I will always cherish; and special thanks, to a special man, to whom so many students owe so much—Professor Dennis A. Calfee.

\*\* J.D., University of Florida Levin College of Law; Law Clerk for the Honorable Judge Ed Carnes, the United States Court of Appeals for the Eleventh Circuit. I thank the Lord for life and all the blessings therein. I dedicate this work to two women in my life, my mother, Vinnett Simpson, and my love, Kemi-Ann Godfrey. Lastly, I commend the members of the *Florida Law Review* and their faculty adviser, Professor Dennis A. Calfee, for their honorable and dedicated work.

1. *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216 (Fla. 2010).

B. Casa Clara Condominium Ass’n v. Charley Toppino & Sons, Inc.: *A Noteworthy Dissent*..... 1252

C. Indemnity Insurance Co. of North America v. American Aviation, Inc.: *Change, but Duty Remains*..... 1252

II. *CURD V. MOSAIC FERTILIZER, LLC: DUTY EXTENDED AD INFINITUM?* ..... 1254

A. *The Majority Opinion* ..... 1254

B. *Justice Polston: Articulating the Potential Cardozian Nightmare* ..... 1256

C. *The Aftermath: Curd as a Roadmap for BP Claimants*..... 1257

III. VENUE SHOPPING: COMPARING THE PROSPECTS FOR POTENTIAL BP CLAIMANTS ACROSS THE AFFECTED GULF STATES ..... 1261

A. *Eleventh Circuit*..... 1261

B. *Alabama*..... 1262

C. *Fifth Circuit*..... 1263

D. *Louisiana* ..... 1268

E. *Texas*..... 1271

F. *Mississippi* ..... 1272

CONCLUSION..... 1275

INTRODUCTION

On April 20, 2010, an explosion lacerated the *Deepwater Horizon* oil rig, beginning the largest accidental oil spill in the history of the petroleum industry.<sup>2</sup> Initial leakage estimates ranged from 1,000 to 19,000 barrels per day.<sup>3</sup> The first study of the spill performed by a peer-reviewed journal concluded that the oil began flowing at a rate of approximately 56,000 barrels per day, eventually leaking approximately 4.4 million barrels of crude oil into the Gulf of Mexico.<sup>4</sup> Businesses and individuals who relied on Gulf waters for their livelihoods were hit extremely hard.<sup>5</sup> Although BP

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2. NAT’L COMM’N ON THE BP *DEEPWATER HORIZON* OIL SPILL & OFFSHORE DRILLING, REPORT TO THE PRESIDENT, *DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING*, at vi (2011), available at [http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER\\_ReporttothePresident\\_FINAL.pdf](http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf); Campbell Robertson & Clifford Krauss, *Gulf Spill Is the Largest of Its Kind, Scientists Say*, N.Y. TIMES, Aug. 3, 2010, at A14.

3. Kevin Krajick et al., The Earth Institute at Columbia University, *Study Affirms Gulf Oil Spill’s Vastness* (Sep. 23, 2010), [www.earthinstitute.columbia.edu/articles/view/2730](http://www.earthinstitute.columbia.edu/articles/view/2730) (citing Timothy J. Crone & Maya Tolstoy, *Magnitude of the 2010 Gulf of Mexico Oil Leak*, 330 SCIENCE MAG. 634, 634 (2010)).

4. *Id.*

5. See Susan Buchanan, *Fishermen Clinging to Livelihoods During Spill Recovery*, LA WEEKLY, Nov. 22, 2010.

established a fund to help those affected, resistance and difficulty have plagued many who attempt to receive fund benefits.<sup>6</sup> Already, a vast number of individual and class-action claims have been filed against BP for the company's apparent failures in managing the distribution of fund benefits.<sup>7</sup>

During the time that the *Deepwater Horizon* oil spill was consuming the daily news cycle, the Florida Supreme Court handed down a landmark decision that may have turned Florida into a favorable jurisdiction for those affected by the spill. In *Curd v. Mosaic Fertilizer, LLC*,<sup>8</sup> the Florida Supreme Court gutted a key restriction to plaintiffs' recovery of pure economic losses. Beyond merely recognizing a commercial fishermen exception to the economic loss rule<sup>9</sup>—a far from radical proposition—the Florida Supreme Court, in a lawsuit alleging negligence, also held that the polluter owed a duty of care to those who fell within the “zone of risk”<sup>10</sup> the polluter created. This extension of duty, as one Florida justice warned in a separate opinion,<sup>11</sup> has the potential to create a Cardozian nightmare of “liability in an indeterminate amount for an indeterminate time to an indeterminate class.”<sup>12</sup>

The traditional economic loss rule precludes plaintiffs—such as Howard Curd, a commercial fisherman, and those affected by the BP spill—from recovering losses not resulting from damage to person or property.<sup>13</sup> A major justification for applying the rule to common law negligence claims is the classic “floodgates” argument famously articulated by Chief Judge Benjamin Cardozo. In his opinion in *Ultramares Corp. v. Touche*,<sup>14</sup> Judge Cardozo warned that the duty element of common law negligence must have boundaries for fear of subjecting a tortfeasor to the aforementioned indeterminate liability to an indeterminate class.<sup>15</sup> Most states have applied the rule to various circumstances and have carved out several exceptions over time, including one for commercial fishermen. After the Florida Supreme Court's decision in *Curd*, Florida now unquestionably promises the greatest chances for recovery of pure economic losses due to the negligence of a polluter such as Mosaic Fertilizer or BP when compared to the other Gulf states.<sup>16</sup>

6. Brian Skoloff, *Problems Plague BP Compensation Fund*, ASSOCIATED PRESS, Oct. 6, 2010, available at [http://www.msnbc.msn.com/id/39525091/ns/us\\_news-life/](http://www.msnbc.msn.com/id/39525091/ns/us_news-life/).

7. Steven Mufson & Juliet Eilperin, *Lawyers Lining Up for Class-Action Suits Over Oil Spill*, WASH. POST, May 17, 2010, at A01, available at <http://washingtonpost.com/wp-dyn/content/article/2010/05/16/AR2010051603254.html?sub=AR>.

8. 39 So. 3d 1216 (Fla. 2010).

9. *Id.* at 1223.

10. *Id.* at 1228.

11. *Id.* at 1232 (Polston, J., concurring in part and dissenting in part).

12. *Id.* (quoting *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931)).

13. *Id.* at 1223–24 (citing *Union Oil Co. v. Oppen*, 501 F.2d 558, 563 (9th Cir. 1974)).

14. 174 N.E. 441 (N.Y. 1931).

15. *Id.* at 444.

16. See *infra* Part III (conducting a state-by-state and circuit-by-circuit analysis of the pure

The issue that remains unclear after *Curd*—which involved a class broader than one comprising solely commercial fishermen—is just how far this newly stated duty will extend. Florida Supreme Court Justice Ricky Polston addressed this issue in a separate opinion.<sup>17</sup> Concurring in part and dissenting in part, Justice Polston recognized that while the court’s opinion purported to address only the claims of “commercial fishermen,” the plaintiffs’ proposed class was broader and included “all fishermen *and those persons* engaged in the commercial catch *and sale* of fish.”<sup>18</sup> Justice Polston opined that “the majority’s decision does not extend to distributors, seafood restaurants, fisheries, fish brokers, or the like who may have been affected by Mosaic’s pollution.”<sup>19</sup> However, the majority opinion is far from explicit on that point. Rather, it provides a roadmap for such prospective plaintiffs’ claims.<sup>20</sup> Therefore, it seems a foregone conclusion that the majority’s opinion will be put to the test by future, non-fishermen plaintiffs.

What if a distributor, seafood restaurant, fishery, fish broker, or the like asked a Florida court to award damages for purely economic losses suffered as a result of a polluter such as BP? In Louisiana, a very popular chef filed suit against BP for the economic losses she incurred as a result of the *Deepwater Horizon* spill.<sup>21</sup> Could that chef rely on *Curd* were her restaurant in Florida? What about other businesses that rely on the waterways or claim economic losses from a decline in tourism-related business as a result of the spill?<sup>22</sup> Just how far will the duty extend? And how will Florida determine the “indeterminate class”?

Part I of this Article provides a brief background of the pure economic loss rule and its application in Florida, including an analysis of pre-*Curd* Florida precedent evidencing the evolution and eventual diminishment of the economic loss rule. Part II analyzes the *Curd* case—its facts,

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economic loss rule’s application in the Gulf States).

17. *Curd*, 39 So. 3d 1216 at 1228 (Polston, J., concurring in part and dissenting in part).

18. *Id.* at 1229 (quoting Petitioner’s Fourth Amended Complaint) (“As an initial matter, I note that the majority decides the case for a more narrow class than those bringing the suit and more narrowly than the claims they allege.”)

19. *Id.*

20. *Id.* at 1227–28 (majority opinion) (analyzing the elements of negligence under Florida law and establishing the element of duty, which is at the center of the traditional economic loss rule); see also *infra* Section II.C.

21. Dennis Persica, The Times-Picayune, *Chef Susan Spicer Sues BP, Others Over Oil Spill in Gulf of Mexico*, TIMES-PICAYUNE.NOLA.COM (New Orleans, La.), June 27, 2010, [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/06/chef\\_susan\\_spicer\\_sues\\_bp\\_othe.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/06/chef_susan_spicer_sues_bp_othe.html). Chef Susan Spicer is not the first chef or restaurateur to file suit against BP. *Id.* However, while the majority of these suits are aimed only at establishing the right to collect from the claims fund established by BP, Chef Spicer is also seeking direct money damages against BP. *Id.*

22. See the U.S. Travel Association’s report on the Gulf spill for an in-depth analysis of the potential long-term impact on tourism as a result of the *Deepwater Horizon* oil spill. OXFORD ECON. FOR THE U.S. TRAVEL ASS’N, POTENTIAL IMPACT OF THE GULF OIL SPILL ON TOURISM (2010), available at <http://www.bpgulfoilspllawsuit.com/supporting-studies/117-oxford-economics-potential-impact-of-the-gulf-oil-spill-on-tourism>.

procedural history, and the opinion of the Florida Supreme Court. Additionally, Part II examines and addresses the concerns Justice Polston expressed in his separate opinion. Lastly, Part II analogizes the holding in *Curd* to the potential claims available to those affected by the BP spill and other plaintiffs adversely affected by polluters. Part III provides the first in-depth analysis of the treatment of the pure economic loss rule in each of the Gulf states—Alabama, Mississippi, Louisiana, and Texas—as well as their applicable federal circuits. The analysis illustrates that Florida's rule, following *Curd*, is the most amenable to plaintiff claims. In the end, it is unclear just how far the holding in *Curd* may stretch the economic loss rule (or lack thereof) in Florida and how much litigation will see the inside of a courthouse based on *Curd*'s precedent.

#### I. THE FOUNDATION OF THE PURE ECONOMIC LOSS RULE AND ITS HISTORY IN FLORIDA

*Robins Dry Dock & Repair Co. v. Flint*<sup>23</sup> is the seminal case in American jurisprudence establishing the common law pure economic loss rule. The plaintiffs in *Robins* were charterers of a vessel that the defendant carelessly damaged during an inspection.<sup>24</sup> When there were delays because of the necessary repairs, the plaintiffs incurred lost profits because of their inability to sail as planned.<sup>25</sup> The plaintiffs' claims sounded in negligence and sought recovery for purely economic losses.<sup>26</sup> In an opinion written by Justice Oliver Wendell Holmes,<sup>27</sup> the U.S. Supreme Court denied recovery to the plaintiffs for those purely economic losses because they had no proprietary interest in the damaged vessel.<sup>28</sup> Justice Holmes' opinion established the bright-line rule that tort liability cannot derive from pure economic loss.<sup>29</sup>

Despite being a decision in admiralty, lower courts have since applied the *Robins* decision to claims of common law negligence.<sup>30</sup> *Barber Lines A/S v. M/V DonauMaru*<sup>31</sup> provides an example of a court applying the *Robins* rule in a case with facts similar to those in *Curd*. The ship *DonauMaru* spilled fuel into Boston Harbor and caused damage to a dock

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23. 275 U.S. 303 (1927).

24. *Id.* at 307.

25. *Id.*

26. *Id.*

27. *Id.* at 303.

28. *Id.* at 309–10.

29. *Id.*

30. Some scholars argue that the prevailing understanding of Justice Holmes' opinion is flawed; the opinion does not, in fact, establish a special rule for pure economic loss. See Peter Benson, *The Problem with Pure Economic Loss*, 60 S.C. L. REV. 823, 826, 878 (2009) (providing an in-depth analysis of the *Robins* decision, the economic loss rule, and a proposition that the dominant approach to pure economic loss is flawed).

31. 764 F.2d 50 (1st Cir. 1985).

owned by a third party.<sup>32</sup> The damaged dock made it impossible for another ship, the *Tamara*, to dock.<sup>33</sup> When the *Tamara* was forced to dock and unload its cargo elsewhere, its owners incurred significant additional costs for fuel, docking, and labor.<sup>34</sup> After the trial court dismissed the plaintiffs' claim, the First Circuit affirmed the judgment and held that "controlling case law denies that a plaintiff can recover damages for negligently caused financial harm, *even when foreseeable*, except in special circumstances."<sup>35</sup> The court then stated that the "most common" special circumstance is "physical injury to the plaintiffs or to their property."<sup>36</sup> Echoing the floodgates sentiment of Chief Judge Cardozo in *Ultramares*, the First Circuit illustrated the effect of reversing the lower court using a hypothetical "downtown auto accident." Liability would attach for the damages suffered by not only the few people who may have been physically hurt, but also the hundreds more who experienced damages due to the subsequent traffic delay.<sup>37</sup> The court acknowledged that the *Robins* precedent may have seen its time pass based on more recent jurisprudence.<sup>38</sup> Nonetheless, the court concluded that it could not reverse the "general judicial principle that (with exceptions) forbids recoveries for negligently caused purely financial losses."<sup>39</sup>

Lest it be thought that *Barber Lines* signaled a modern strict adherence to the traditional rule, the reality has been quite the opposite. Courts have carved out exceptions to the blanket no-liability roots of the rule, and the majority of states and jurisdictions have recently retreated from such harsh results for plaintiffs.<sup>40</sup> Florida is no different, and the evolution of the traditional rule has led to the Florida Supreme Court narrowing its application to only a few circumstances. The cases of *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*,<sup>41</sup> *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc.*,<sup>42</sup> and *Indemnity Insurance Co. of North America v. American Aviation, Inc.*,<sup>43</sup> provide a clear history

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32. *Id.* at 50.

33. *Id.*

34. *Id.*

35. *Id.* at 51 (emphasis added).

36. *Id.*

37. *Id.* at 54 ("The typical downtown auto accident, that harms a few persons physically and physically damages the property of several others, may well cause financial harm (e.g., through delay) to a vast number of potential plaintiffs.").

38. *Id.* at 53.

39. *Id.* at 57.

40. *See Union Oil Co. v. Oppen*, 501 F.2d 558, 566–67 & n.9 (9th Cir. 1974) (recognizing cases where economic losses have been "recovered for the negligence of pension consultants, accountants, architects, attorneys, notaries public, test hole drillers, title abstractors, termite inspectors, soil engineers, surveyors, real estate brokers, drawers of checks, directors of corporations, trustees, bailees and public weighers").

41. 515 So. 2d 180 (Fla. 1987).

42. 620 So. 2d 1244 (Fla. 1993).

43. 891 So. 2d 532 (Fla. 2004).

of how the rule has been adopted, adapted, and eventually narrowed for claims of negligence in Florida.

A. *AFM Corp. v. Southern Bell Telephone & Telegraph Co.:*  
*Strict Adherence*

In *AFM Corp.*, the plaintiff entered into a Yellow Pages advertising agreement with Southern Bell Telephone and Telegraph Company.<sup>44</sup> Between the execution of the contract and the placement of the advertisements, the plaintiff moved offices and changed phone numbers in order to use an automatic phone referral system.<sup>45</sup> When the Yellow Pages were eventually distributed, the plaintiff's old telephone number was printed in the advertisement—a number that was, in the interim, assigned to another Southern Bell customer who promptly disconnected the referral system.<sup>46</sup> After more mistakes on the part of Southern Bell, the plaintiff sued and asserted a claim for economic losses based solely on a theory of tort and common law negligence.<sup>47</sup> In its review, the U.S. Court of Appeals for the Eleventh Circuit certified questions to the Florida Supreme Court, which then consolidated them into a single question: Does “Florida permit a purchaser of services to recover economic losses in tort without a claim for personal injury or property damage?”<sup>48</sup>

Just months prior to deciding *AFM Corp.*, the Florida Supreme Court decided *Florida Power & Light Co. v. Westinghouse Electric Corp.*,<sup>49</sup> holding that where negligence claims derive from a contract, contract principles are better suited than tort principles for remedying pure economic losses.<sup>50</sup> Although *AFM Corp.* addressed a contract for services while *Florida Power & Light* addressed the issue in a contract for goods, the court reached the same conclusion for both: “[W]ithout some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses.”<sup>51</sup> The sole remedy, therefore, is in contract law, and the court unquestionably held that the economic loss rule in Florida applies to claims sounded in contract.

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44. *AFM Corp.*, 515 So. 2d at 180.

45. *Id.*

46. *Id.* at 180–81.

47. *Id.* at 181.

48. *Id.* at 180.

49. 510 So. 2d 899 (Fla. 1987).

50. *Id.* at 902 (stating that the economic loss rule has a “long, historic” basis in Florida).

51. *AFM Corp.*, 515 So. 2d at 181–82; see also Heather Howdeshell, Note, *Didn't My General Contractor Pay You? Subcontractor Construction Liens in Residential Construction Projects*, 61 FLA. L. REV. 151, 170 & n.140 (2009).



B. Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.:  
*A Noteworthy Dissent*

Nearly six years after *AFM Corp.*, the Florida Supreme Court addressed whether a homeowner could recover pure economic losses from a concrete provider under a theory of negligence in *Casa Clara Condominium Ass'n*.<sup>52</sup> The plaintiffs owned residential units which were built with defective concrete supplied by Toppino & Sons, Inc.<sup>53</sup> The plaintiffs acknowledged the state's economic loss rule but implored the court to create a negligence-based exception to the rule to compensate homeowners who have suffered economic losses after a breach of contract for the construction of their homes.<sup>54</sup> The court again stated that contract—and not tort—law was most appropriate for providing any available remedy.<sup>55</sup> The court also held that the homeowners bargained for finished products—completed, constructed homes—and not the homes' individual components, such as the concrete. Because the concrete was part and parcel of the completed home, the defective concrete caused no damage except to the product itself.<sup>56</sup>

A prescient dissent by Florida Supreme Court Justice Leander J. Shaw, Jr. asserted that contract law was inapplicable because the homeowners were not parties to the contract between Toppino and the general contractor who constructed the homes.<sup>57</sup> Therefore, he argued, it would be imprudent to “stretch” the economic loss rule to bar an action by an innocent third party who had suffered a foreseeable injury at the hand of a tortfeasor.<sup>58</sup> Justice Shaw essentially suggested shifting the economic loss rule from a general rule for which exceptions need be sought to a concept expressly limited to certain circumstances. This suggestion of limitation on the rule perhaps provided the spark for several more exceptions carved out by the Florida Supreme Court in subsequent years.

C. Indemnity Insurance Co. of North America v. American Aviation,  
 Inc.: *Change, but Duty Remains*

In *Indemnity Insurance Co. of North America*, the Florida Supreme Court fell in line with Justice Shaw's dissent and explicitly limited the scope of the economic loss rule.<sup>59</sup> There, an aircraft owner and its insurer sued American Aviation for damage to the aircraft because of American

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52. Casa Clara Condo. Ass'n v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993).

53. *Id.* at 1245.

54. *Id.* at 1246 (arguing that contract remedies would be burdensome and unfair to homeowners).

55. *Id.* at 1247 (quoting *Fla. Power & Light Co.*, 510 So. 2d at 902).

56. *Id.* (applying the precedent that in a product liability claim, no recovery may be had unless the defective product causes damage to something or someone other than itself).

57. *See id.* at 1249 (Shaw, J., concurring in part and dissenting in part).

58. *Id.*

59. *Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004).

Aviation's "negligent maintenance and inspection of the aircraft's landing gear."<sup>60</sup> No privity existed between the plaintiffs and American Aviation.<sup>61</sup> After receiving five certified questions from the Eleventh Circuit, the Florida Supreme Court again consolidated and rephrased the questions into a single question: "[W]hether the economic loss doctrine bars a negligence action to recover purely economic loss in a case where the defendant is neither a manufacturer nor distributor of a product and there is no privity of contract."<sup>62</sup> The rephrasing of the question shows how the court aimed to limit the scope of the economic loss rule in Florida.

In its first explicit limitation on the application of the rule, the court held that the economic loss rule "bars a negligence action to recover solely economic damages *only* in circumstances where the parties are either in contractual privity or the defendant is a manufacturer or distributor of a product."<sup>63</sup> Because American Aviation was not a manufacturer or distributor of a product and no privity existed between the parties, the economic loss rule did not bar the action.<sup>64</sup> Until this holding, Florida's highest court had not explicitly established the exclusive circumstances in which the economic loss rule remained a valid bar to a negligence claim.<sup>65</sup> In case its holding could be interpreted in any other manner, the court clearly stated: "We now agree that the economic loss rule should be expressly limited."<sup>66</sup> The court dubbed these limited scenarios as the "Contractual Privity Economic Loss Rule"<sup>67</sup> and the "Products Liability Economic Loss Rule."<sup>68</sup> After partitioning the rule into these two distinct classes, the court had little difficulty finding that the facts of the case did not fit into either.<sup>69</sup> The court expressly overruled *AFM Corp.* and reasserted its opinion from a prior case where it recognized that *AFM Corp.* was "unnecessarily over-expansive in [its] reliance on the economic loss rule as opposed to fundamental contractual principles."<sup>70</sup>

The court held that those cases that no longer fit within the scope of the rule and its newly articulated categories "should be decided on the

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60. *Id.* at 534.

61. *Id.*

62. *Id.* (quoted material appears in all caps in original).

63. *Id.* (emphasis added).

64. *Id.*

65. *Id.* at 536 ("In this state, the economic loss rule has been applied in two different circumstances. The first is when the parties are in contractual privity and one party seeks to recover damages in tort for matters arising from the contract. The second is when there is a defect in a product that causes damage to the product but causes no personal injury or damage to other property.").

66. *Id.* at 542.

67. *Id.* at 536-37.

68. *Id.* at 537-41.

69. *Id.* at 541.

70. *Id.* at 542 (quoting *Moransais v. Heathman*, 744 So. 2d 973, 981 (Fla.1999)) (internal quotation marks omitted).

traditional negligence principles of duty, breach, and proximate cause.”<sup>71</sup> In a concurring opinion, Justice Raoul G. Cantero made a point of emphasizing this remaining burden of establishing duty.<sup>72</sup> To assuage concerns of the floodgates opening wide, Justice Cantero stated that “our limitation of the rule will not open the gates to widespread tort recovery for purely economic losses . . . [because] plaintiffs whose cases fall outside of the economic loss rule must still prove ‘duty, breach, and proximate cause.’”<sup>73</sup> The opinion further stated that when compared to the traditional economic loss rule, “[t]he ‘duty’ prong remains a strong filter in these cases—virtually as strong as the rule itself.”<sup>74</sup> This decision narrowed the scope of the economic loss rule, with the court relying on the “duty” element of a negligence claim to prevent the Cardozian nightmare.

## II. *CURD V. MOSAIC FERTILIZER, LLC*: DUTY EXTENDED AD INFINITUM?

### A. *The Majority Opinion*

On September 5, 2004, nearly six years before anyone had ever heard of the *Deepwater Horizon* oil rig, the Gulf of Mexico around Tampa Bay was forever changed when a dyke burst—releasing thousands of gallons of acidic wastewater into Hillsborough Bay.<sup>75</sup> The Hillsborough County Environmental Protection Commission and the Florida Department of Environmental Protection warned the owner, Mosaic Fertilizer, LLC, that the quantity of wastewater in the pond was dangerously pushing the dyke to its limits.<sup>76</sup> Nonetheless, Mosaic failed to improve the condition until it was too late. Like those suffering after the *Deepwater Horizon* spill, many businesses and individuals who earned their living on Tampa Bay were seriously damaged.<sup>77</sup> Also like those affected by the *Deepwater Horizon* spill, those who were affected by the toxic pollutants spilled by Mosaic promptly initiated litigation.

One of the fishermen whose livelihood swam in the waters of Tampa Bay was Howard Curd.<sup>78</sup> Curd is the named plaintiff in a class action brought by a broad class against Mosaic Fertilizer to recover for the economic losses that they suffered after the spill.<sup>79</sup> The trial court dismissed the proposed class action, and although Florida’s Second

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71. *Id.* at 543.

72. *Id.* at 544 (Cantero, J., concurring).

73. *Id.* (quoting majority opinion at 543).

74. *Id.* at 546.

75. Janet Zink et al., *Acidic, Radioactive Water Spills Into Bay*, ST. PETERSBURG TIMES, Sept. 6, 2004, [http://www.sptimes.com/2004/09/06/Hillsborough/Acidic\\_\\_radioactive\\_w.shtml](http://www.sptimes.com/2004/09/06/Hillsborough/Acidic__radioactive_w.shtml).

76. Petitioners’ Initial Brief at 4, *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216 (No. SC08-1920), 2008 WL 5260712, at \*4 (Fla. 2010).

77. *Id.* at 5.

78. *Id.*

79. *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216 (Fla. 2010).

District Court of Appeal affirmed, it certified two questions to the Florida Supreme Court as matters of great public importance.<sup>80</sup> The first question asked, “Does Florida recognize a common law theory under which commercial fishermen can recover for economic losses proximately caused by the negligent release of pollutants despite the fact that the fishermen do not own any property damaged by the pollution?”<sup>81</sup> In answering in the affirmative, the Florida Supreme Court went further by identifying the class of plaintiffs to whom Mosaic owed a duty of care as those who fell within the foreseeable “zone of risk.”<sup>82</sup> This precedent is striking because in applying the malleable “zone of risk” analysis to a class which, as a whole, was not limited to commercial fishermen, the court may have paved the way for a plethora of future litigation.

In holding the economic loss rule inapplicable to the facts, *Curd* was unremarkable.<sup>83</sup> After all, it merely reiterated the holding in *Indemnity Insurance Co. of North America* and joined the many other jurisdictions with an explicit carve-out of the economic loss rule as applied to commercial fishermen.<sup>84</sup> However, in expanding duty through use of the “zone of risk” analysis in a claim for purely economic losses, *Curd* represented nothing short of a landmark extension.

If prior cases discussed duty as the lock on the floodgates, then the *Curd* court turned the key. After finding traditional negligence principles applicable to the claim, the court questioned the district court’s finding that the defendant did not owe “an independent duty of care to protect the fishermen’s purely economic interests—that is, their expectations of profits from fishing for healthy fish.”<sup>85</sup> In overturning the district court, the Florida Supreme Court held that Mosaic did owe such a duty and that the duty “was not shared by the public as a whole.”<sup>86</sup> After rationalizing duty with the concept of foreseeability, the court recognized that although duty may arise from several sources, the catch-all category of “a duty arising from the general facts of a case”<sup>87</sup> encompassed “that class of cases in which the duty arises because of a foreseeable zone of risk arising from the acts of the defendant.”<sup>88</sup> According to the court, it is this duty that extended to *Curd* and his class.

The court found that Mosaic’s business of storing pollutants and

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80. *Id.* at 1218–19.

81. *Id.* at 1218.

82. *Id.* at 1228.

83. *See supra* Section I.C (recognizing the Florida Supreme Court’s limitation of the economic loss rule to only contract and products liability actions).

84. *See infra* Part III.

85. *Curd*, 39 So. 3d. at 1223 (quoting *Curd v. Mosaic Fertilizer, LLC*, 993 So. 2d 1078, 1083 (Fla. 2d Dist. Ct. App. 2008)).

86. *Id.*

87. *Id.* at 1228 (citing *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003) (citing *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 503 n.2 (Fla. 1992))).

88. *Id.* (quoting *McCain*, 593 So. 2d at 503 n.2) (internal quotation marks omitted).

chemicals created an appreciable zone of risk and that Mosaic therefore was obligated to protect those who may be exposed to the pollutants.<sup>89</sup> Furthermore, the court held that the commercial fishermen had a “special interest within that zone of risk, an interest not shared by the general community.”<sup>90</sup> To support its finding that this interest was “special,” the court stated that the fishermen not only relied on the fish in those waters for their livelihood, but that they were also licensed by the state to do so.<sup>91</sup> After all of the prologue, the court held Mosaic’s actions “constituted a tortious invasion that interfered with the special interest of the commercial fisherman to use those public waters to earn their livelihood.”<sup>92</sup> The court concluded by stating, “We find this breach of duty has given rise to a cause of action sounding in negligence.”<sup>93</sup> After expanding the reach of the duty element beyond the boundaries relied upon for decades as a shield against litigation, the *Curd* court seemingly saw the damages element of a claim as a sufficient hurdle to serve the same goal and act as a new shield.<sup>94</sup>

#### B. Justice Polston: Articulating the Potential Cardozian Nightmare

Likely due to the jurisdictional limitations inherent in certified questions, the majority opinion focused solely on the commercial fishermen in *Curd*’s class.<sup>95</sup> However, a separate opinion written by Justice Polston proposed that such a limited reading of the holding is perhaps myopic. In his view, as to the specific question regarding the negligence claim, “the majority decides the case for a more narrow class than those bringing the suit and more narrowly than the claims they allege.”<sup>96</sup> The true class of plaintiffs suing Mosaic included more than merely commercial fishermen, and their claims extended far beyond profit losses associated with closed waterways or dead fish. The claimants included “all fishermen *and those persons* engaged in the commercial catch *and sale* of fish,” and their pleadings requested broad damages, including damages attributable to the resulting harm to their reputation.<sup>97</sup>

The good justice, clearly recognizing the dangers inherent in the majority’s extension of duty in *Curd*, attempted to blunt the breadth of the

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89. *Id.* (“It was foreseeable that, were these materials released into the public waters, they would cause damage to marine and plant life as well as to human activity.” (citing *McCain*, 593 So. 2d at 503 n.2)).

90. *Id.* (citing *Union Oil Co. v. Oppen*, 501 F.2d 558, 568 (9th Cir. 1974)).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* (“[I]n order to be entitled to compensation for any loss of profits, the commercial fishermen must prove all of the elements of their causes of action, *including damages*.” (emphasis added)).

95. See FLA. CONST. art. V, § 3(b) (limiting the appellate jurisdiction of Florida’s supreme court, including, as was the case in *Curd*, addressing certified questions of great public importance); see also *infra* note 123.

96. *Curd*, 39 So. 3d. at 1229 (Polston, J., concurring in part and dissenting in part).

97. *Id.* (quoting Petitioner’s Fourth Amended Complaint) (internal quotation marks omitted).

majority's ruling. First, he opined that the majority's decision "does not extend to distributors, seafood restaurants, fisheries, fish brokers, or the like whose incomes may have been affected by Mosaic's pollution."<sup>98</sup> However, the majority opinion is far from explicit on this point. Second, he made a public policy prophylactic argument that Mosaic owed a duty of care to neither the commercial fishermen *nor* any of the claimants in the class action lawsuit.<sup>99</sup>

Despite the fact that Florida effectively eviscerated the economic loss rule in claims of negligence six years earlier,<sup>100</sup> Justice Polston relied on that doctrine's underpinnings to bolster his assertion. Justice Polston focused on the fact that, "[h]ere, the plaintiffs have suffered no personal injury. They have suffered no property damage."<sup>101</sup> Justice Polston argued that "commercial fishermen in Florida do not have a 'special' interest within the 'zone of risk' the majority finds Mosaic to have created."<sup>102</sup> Specifically, the justice questioned the majority's reliance on the licensure of the fisherman as a basis for establishing duty.<sup>103</sup> He stated that "if every state-licensed Floridian has a 'special' or 'unique' interest, then it seems there is endless 'foreseeable' liability."<sup>104</sup>

Echoing the learned Judge Cardozo, Justice Polston mapped the horizon he feared: "The unrestricted imposition of liability on polluters for purely economic damages could create future liability 'in an indeterminate amount for an indeterminate time to an indeterminate class.'"<sup>105</sup> Whether Justice Polston is deemed to be a soothsayer or Henny Penny<sup>106</sup> will likely take years of litigation to ascertain.

### C. *The Aftermath: Curd as a Roadmap for BP Claimants*

While it is possible that the majority opinion and Justice Polston's opinion were drafted without a thought to the impending BP *Deepwater Horizon* oil spill litigation, it seems unlikely at best.<sup>107</sup> Based on the scope of Justice Polston's opinion, it seems as though he was addressing

98. *Id.*

99. *See id.* at 1230–34.

100. *See supra* Section I.C (discussing *Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004)).

101. *Curd*, 39 So. 3d at 1232 (Polston, J., concurring in part and dissenting in part).

102. *Id.* at 1233.

103. *Id.* at 1233–34.

104. *Id.* ("[H]otels and restaurants near the beach, seafood truck drivers, beach community realtors, and yacht salesmen are all licensed by the State to conduct commercial activities that may be negatively affected by pollution of coastal waters.")

105. *Id.* at 1232 (quoting *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931)).

106. Henny Penny, also known as Chicken Little, is a fable about a chicken who believes the world is coming to an end. It is a common idiom indicating a hysterical or mistaken belief that disaster is imminent. *See, e.g.*, STEVEN KELLOGG, *CHICKEN LITTLE* (1985).

107. At the time the *Curd* opinion was handed down, the BP spill had been going on for over fifty-eight days and was at the forefront of almost all news coverage, especially in Gulf states, including Florida.

concerns that spread far beyond the small group affected by Mosaic and the small area of Tampa Bay at issue in *Curd*. His focus was on the state of Florida *as a whole* and the “tens of thousands of Floridians who earn their living from healthy ocean waters”<sup>108</sup> and via beach tourism across the state.<sup>109</sup> Looking ahead—and, perhaps, toward the Gulf—Polston saw the rising tide of litigation that would result if *Curd* is read to extend duty too far and too wide.

Despite Justice Polston’s protestations, following *Curd*, litigants claiming damages due to the BP oil spill could easily illustrate that commercial fishermen have a common law negligence action against polluters in Florida for pure economic losses. Equally true, although abhorrent to the justice’s view of jurisprudence, is that *Curd*’s legal rationale could be adapted by plaintiffs’ attorneys to support the conclusion that polluters also owe a duty of care to hotels, restaurants, tourism industries, theme parks, or other tertiary plaintiffs who fall with the “foreseeable zone of risk.” In any litigation stemming from the *Deepwater Horizon* oil spill, this would be almost as simple as substituting the party names and a few facts and then following the roadmap to liability provided in the majority opinion.

First, a plaintiff in BP litigation could establish that BP, like Mosaic Fertilizer, “created an appreciable zone of risk” and was therefore “required to exercise prudent foresight whenever others may be injured as a result.”<sup>110</sup> Second, a plaintiff could establish that BP’s duty, like Mosaic Fertilizer’s duty, “ar[ose] because of a foreseeable zone of risk arising from” BP’s actions.<sup>111</sup> Therefore, like in Mosaic Fertilizer, BP’s “activities created an appreciable zone of risk within which [BP] was obligated to protect those who were exposed to harm.”<sup>112</sup> Third, it is not a reach to state that, like Mosaic Fertilizer, BP’s “business involved the storage [and excavation] of pollutants and hazardous contaminants.”<sup>113</sup> Fourth, it was similarly foreseeable that, were these materials released into the public waters, “they would cause *damage* to marine and plant life as well as to *human activity*.”<sup>114</sup> Fifth, these tertiary plaintiffs could establish that they “had a special interest within that zone of risk, an interest not shared by the

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108. *Curd*, 39 So. 3d at 1233 (Polston, J., concurring in part and dissenting in part).

109. *Id.* (citing CTR. FOR URBAN & ENVTL. SOLUTIONS AT FLA. ATL. UNIV., FLORIDA VISITOR STUDY 1 (2008); Forrest J. Bass, *Calming the Storm: Public Access to Florida’s Beaches in the Wake of Hurricane-Related Sand Loss*, 38 STETSON L. REV. 541, 570–71 (2009)).

110. *Id.* at 1228 (majority opinion) (quoting *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992)) (internal quotation marks omitted).

111. *Id.* (quoting *McCain*, 593 So. 2d at 503 n.2) (internal quotation marks omitted).

112. *Id.*

113. *Id.* The oil sludge from the BP spill contains a bevy of toxins that could include elevated levels of polynuclear aromatic hydrocarbons (or PAHs), which could be carcinogenic. See Joshua Philipp, *BP Oil Spill Taking Toll on Louisiana Indian Tribe*, EPOCH TIMES, Oct. 31, 2010, <http://www.theepochtimes.com/n2/content/view/45131/>.

114. *Curd*, 39 So. 3d at 1228 (citing *McCain*, 593 So. 2d at 503 n.2) (emphasis added).

general community.”<sup>115</sup>

Hotels and resorts, much like commercial fishermen, are licensed and heavily regulated by the state of Florida.<sup>116</sup> While the vast majority of such tertiary plaintiffs are not licensed “to conduct commercial activities *in* the waters” of the state, as were fishermen in *Curd*,<sup>117</sup> many certainly conduct activities along or near those waters and, like the *Curd* fishermen, “[are] dependent on those waters to earn their livelihood.”<sup>118</sup>

Finally, like Mosaic Fertilizer, BP’s “activities placed the [tertiary plaintiff’s] peculiar interests directly within the zone of risk created by”<sup>119</sup> BP’s activities. “As a result, [BP] was obligated to exercise prudent foresight and take sufficient precautions to protect that interest.”<sup>120</sup> Therefore, a well-plead claim with *Curd* as binding precedent would leave no other alternative than to conclude that BP owed hotels, restaurants, and other similarly situated plaintiffs a duty of care for pure economic losses arising from the BP oil spill.

This is not to say that such an argument is unassailable. To be certain, many high-priced law firms may gladly fill many a billable hour pontificating on just how “peculiar” a plaintiff’s interests must be to be worthy of such a duty of care. But *Curd* presents a far more pressing problem for the judiciary. Even assuming, *arguendo*, that the herd would be thinned by plaintiffs unable to establish proper damages, the liberalizing of the duty requirement will, at a minimum, give fresh sets of keys to the courthouse doors to litigants. Simply put, cases which would have previously been dismissed at the early stages of litigation for failure to state a cause of action on an element based on the law (i.e., the existence of a duty) will now be required to see a jury to decide those issues based on the facts (i.e., proximate causation and damages). These practical changes in litigation posture will provide leverage to plaintiffs and increase the pressure on wealthy defendants to settle.

Given the implications of its decision to even expound on the common law duty issue, it seems unfathomable that the learned justices of the Florida Supreme Court failed to pay it any consideration. Certainly, the court simply could have found a statutory cause of action (which they unanimously did) and held that this obviated the need to address the common law liability. The court has employed this method of judicial avoidance in many cases, and it would have been a far more prudent

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115. *Id.* (citing *Union Oil Co. v. Oppen*, 501 F.2d 558, 568 (9th Cir. 1974)).

116. *See, e.g.*, FLA. STAT. ANN. § 509.241 (West 2010) (requiring, under criminal penalty, the licensure of hotels and restaurants by the state of Florida).

117. *Curd*, 39 So. 3d at 1228 (emphasis added).

118. *Id.* The Florida Supreme Court would be injudicious to base its distinction between the commercial fishermen in *Curd* and such tertiary plaintiffs solely on the fact that the tertiary plaintiffs’ businesses are situated *in* the waters rather than alongside the waters.

119. *Id.*

120. *Id.* (citing *Kaisner v. Kolb*, 543 So. 2d 732, 735 (Fla. 1989)).



posture to take in *Curd*.<sup>121</sup> This would hardly have affected the claims, since the broad damages permitted under Florida Statutes § 376.313 include “*all damages* resulting from a discharge or other condition of pollution” covered by further statutes.<sup>122</sup>

As stated above, due to the jurisdictional constraints in Florida’s constitution,<sup>123</sup> the court was restricted to answering the specific question asked about claims of commercial fishermen. Because Florida’s Second District Court of Appeal did not ask, the Supreme Court could not opine on whether Mosaic owed a duty of care for the pure economic damages of *non-commercial fishermen* or any other tertiary plaintiffs for that matter. However, there is a fine line between obeying the constitutional limitations and treading in waters that could have been easily traversed.

Another foreseeable effect of this decision is that the Florida Supreme Court cannot, *sua sponte*, grant certiorari to rehear this matter. The precedent is set and is now wholly binding in Florida. At issue is the freedom of lower courts to limit its application specifically to commercial fishermen or expand it to tertiary plaintiffs. It will take either varied application of the precedent by, and unequal justice in, the lower courts (conflict jurisdiction) or another district court of appeal certifying an “on all fours” question for the Florida Supreme Court to ever again address this issue. Hence, the question of just how far duty will extend in these cases remains open and will likely take years of litigation before being answered. Whether or not liability proves to be extended in a way that Justice Polston suggested, one incontrovertible result of the *Curd* decision is that potential claimants asserting purely economic losses as a result of the BP oil spill now seem to have sounder footing for their negligence-based claims in the courts of the state of Florida. Therefore, if venue can be established, this decision appears to signal a green light to BP claimants who want to try their luck under Florida law.

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121. See, e.g., *Raborn v. Menotte*, 974 So. 2d 328, 332 (Fla. 2008) (“Having answered this first question, we decline to answer the second certified question as it is moot.”); *T.M. v. State*, 784 So. 2d 442, 444 (Fla. 2001) (“Because the district court applied heightened rather than strict scrutiny we remand this case for further consideration. We decline to address the remaining issues raised by the parties.”); *J.A. v. State*, 788 So. 2d 953, 954 (Fla. 2001) (citing *T.M.* in declining second question); *Fawcett v. State*, 615 So. 2d 691, 692 (Fla. 1993) (“We find the first certified question irrelevant and moot in light of our disposition of the second question, and we thus decline to answer it.”).

122. FLA. STAT. ANN. § 376.313(3) (West 2011) (emphasis added).

123. For instance, Florida’s high court does not have certiorari powers akin to the U.S. Supreme Court. See *Haines City Comm. Dev. v. Heggs*, 658 So. 2d 523, 525 n.2 (Fla. 1995). Instead, the court may hear matters only as specifically delineated in its state’s constitution. FLA. CONST. art. V, § 3(b). In *Curd*, the Florida Supreme Court had jurisdiction because a lower appellate court presented it with a question of great public importance. *Curd*, 39 So. 3d at 1218; see also FLA. CONST. art. V, § 3(b)(4).

### III. VENUE SHOPPING: COMPARING THE PROSPECTS FOR POTENTIAL BP CLAIMANTS ACROSS THE AFFECTED GULF STATES

The Gulf states directly affected by the BP oil spill—Alabama, Louisiana, Texas, Mississippi, and Florida—and their federal circuits—the Fifth and Eleventh Circuits—take varied approaches to the economic loss rule, especially in the contexts likely to arise in BP litigation. Florida's *Curd* opinion overwhelmingly represents a break from its fellow Gulf states, liberally opening the door for claims that heretofore would not have survived summary judgment. Regardless, variations among these states' and circuits' common law principles could dramatically affect who is compensated and for what injuries in BP litigation. The following analysis attempts the first comprehensive review of the Gulf states' adherence to the economic loss rule vis-à-vis contexts similar to the current oil spill.

#### A. Eleventh Circuit

Florida's federal circuit has taken a much more conservative approach to the economic loss rule than the Florida Supreme Court. For nearly three decades, the Eleventh Circuit steadfastly has held to the economic loss rule with the exception for commercial fishermen.

In *Kingston Shipping Co. v. Roberts*,<sup>124</sup> the new Eleventh Circuit<sup>125</sup> adopted with little discussion the *Robins* rule, limiting recovery in tort to only those instances of injury or damage to property.<sup>126</sup> In *Kingston*, a main ship channel in Tampa Bay was closed for nearly a month after a ship collided with a U.S. Coast Guard buoy tender, sinking the latter in the waterway.<sup>127</sup> Delayed vessels sought damages as a result of the holdups in entering or leaving the port of Tampa.<sup>128</sup> In affirming the district court's ruling, the Eleventh Circuit held that the vessels failed to state a cause of action, noting that "a party may not recover economic losses not associated with physical damages."<sup>129</sup> The court held the same in a subsequent case involving blockage of the Tampa Bay port.<sup>130</sup>

The next year, the court recognized a small exception to the economic loss rule. In *Miller Industries v. Caterpillar Tractor Co.*,<sup>131</sup> a manufacturer sold the plaintiff ship owner a faulty engine that caused the ship to stall at sea, delaying its scheduled trip.<sup>132</sup> Although the case stemmed from a

124. 667 F.2d 34 (11th Cir. 1982) (per curiam).

125. See Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, § 2, 94 Stat. 1994, 1994 (creating the Eleventh Circuit by splitting the Fifth Circuit).

126. *Kingston*, 667 F.2d at 35 (citing *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927)).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Hercules Carriers, Inc. v. Florida*, 720 F.2d 1201, 1202 (11th Cir. 1983) (per curiam).

131. 733 F.2d 813 (11th Cir. 1984) (per curiam).

132. *Id.* at 815–16.

products liability claim, the district court awarded and the Eleventh Circuit affirmed damages sounding in tort, namely, lost profits of uncaptured fish of its crew members who intervened in the case despite not being in privity of contract with the defendant.<sup>133</sup>

Citing the U.S. Court of Appeals for the Ninth Circuit's *Union Oil Co. v. Oppen* decision, the Eleventh Circuit adopted a commercial fishermen exception to the economic loss rule.<sup>134</sup> A key rationale for the court's decision was that the injury to commercial fishermen—who make their living from and are trained in the enterprise of catching fish—from such a tortious act was “neither remote nor a speculative injury.”<sup>135</sup> Furthermore, these plaintiffs were not the sort that would be unknown to the tortfeasor, as injury to their ability to catch fish would be a foreseeable harm of such tortious activity.<sup>136</sup> In essence, the court held that the justifications for limiting pure economic losses to preclude an indeterminate class for an indeterminate time did not apply to commercial fishermen, who would be foreseeable victims of such tortious activity. In the BP context, it is likely that the Eleventh Circuit also would find a commercial fishermen exception, allowing recovery for demonstrated economic damages associated with the spill as those injuries would be just as foreseeable as the fishermen in *Miller Industries*, if not more. With respect to more remote or speculative damages to restaurants or hotels, however, those injuries would likely not qualify for the exception in this circuit. Since its early cases, the Eleventh Circuit has not demonstrated any move away from the *Robins* rule in this respect or from the limited commercial fishermen exception.

### B. Alabama

The state with the least amount of coastline affected by the BP oil spill,<sup>137</sup> Alabama, also has the fewest court decisions analyzing the economic loss rule in this or similar contexts. Alabama state courts have cited *Robins* only once<sup>138</sup> and have never considered the Ninth Circuit's application of the commercial fishermen exception in published opinions.<sup>139</sup> Alabama state decisions and commentary<sup>140</sup> support the

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133. *Id.* at 816, 818, 823.

134. *Id.* at 819–20 (citing *Union Oil Co. v. Oppen*, 501 F.2d 558, 567 (9th Cir. 1974)).

135. *Id.* at 820.

136. *Id.*

137. *All Things Considered: Notable Numbers from the Gulf Oil Spill* (NPR radio broadcast Aug. 3, 2010), available at 2010 WLNR 15436369.

138. This analysis was based on a Westlaw Keycite search in May 2011. The single Alabama state court case discussing or even citing to *Robins* was *Ziegler v. Blount Bros. Construction Co.*, 364 So. 2d 1163, 1166–67 (Ala. 1978).

139. This analysis was based on a Westlaw Keycite search in November 2010.

140. See, e.g., Commentary, *Recovery of Economic Damages Under the Alabama Extended Manufacturer's Liability Doctrine*, 35 ALA. L. REV. 329, 346 (1984) (“[W]hat would the court's view on recovery of economic damages likely be? Because the court continues to retain the

conclusion that Alabama is likely to apply stringently the economic loss rule to BP litigation claims.

In *Ziegler v. Blount Bros. Construction Co.*, the Alabama Supreme Court essentially applied the principles of the economic loss rule when residents of a town sought economic damages against a contractor for its tortious construction of the Walter Bouldin Dam.<sup>141</sup> The town's residents claimed, under theories of third-party beneficiary and negligence, that the defendant should have known its tortious conduct in constructing a dam that later collapsed would lead to increases in their utility costs.<sup>142</sup> First, regarding the third-party beneficiary theory, the court found that the purpose of the contract for the dam's construction was not to benefit the town's residents who would consume the additional electricity.<sup>143</sup> Instead, the residents were merely "incidental beneficiaries who claim the loss of an economic benefit."<sup>144</sup> More importantly, the court held that the defendant owed the plaintiffs no duty of care for their pure economic losses. In sum, the court reasoned that it was remote and not "reasonably foreseeable" that errors in construction of the dam would lead to the state's implementation of a rate-increasing clause to obtain electricity from another source.<sup>145</sup>

This result and results in Alabama products liability claims<sup>146</sup> illustrate that Alabama holds firm to the economic loss rule. Whether an exception for commercial fishermen under the economic loss rule exists in this state remains unclear. However, based on its strict adherence to the rule in the Bouldin Dam case and little sign of retreat since then, the Alabama Supreme Court certainly has a much less liberal view of the economic loss doctrine than the Florida Supreme Court. If residents were not the intended beneficiaries of the contract designed to provide them with electricity, then certainly charter boats, beach vendors, hotels, resorts, or amusement parks would not qualify as intended beneficiaries of any contractual or tort duty of BP to drill in a non-negligent manner.

### C. Fifth Circuit

The circuit likely to field many of the BP claims is the U.S. Court of Appeals for the Fifth Circuit, whose jurisdiction includes Mississippi, Louisiana, and Texas. The "Oil Circuit" may prove to be the most perilous for plaintiffs bringing claims against BP arising from the *Deepwater Horizon* spill.<sup>147</sup> Unlike the Ninth and other circuits, the Fifth Circuit has

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distinction between recovery in tort and recovery in contract, it is unlikely that the court would undercut the provisions of contract law in favor of recovery in tort.").

141. *Ziegler*, 364 So. 2d at 1164–65.

142. *Id.* at 1165, 1167.

143. *Id.* at 1166.

144. *Id.*

145. *Id.* at 1167–68.

146. *See, e.g.,* *Lloyd Wood Coal Co. v. Clark Equip. Co.*, 543 So. 2d 671, 672 (Ala. 1989).

147. *See* Michael Kunzelman, *New Orleans Judge to Handle Most Gulf Oil Spill Lawsuits*,

adhered religiously to the economic loss rule, providing no true exception for commercial fishermen despite repeated opportunities to revisit its holding.

Although many—even BP—argue that the Fifth Circuit recognizes the commercial fishermen exception to the rule barring damages for economic losses absent a physical injury,<sup>148</sup> a close reading of circuit decisions suggests otherwise. The genesis of this misperception is *Louisiana ex rel. William J. Guste v. M/V Testbank (M/V Testbank I)*.<sup>149</sup> Two vessels collided near the Mississippi River Gulf Outlet, dropping twelve tons of a highly toxic chemical—pentaclorophenol (PCP)—into the waterway while drums of hydrobromic acid and ethyl mercaptan were lost overboard or ruptured.<sup>150</sup> As a result, the U.S. Coast Guard shut off portions of Louisiana waterways and marshes to commercial fishermen.<sup>151</sup> The plaintiffs sued the vessel owners under numerous theories, including maritime tort.<sup>152</sup>

The district court judge noted the Fifth Circuit’s “steadfast” adherence to the economic loss rule before rejecting its application to commercial fishermen.<sup>153</sup> The judge relied primarily on similar exceptions carved out by other jurisdictions that held that commercial fishermen had a special interest that the tortious defendants had a duty not to harm negligently.<sup>154</sup> In sum, the judge noted that the defendants caused “a tortious invasion that interfered with the special interest of the commercial fishermen, crabbers,

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ASSOCIATED PRESS, Aug. 10, 2010, available at 2010 WLNR 16307871 (noting that the U.S. Judicial Panel on Multidistrict Litigation ordered a Louisiana judge to hear seventy-seven cases and potentially 200 related claims). The panel wrote, “Without discounting the spill’s effects on other states, if there is a geographic and psychological ‘center of gravity’ in this docket, then the Eastern District of Louisiana is closest to it,” according to the Associated Press. *Id.* (internal quotation marks omitted). Furthermore, regardless of whether it actually interferes with judicial independence, it is noteworthy that media reports have repeatedly documented the Fifth Circuit’s ties to Big Oil. *Id.* (reporting that only four New Orleans-based judges could hear the case because others have recused themselves partially due to their “oil and gas industry investments” and that another judge owned corporate bonds issued by two of the BP defendants); see also Rebecca Mowbray, *Drilling Ban in Standoff; Case Will Return to Court This Morning*, TIMES-PICAYUNE (New Orleans, La.), June 24, 2010, at A08, available at 2010 WLNR 12815655 (placing the number of New Orleans judges who recused themselves at seven out of twelve district court judges); ALLIANCE FOR JUSTICE, JUDICIAL GUSHER: THE FIFTH CIRCUIT’S TIES TO OIL 8–9 (2010), available at [www.afj.org/about-afj/press/fifth\\_circuit\\_judges\\_report.pdf](http://www.afj.org/about-afj/press/fifth_circuit_judges_report.pdf) (documenting alleged investments and ties to oil of Fifth Circuit judges).

148. See, e.g., BP Defendants’ Memorandum of Law in Support of Their Motion to Dismiss Plaintiffs’ Complaint at 24, *Marine Horizons, Inc. v. BP PLC*, No. 1:10-cv-00227-WS-N (S.D. Ala. July 12, 2010), 2010 WL 2771473 (discussing “one very narrow exception to the *Robins Dry Dock* rule”).

149. *La. ex rel. Guste v. M/V Testbank (M/V Testbank I)*, 524 F. Supp. 1170 (E.D. La. 1981).

150. *Id.* at 1171 & n.1.

151. *Id.* at 1171.

152. *Id.*

153. *Id.* at 1172, 1174.

154. *Id.* at 1173 (citing *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974); *Burgess v. M/V Tamano*, 370 F. Supp. 247 (S.D. Me. 1973); *Masonite Corp. v. Steede*, 23 So. 2d 756 (Miss. 1945) (en banc); *Hampton v. N.C. Pulp Co.*, 27 S.E.2d 538 (1943)).

shrimpers and oystermen to use those public waters to earn their livelihood.”<sup>155</sup> Accordingly, when the judge granted summary judgment against the plaintiffs seeking relief for economic damages not associated with a physical injury or contract, the judge did not include “commercial fishermen, oystermen, crabbers and shrimpers” who routinely operated on the closed waterways as defined by the Coast Guard. This allowed commercial fishermen, but not the other plaintiffs, to continue in the litigation.<sup>156</sup>

On appeal, the Fifth Circuit affirmed the district court’s opinion twice—in a per curiam decision (*M/V Testbank II*)<sup>157</sup> and an en banc ruling (*M/V Testbank III*).<sup>158</sup> Importantly, these appeals concerned the district court’s grant of summary judgment against the non-fishermen plaintiffs in *M/V Testbank I*.<sup>159</sup> Therefore, *M/V Testbank II* and *M/V Testbank III* did not pass judgment on or endorse the commercial fishermen exception in *M/V Testbank I* made by a lone district court judge. Moreover, the rationale of the en banc Fifth Circuit decision strongly indicates that even the claims of the commercial fishermen must yield to the economic loss rule.

Sitting en banc, the Fifth Circuit reaffirmed its endorsement of the economic loss rule on the grounds that anything less than a categorical bar to recovering economic losses absent damages to the plaintiff’s person or property would be unworkable. “Ultimately we conclude that without this limitation foreseeability loses much of its ability to function as a rule of law.”<sup>160</sup> The rule “is a pragmatic limitation on the doctrine of foreseeability, a limitation we find to be both workable and useful.”<sup>161</sup> The court went on: “The explanation . . . is a pragmatic one: the physical consequences of negligence usually have been limited, but the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended.”<sup>162</sup> “[W]e disagree with a case-by-case approach because we think the value of a rule is significant in these maritime decisions.”<sup>163</sup> In addition, the court refused to recognize a public nuisance exception to sue polluters because of the “problem” in “determining which foreseeable damages are too remote to justify recovery in negligence.”<sup>164</sup>

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155. *Id.* at 1174.

156. *Id.*

157. La. *ex rel.* *Guste v. M/V Testbank (M/V Testbank II)*, 728 F.2d 748, 750 (5th Cir. 1984) (per curiam).

158. La. *ex rel.* *Guste v. M/V Testbank (M/V Testbank III)*, 752 F.2d 1019, 1032 (5th Cir. 1985) (en banc).

159. *Id.* at 1021 n.2 (“The rights of commercial fishermen who survived summary judgment are not before us.”).

160. *Id.* at 1021.

161. *Id.* at 1032.

162. *Id.* at 1022 (quoting Fleming James, Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 45 (1972)) (internal quotation marks omitted).

163. *Id.* at 1026.

164. *Id.* at 1030.

Recognizing a commercial fishermen exception would introduce the same unpredictability in the stream of liability and application of tort concepts, such as foreseeability, that the Fifth Circuit sought to extract in *M/V Testbank III*. To illustrate, even limiting the class of plaintiffs excused from the economic loss rule to commercial fishermen proves troublesome under that rationale: Who will qualify as a “commercial fishermen”? For how long must those plaintiffs have used affected waterways for the defendants to have owed them a duty of care? Which damages of the commercial fishermen would be covered? And for how long can commercial fishermen recover for dead fish even after they are physically able to return to the seas?<sup>165</sup>

Clearly, though, the Fifth Circuit was not in unison in excluding the commercial fishermen claims. The court noted a “substantial argument can be made” that commercial fishermen have a proprietary interest in fish that would effectively save those plaintiffs from the rule’s administration.<sup>166</sup> Alternatively, the court noted its decision would sidestep extending the Ninth Circuit’s commercial fishermen exception adopted in *M/V Testbank I*.<sup>167</sup> In fact, two of the judges concurring in the judgment demonstrated at most a sympathy for the commercial fishermen or at least an unwillingness to close the rule to any exceptions.<sup>168</sup> Still, another concurring judge noted the infeasibility of the courts to administer a non-categorical rule.<sup>169</sup> Moreover, even the dissent acknowledged that notwithstanding the majority’s supposed reservations in the breadth of its ruling, *M/V Testbank III* was contrary to the Ninth Circuit’s exception for commercial fishermen.<sup>170</sup> Ultimately, though, the Fifth Circuit concluded that “today’s decision does not foreclose free consideration by a court panel of the claims of commercial fishermen.”<sup>171</sup>

But in the twenty-five years since *M/V Testbank III*, the Fifth Circuit has yet to recognize such an exception.<sup>172</sup> In fact, in 2006 the Fifth Circuit

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165. See *infra* text accompanying notes 213–15 (discussing Texas rule that limits damages of commercial fishermen to the period in which they were denied the *opportunity* to fish rather than allowing a claim for feral fish otherwise uncaught).

166. *M/V Testbank III*, 752 F.2d at 1027 n.10.

167. *Id.* (referencing *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974)).

168. *Id.* at 1034 (Williams, J., concurring) (“The commercial fishermen properly recover because their livelihood comes from a ‘resource’ of the water which was polluted. Yet, physical property owned by them was not damaged and it is doubtful that a proprietary interest could have been shown.”); see also *id.* at 1035 (Garwood, J., concurring) (“I am in full accord with the desirability of a general rule in accordance with the principles stated by [the en banc decision], and for the reasons . . . articulate[d]. However, we need not in this case either foreclose, or define the precise contours of, possible rare exceptions.”).

169. *Id.* at 1032–34 (Gee, J., concurring).

170. *Id.* at 1043 (Wisdom, J., dissenting).

171. *Id.* at 1027 (en banc).

172. However, similar to the varied decisions of the *M/V Testbank III* judges, views on the exception for commercial fishermen have not been uniform within the Fifth Circuit’s jurisdiction. See *Shaughnessy v. PPG Indus., Inc.*, 795 F. Supp. 193, 196 (W.D. La. 1992); see also Tamara Dixon, Note, *Recovery of Economic Loss Absent Physical Damage to a Proprietary Interest: Does*

overturned its lower court's adoption of an exception and added: "While other jurisdictions may have abandoned or relaxed the bright line rule of *Robins* and *TESTBANK*, this circuit has not retreated from *TESTBANK*'s physical injury requirement . . ." <sup>173</sup> There, claimants brought an action against a barge owner whose vessel crashed into a bridge and released a toxic gas that resulted in the evacuation of businesses and residents. <sup>174</sup> While dismissing the district court's commercial fishermen exception on technical grounds, <sup>175</sup> the Fifth Circuit noted that *M/V Testbank III* dismissed a "case-by-case approach" to unintentional maritime torts, and the court reiterated its commitment to the economic loss rule. <sup>176</sup>

Granted, the waters are murky on whether the Fifth Circuit would uphold a commercial fishermen exception in BP lawsuits, although that question may not even make it to the circuit's docket. <sup>177</sup> On the larger issue, though, the Fifth Circuit likely will not sustain claims from periphery plaintiffs whose alleged non-proprietary damages due to the BP oil spill are too remote to deserve compensation under maritime law.

An important caveat to the Fifth Circuit jurisprudence should be noted. Prior to the *Testbank* rulings, in at least two instances, Fifth Circuit courts ruled in favor of plaintiffs where no physical damage to their property actually occurred. <sup>178</sup> In *J. Ray McDermott & Co. v. S.S. Egero*, <sup>179</sup> the Fifth Circuit found that the plaintiff-contractor was the "owner" of a pipeline project that was delayed due to the defendant-shipper's misplaced anchor. <sup>180</sup> Also, a federal district court in Louisiana ruled in favor of the plaintiffs in a case in which the defendant-shipper caused them additional expenses due to the defendant's collision with canal locks that blocked

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*Testbank Dim the Bright-Line?*, 46 LA. L. REV. 913, 921 (1986) ("In contrast, the policy issues behind *Testbank* and *Union Oil* seem to support recognizing the claims of commercial fishermen and imposing liability on the defendants."). In *Shaughnessy*, the court applied a commercial fishermen exception to a fishing and hunting guide business that suffered losses due to pollution of Louisiana waters. *Shaughnessy*, 795 F. Supp. at 194, 196–97. However, the court found that the case was distinguishable from the *Testbank* decisions as it was based on a land-based tort—not a maritime tort. *Id.* at 196.

173. *In re Taira Lynn Marine Ltd. No. 5, LLC*, 444 F.3d 371, 379 (5th Cir. 2006) (internal quotation marks omitted) (overruling a district court's decision that plaintiffs qualified for a "commercial fishermen" exception to the *Testbank* rule based on the grounds that the claims were not properly included in a motion for summary judgment). The court's decision here appears spurious. In essence, the court rules against the commercial fishermen, refusing to apply the supposed *M/V Testbank I* exception, because in their application for a grant of summary judgment, the plaintiffs claimed that they were "wholesale fishermen," not "commercial fishermen." *Id.*

174. *Id.* at 375–76.

175. *See supra* note 173.

176. *In re Taira Lynn Marine Ltd.*, 444 F.3d at 378–79.

177. Mary Foster, *\$20 Billion Oil Fund to Begin Payments in August*, ASSOCIATED PRESS FIN. WIRE, July 15, 2010 (noting BP's creation of a \$20 billion fund to compensate claimants alleging losses due to the BP oil spill and the potential large settlements with commercial fishermen).

178. Dixon, *supra* note 172, at 918–20.

179. 453 F.2d 1202 (5th Cir. 1972).

180. *Id.* at 1203–04.



navigable waterways.<sup>181</sup> These cases, however, likely would not be persuasive in undoing the *Testbank* tenets. Both cases were ignored by the majority in *M/V Testbank III* while cited approvingly by the dissent.<sup>182</sup> *M/V Testbank III* likely rendered the decisions devoid of any jurisprudential value. A Fifth District appeals or district court has referenced *S.S. Ergo* in only one case<sup>183</sup> since *M/V Testbank III* and has not cited the other district court case. Moreover, neither court in those pre-*M/V Testbank* decisions allowed recovery for lost profits,<sup>184</sup> which would be at the heart of any damage claims by the periphery plaintiffs in BP lawsuits. Looking at the Fifth Circuit rules in a vacuum is not desirable. In fact, individual state laws and preferences inform the *Testbank* rule, leading to variation in recognition of rights to economic losses among commercial fishermen and other plaintiffs.

#### D. Louisiana

Although the leading Fifth Circuit decision on the economic loss rule bubbled up from its borders, Louisiana state courts have broken with the per se economic loss rule in lieu of a duty-risk analysis.<sup>185</sup> Yet, due to the stringent application of the analysis as well as additional common law restrictions, Louisiana state law still would provide little solace to private BP plaintiffs, including commercial fishermen. Unsurprisingly, in its multistate defense, BP argued that if any state's laws were applicable to oil spill claims, they were Louisiana's, regardless of where the plaintiff's injuries occurred.<sup>186</sup>

In one case in which a tortfeasor's negligent act deprived a plaintiff of the benefits of its contract, the Louisiana Supreme Court refused to permit the recovery of pure economic loss that the court suggested could have resulted in damages "in an indeterminate amount for an indeterminate time to an indeterminate class."<sup>187</sup> In *PPG Industries, Inc. v. Dean Dredging*, a dredging contractor working on Louisiana's Calcasieu River damaged a

181. *In re Lyra Shipping Co., Ltd.*, 360 F. Supp. 1188, 1189, 1191–92 (E.D. La. 1973).

182. *La. ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1020–32 (5th Cir. 1985) (en banc); *id.* at 1041 & n.15 (Wisdom, J., dissenting).

183. *Tex. E. Transmission Corp. v. McMoRan Offshore Exploration Co.*, 877 F.2d 1214 (5th Cir. 1989).

184. *S.S. Egero*, 453 F.2d at 1204; *Lyra Shipping*, 360 F. Supp. at 1192.

185. Shelly F. Spansel, Comment, *Robins Dry Dock Versus State Laws Governing Liability for Pure Economic Loss: How the Maritime Circuit Should Resolve the Preemption Conflict*, 51 LOY. L. REV. 165, 172 (2005).

186. *See, e.g.*, BP Defendants' Memorandum of Law in Support of Their Motion to Dismiss Plaintiff's Complaint at 21 n.5, *Marine Horizons, Inc. v. BP PLC*, No. 1:10-cv-00227-WS-N (S.D. Ala. July 12, 2010), 2010 WL 2771473 ("Thus, the State of Louisiana is adjacent to the accident site, and its laws may govern certain claims arising from the incident absent applicable federal law or any inconsistencies between Louisiana law and federal law.").

187. *PPG Indus., Inc. v. Dean Dredging*, 447 So. 2d 1058, 1061 (La. 1984) (quoting *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931)) (internal quotation marks omitted).

natural gas line owned by Texaco.<sup>188</sup> The plaintiff in the case was not Texaco or a subsidiary but a third party who relied on the gas line to run its manufacturing plant, PPG Industries.<sup>189</sup> Due to the gas line damage, the plaintiff bought natural gas from another source and at a higher price and later filed suit against the dredger.<sup>190</sup>

Although repeatedly acknowledging that the defendant-dredger acted “negligently,” the court found that “[r]ules of conduct are designed to protect *some* persons under *some* circumstances against *some* risks.”<sup>191</sup> In adopting a case-by-case, duty-risk analysis, Louisiana’s high court looked to policy considerations and at the “ease of association between the rule of conduct, the risk of injury, and the loss sought to be recovered.”<sup>192</sup> While the court acknowledged an ease of association between the rule not to negligently damage another’s property and the damage to Texaco’s pipeline, the court found no similar association between that rule and protecting a third party’s contract interest in the damaged property.<sup>193</sup> Therefore, the court ruled against the plaintiff.

*PPG Industries, Inc.* is profound not for its holding but for its abandonment of a per se bar on pure economic loss.<sup>194</sup> The fact that the court found the plaintiff’s contract interest in the damaged property too remote to deserve protection is an indicator that plaintiffs alleging economic losses in their tourism or restaurant industries due to environmental damage from BP’s oil spill also will fail the duty-risk analysis. In fact, post-*PPG Industries, Inc.*, Louisiana state courts have been reluctant to recognize pure economic losses—including those of commercial fishermen—unlike other Gulf states.<sup>195</sup>

In *Phillips v. G&H Seed Co.*,<sup>196</sup> a Louisiana appeals court overturned a jury verdict in favor of crawfish purchasers and processors after the defendants coated their food with a product that killed or sterilized the crustaceans.<sup>197</sup> The defendants settled with the crawfish farmers, but not

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188. *Id.* at 1060.

189. *Id.*

190. *Id.*

191. *Id.* at 1061. *But see* Maddox v. Int’l Paper Co., 47 F. Supp. 829, 831 (W.D. La. 1942) (holding that “future profits from a business, reduced or destroyed by the act of another, are allowable”).

192. *PPG Indus., Inc.*, 447 So. 2d at 1061.

193. *Id.*

194. Rebecca L. Lear, Comment, *Negligent Interference with Contract—An Argument Against Categorical Rejection: Applying a Duty/Risk Analysis to Negligent Drug Testing*, 60 LA. L. REV. 855, 860 (2000). *But see* TS & C Investments, L.L.C. v. Beusa Energy, Inc., 637 F. Supp. 2d 370, 374–75 (W.D. La. 2009) (“Both the Louisiana Supreme Court and the federal Fifth Circuit have adopted the *Robins Dry Dock* rule in the context of an unintentional *maritime* tort.”). Although the Louisiana Supreme Court’s *PPG Industries, Inc.* holding fell in line with the economic loss rule, the court clearly applied a duty-risk analysis in deciding the case. *PPG Industries, Inc.*, 447 So. 2d at 1061.

195. *See* Lear, *supra* note 194, at 860.

196. 10 So. 3d 339 (La. App. 2009).

197. *Id.* at 344.

with plaintiffs under contract to purchase the farmers' crawfish.<sup>198</sup> The purchasers and processors then brought a products liability action against the defendants for harming the crawfish industry.<sup>199</sup>

Although the trial judge found that "the economic damages to the entire crawfish industry in general and these plaintiffs in particular was foreseeable consequence [sic] of the damage to the crawfish crop caused by [the defendant's] negligence," the appeals court, citing nearly the entire holding of *PPG Industries, Inc.*, ruled otherwise.<sup>200</sup> As in *PPG Industries, Inc.*, the court found that the plaintiffs' lack of a property interest in the damaged entity—here, the crawfish—necessitated a finding that the plaintiff stated no cause of action.<sup>201</sup> The court found that the damaged crawfish were the property of the farmers—not the plaintiff-purchasers.<sup>202</sup>

A common strain in *Phillips* and other Louisiana opinions that will likely be determinative in claims of commercial fishermen against BP is the denial of a private property interest in natural resources or wildlife. As noted in *Barasich v. Shell Pipeline Co.*,<sup>203</sup> local statutory and constitutional provisions cut against private plaintiffs claiming ownership over public resources.<sup>204</sup> For instance, commercial fishermen lost their tort claim for lack of such a proprietary interest in wild crawfish when the defendants' dredging and oil and gas exploration activities allegedly destroyed the aquatic ecosystem, greatly diminishing the crustaceans.<sup>205</sup> Furthermore, the Louisiana court of appeals held in the same case that state-endorsed fishing licenses do not grant commercial fishermen the requisite proprietary

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198. *Id.* at 341.

199. *Id.* at 340–41.

200. *Id.* at 342, 344.

201. *Id.* at 344.

202. *Id.*

203. No. 05-4180, 2006 WL 3913403 (E.D. La. Nov. 20, 2006).

204. *Id.* at \*5, \*7–8.

The ownership and title to all wild birds, and wild quadrupeds, fish, other aquatic life, the beds and bottoms of rivers, streams, bayous, lagoons, lakes, bays, sounds, and inlets bordering on or connecting with the Gulf of Mexico within the territory or jurisdiction of the state, including all oysters and other shellfish and parts thereof grown thereon, either naturally or cultivated, and all oysters in the shells after they are caught or taken therefrom, are and remain the property of the state, and shall be under the exclusive control of the Wildlife and Fisheries Commission . . . .

LA. REV. STAT. ANN. § 56:3(A) (West 2011). "The control and supervision of the wildlife of the state, including all aquatic life, is vested in the Louisiana Wildlife and Fisheries Commission." LA. CONST. art. IX, § 7(A). Louisiana courts also have recognized the state's constitution created a public trust for the protection and conservation of its natural resources. *See, e.g.*, *Save Ourselves, Inc. v. La. Envtl. Control Comm'n*, 452 So. 2d 1152, 1154 (La. 1984) (citing LA. CONST. art. IX, § 1).

205. *La. Crawfish Producers Ass'n-W. v. Amerada Hess Corp.*, 935 So. 2d 380, 381, 384–85 (La. App. 2006).

interest to state a cause of action.<sup>206</sup> This finding is directly at odds with the Florida Supreme Court's decision in *Curd*, where the mere licensure of commercial fishermen seemed enough in and of itself to grant that class a legally cognizable cause of action against polluters.<sup>207</sup>

Likewise, in *Dempster v. Louis Eymard Towing Co.*, plaintiffs claiming the defendants were responsible for the loss of a fishing site also failed to state a cause of action.<sup>208</sup> There, the defendants' barges collided on the Mississippi River, scattering debris and ruining a fishing site that the plaintiffs had relied on for years.<sup>209</sup> Still, the court held that the fishermen had "no proprietary interest in the fishing site or in anticipated fish caught in the future."<sup>210</sup> This judicial reluctance to recognize special protections for commercial fisherman is a harbinger of defeat for other possible BP plaintiffs. For instance, resorts or hotels that rely on pristine beaches and waters would likely fail to state a statutory claim under Louisiana tort law under these holdings. First, Louisiana courts could easily determine that no ease of association exists between laws prohibiting polluting public waters and a hotel's expectation losses, as the purpose of pollution rules is to protect the state's natural resources, not a plaintiff's profits. Secondly, following the *Phillips-Barisch-Dempster* line of cases, the court would likely summarily hold that since the plaintiffs had no property interest in the public's beaches and waters, no cause of action existed, despite the required duty-risk analysis in *PPG Industries, Inc.*<sup>211</sup>

#### E. Texas

Texas federal courts follow the traditional *M/V Testbank* precedent developed by Louisiana federal courts: denying pure economic losses with an exception for commercial fishermen. However, relying on state law, the Texas federal courts will deny that exception to fishermen who are either not licensed by the state or whose losses are not associated with state-granted licenses; thus, Texas limits the pool of "commercial fishermen" who may recover for pollution-related damages and the types of damages for which they may recover.<sup>212</sup> With respect to both commercial fishermen

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206. *Id.* In essence, the court found that the state's grant of a fishing license is not akin to a landowner's grant of a subsidiary proprietary interest. Instead, the license is a privilege the state grants pursuant to its regulatory powers. *Id.*

207. *See supra* Section II.A.

208. *Dempster v. Louis Eymard Towing Co.*, 503 So. 2d 99, 100 (La. App. 1987).

209. *Id.*

210. *Id.* at 102.

211. A notable exception to this line of cases is where defendants damaged oyster beds that Louisiana leased to plaintiffs. There, the courts have recognized a cognizable property interest to which the defendant owed the plaintiff a duty of care not to negligently harm the leasehold. *See, e.g.*, *Jurisich v. La. S. Oil & Gas Co.*, 284 So. 2d 173, 178 (La. App. 1973). Therefore, to the extent BP's oil damages resorts' or hotels' private beaches or other property, a Louisiana court could conceivably find in favor of those plaintiff-owners.

212. *See, e.g.*, *Golnoy Barge Co. v. M/T Shinoussa*, 841 F. Supp. 783, 785 (S.D. Tex. 1993).

and other potential plaintiffs, Texas plaintiffs likely face greater difficulty than Florida plaintiffs in recovering for pure economic loss.

As in other jurisdictions, commercial fishermen are not granted a special right to feral fish. Instead, Texas fishermen claims are based on the denial of their state-granted public right to fish. In *Golnoy Barge Co. v. M/T Shinoussa*, a Texas federal court found, “The commercial fishermen recover not for injury to the fish stocks, but for physical interference with their *opportunity to fish*. It is only during the closure period and in the closed area that the spill actually interferes with their ability to fish.”<sup>213</sup>

In that case, a ship collided with a tank barge, spilling oil into the Houston Ship Channel.<sup>214</sup> However, the district court found that the commercial fishermen could only recover for losses while the adjacent Galveston Bay was closed.<sup>215</sup> Therefore, under this jurisdictional pronouncement, presumably once the bay reopened commercial fishermen who could not yield the same number of fish due to a BP-like contamination would be uncompensated for those losses. This result would severely hinder the traditional protections for commercial fishermen. As for other pollution plaintiffs, Texas common law firmly adheres to the economic loss rule. As recently as 2009 a state appellate court held, “In tort cases where there is an absence of privity of contract or, as in this case, an absence of third-party beneficiary status, economic damages are not recoverable unless they are accompanied by actual physical injury or property damage.”<sup>216</sup> Therefore, BP plaintiffs who are successful in lodging common law claims in Texas will likely lose unless they can prove physical injury or property damage.

#### F. Mississippi

The Mississippi Supreme Court has yet to formally adopt the economic loss rule or define its contours within state law.<sup>217</sup> Furthermore, outside the context of products liability litigation, it is unclear how Mississippi state law’s treatment of economic loss, as developed by its lower courts, would affect BP litigation.<sup>218</sup> Mississippi case law provides some indication that a state tort claim would provide nowhere near the level of relief as would a Florida claim following *Curd*.

In fact, in the leading Mississippi tort claim to reach the state supreme

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213. *Id.* at \*3 (emphasis added).

214. *Golnoy Barge Co. v. M/T Shinoussa*, No. 93-2021, 1993 WL 347219, at \*1 (5th Cir. Aug. 19, 1993) (per curiam).

215. *Golnoy Barge Co.*, 1993 WL 735038, at \*3.

216. *City of Alton v. Sharyland Water Supply Corp.*, 277 S.W.3d 132, 152–53 (Tex. App. 2009).

217. *Progressive Ins. Co. v. Monaco Coach Corp.*, No. 1:05-cv-DMR-JMR, 2006 WL 839520, at \*3 (S.D. Miss. Mar. 29, 2006).

218. *See, e.g., State Farm Mut. Auto Ins. Co. v. Ford Motor Co.*, 736 So. 2d 384, 386–88 (Miss. App. 1999) (upholding economic loss rule in products liability cases).

court in this area, *Masonite Corp. v. Steede*,<sup>219</sup> the court's reasoning suggests that even commercial fishermen would not be able to recover for their damages under BP litigation. There, the plaintiff's fishing resort was "substantially destroyed" by wood fiber discharges from the defendant's manufacturing plant.<sup>220</sup> The plaintiff sued for lost profits after fishermen stopped patronizing his resort along the Pascagoula River.<sup>221</sup> The court ruled in favor of the plaintiff's claim, finding the defendant liable for the destruction of the plaintiff's business.<sup>222</sup>

Two aspects of the Mississippi Court's ruling, however, could be burdensome for commercial fishermen claims. First, both here and previously, the Mississippi court has reiterated that no private property right exists to wild animals to which a plaintiff may claim a pecuniary loss.<sup>223</sup> Secondly, as at least one analysis has pointed out, the plaintiff's right to recovery did not merely result from damage to its business but damage to its property rights associated with that commercial enterprise.<sup>224</sup> Indeed, the court's analysis strongly supports this proposition. Although the court continually faults the defendant for destroying the plaintiff's fishery,<sup>225</sup> the court appears to be referencing the physical location (i.e., the plaintiff's property), as opposed to an abstract commercial enterprise. For instance, the plaintiff's fishery business featured the rental or sale of boats and bait and the supply of board and lodgings to patrons.<sup>226</sup> Yet, the subject of the Mississippi Supreme Court's attention was on the property interest affected by the contamination. The court noted that the "valuable rights" destroyed, to which the plaintiff was entitled to compensation, were its access to the Pascagoula River and its ability to exclude or allow others.<sup>227</sup> The court also found that:

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219. *Masonite Corp. v. Steede (Masonite II)*, 23 So. 2d 756 (Miss. 1945) (en banc).

220. *Masonite Corp. v. Steede (Masonite I)*, 21 So. 2d 463, 463 (Miss. 1945). The Mississippi Supreme Court considered the *Masonite Corp. v. Steede* case twice in 1945—once in March and again in November.

221. *Id.* at 463–64.

222. *Masonite II*, 23 So. 2d at 759.

223. *Id.* at 757–58 (noting that the plaintiff had "valuable rights" that existed from both its ability to obtain access to the Pascagoula River and to deny access to others—but not recognizing any rights to the fish therein); see also *Masonite I*, 21 So. 2d at 465 (Griffith, J., concurring) ("The tort complained of was that the defendant killed the fish in the Pascagoula River, but plaintiff did not own the fish or any legal right or interest therein whatsoever."); *Ex parte Fritz*, 38 So. 722, 723 (Miss. 1905) ("It is perfectly clear that [Fritz] does not own the fish in Horn Lake, and this would be true even if he owned the bed of the entire lake and all its waters. Fish are feræ naturæ. They are incapable, until actually taken, of absolute ownership, except in artificial lakes or in small ponds that are entirely land locked.").

224. 33 AM. JUR. PROOF OF FACTS (THIRD) 163, at § 16 ("Several courts have recognized that commercial use is part of a plaintiff's 'use and enjoyment' of property, so that loss in the property's commercial value due to contamination caused by the defendant is compensable.") (citing *Masonite II*, 23 So. 2d 756 (Miss. 1945) (en banc)).

225. *Masonite II*, 23 So. 2d at 758 (noting the "practical destruction of the [plaintiff's] fishery").

226. *Masonite I*, 21 So. 2d at 463.

227. *Masonite II*, 23 So. 2d at 757–58.

One of the elements of the value of the [plaintiff's] right to permit others to obtain, or exclude others from obtaining, access to this river in order to fish therein, was to use it to promote a commercial purpose . . . . In order for persons permitted by [the plaintiff] to obtain access to the river to be enabled to fish therein, they must have fishing tackle, bait, boats, and if they remain there for any length of time food and lodging, the furnishing of which is so closely related to the [plaintiff's] right to permit persons to obtain access to the river on her own terms as to become virtually a part of it. *If the killing of the fish caused persons to discontinue availing themselves of the [plaintiff's] fishing facilities, the principal element of the value of this right of the [plaintiff] was destroyed; and she is entitled to damages therefor . . . .*<sup>228</sup>

Therefore, read narrowly, *Masonite Corp.* is not a complete abrogation of the economic loss rule. The contamination resulted in an injury to the plaintiff's property as a result of the near-evisceration of the commercial enterprise therein due to the contamination of the river. Nowhere in the opinion does it even remotely suggest that all third parties negatively impacted by the contamination could claim damages from a defendant-corporation. Translated into the BP oil spill context—and with no official Mississippi adoption of the Ninth Circuit's commercial fishermen exception in *Union Oil Co. v. Oppen*—Mississippi's tort protections would not aid commercial fishermen, who have no proprietary interest in uncaught fish and likely no real property interest that could be directly devalued by a contamination. *Masonite Corp.*, however, could conceivably assist coastal businesses, such as resorts or hotels, that grant access to the Gulf and whose commercial enterprises on this real property were devalued as a direct result of the contamination.

Beyond mere conjecture, other support exists that Mississippi courts have not discarded the economic loss rule. In *East Mississippi Electric Power Ass'n v. Porcelain Products Co.*,<sup>229</sup> a federal court in Mississippi predicted that Mississippi state courts would uphold the rule.<sup>230</sup> Although that case was a products liability action involving insulators for power lines, the court found that, "Mississippi courts would embrace the rule of no recovery in tort for economic damages."<sup>231</sup> Therefore, although Mississippi's rule has not been crystallized by its supreme court, Mississippi likely would offer fewer protections than would be afforded under *Curd*.

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228. *Id.* at 758 (emphasis added).

229. 729 F. Supp. 512 (S.D. Miss. 1990).

230. *Id.* at 514.

231. *Id.* at 517.

## CONCLUSION

In two major respects, the Florida Supreme Court has adopted a rule for recovery of pure economic losses that is far more inclusive of these claims than its fellow Gulf states. This distinction could affect the outcomes of not only potential BP litigation, but also other tort suits affecting the Gulf of Mexico and other waterways. First, Florida's high court adopted a protection for commercial fishermen that seemingly does not exclude lost profits from allowable damages and does not limit losses to only the period in which no opportunity to fish existed. Second, beyond merely recognizing a commercial fishermen exception to the economic loss rule, the Florida Supreme Court also affirmed the use of a "zone of risk" analysis for determining whether defendants did, in fact, owe a duty to plaintiffs. Justice Polston's denouncement of the court's failure to delimit the outer bounds of this zone and to identify and limit those parties whose interests would be protected may well prove to be noteworthy as future litigation unfolds. This uncertainty is unquestionably ripe for further clarification by the Florida Supreme Court. If the court fails to do so, Florida may become not only the mecca for Gulf pollution litigation, but also a jurisdiction where neither potential tortfeasors, nor insurers, nor courts know exactly who fits into the indeterminate class.