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INTERIM PAYMENTS AND ECONOMIC DAMAGES TO COMPENSATE PRIVATE-PARTY VICTIMS OF HAZARDOUS RELEASES

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There is a gap in tort recovery for many hazardous release victims. Hazardous spill victims receive different damage compensation based solely upon the type of hazardous substance released, with oil spill victims benefitting from a number of statutory damage recovery mechanisms that victims of other type of hazardous substance releases do not receive. Specifically, those injured by oil spills receive interim payments and recover for their economic loss. Yet, many victims injured by non-oil hazardous spills will incur economic harm but will not receive compensation because of a prohibition on recovery for economic loss absent accompanying physical injury or private property damage. That prohibition on recovery, known as the "pure economic loss rule," serves as an effective bar to recovery for most spill victims because hazardous releases often damage public natural resources (such as water) rather than private property. This Article articulates normative policy for expanding interim payments and pure economic loss recovery to a larger class of private-party hazardous release than just those injured by oil.

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> *Spills are excellent engines of pure economic loss. They cause relatively little damage to private property or human life. Instead, they devastate something un-owned—natural resources, wildlife, the shores, the environment—and that devastation causes severe disruption to the surrounding co-dependent economy. The resulting loss to individuals and businesses is a massive economic ricochet.*[1]

I. INTRODUCTION

Many victims injured by hazardous releases[2] will not be compensated because of a prohibition on recovering economic loss absent accompanying physical injury or property damage.[3] This exclusion, known as the "pure economic loss rule," is broadly applied in federal maritime and state common law to prohibit recovery for "pure" economic harm.[4] For example, under this rule, if a fishing charterer's

1. Vernon Valentine Palmer, *The Great Spill in the Gulf . . . and a Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability*, 116 PENN ST. L. REV. 105, 109 (2011) (italics added) (discussing oil spills).

2. For this Article's general purpose, a "hazardous" substance broadly references toxic substances, including oil and natural gas. A "release" references any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.

3. "Economic loss" is calculable pecuniary loss that can be substantiated by evidence. It includes lost income or profit, lost earnings capacity, property damage, and personal injury. It is distinct from non-economic harm like pain and suffering, loss of life's enjoyment, and punitive damages. *See* Karen Beth Clark, Comment, *Recovery of Economic Losses Under the Massachusetts Oil and Hazardous Material Release Prevention and Response Act: Chapter 21E*, 21 B.C. ENVTL. AFF. L. REV. 511, 511–12 (1994).

4. *See, e.g.*, Palmer, *supra* note 1, at 115. This exclusionary rule is known by a variety of terms, including the rule in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), the exclusionary loss rule, the relational economic loss rule, the stand-alone economic loss rule,

boat engine is fouled by a chemical spill and the charterer cannot fish, the charterer can recover the property damage along with consequential economic loss like business interruption. However, if a chemical spill fouls the water and not the boat, and the charterer cannot fish because of a ban on fishing or a decline in the fish population, the charterer's loss is "purely" economic, and there is no recovery for the charterer's business interruption. In both instances, the charterer has lost income because of a hazardous release. It is only when the loss is a consequence of property damage or physical injury that the loss is recoverable.[5] Courts and commentators articulate numerous and varied justifications for the rule, including its bright-line simplicity, the fact that it limits what would otherwise be open-ended liability, its ability to avert fraudulent claims, and the fact that it maintains liability in scale with the gravity of the defendant's conduct.[6]

The pure economic loss rule operates as a complete bar to recovery for many release victims.[7] Hazardous spills often do not cause physical harm or private property damage because the injury occurs instead to *publicly* owned resources like water bodies, air, wildlife, and other natural resources.[8] When the injury is to a public resource, the pure economic loss rule operates to bar victim recovery.[9] The plight of release victims is compounded because, even when economic loss is legally recoverable as a consequence of physical injury or property

and the general economic loss no liability doctrine. Commentators are divided on whether it is truly a single rule, a series of rules, or a legal policy against pure economic loss recovery. *Id.* at 115, 119.

5. Andrew B. Davis, Note, *Pure Economic Loss Claims Under the Oil Pollution Act: Combining Policy and Congressional Intent*, 45 COLUM. J.L & SOC. PROBS. 1, 5 (2011).

6. *See, e.g.*, Palmer, *supra* note 1, at 109–10, 115, 118 & n.59. While this Article does not attempt to provide a comprehensive compilation of the justifications for the pure economic loss rule, a particularly thoughtful review can be found at Anita Bernstein, *Keep it Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773 (2006).

7. Ronen Perry, *The* Deepwater Horizon *Oil Spill and the Limits of Civil Liability*, 86 WASH. L. REV. 1, 10 (2011) (listing all those who are affected by oil spills and then noting that "American courts have consistently denied recovery for this kind of loss").

8. *See, e.g.*, Palmer, *supra* note 1, at 109 (identifying the fact that oil spills often damage un-owned public resources and thus the economic loss rule effectively shields polluters from oil spill liability); Perry, *supra* note 7, at 10.

9. Palmer, *supra* note 1, at 116 (discussing how oil spills have a limited impact on private property).

damage, victims face a problematic time lag between injury and claims payment.[10]

Three notable exceptions exist that enable hazardous release victims to recover certain types of pure economic loss. The first is a general exception for commercial fisherman that developed in admiralty and common law.[11] The second is an exception in some jurisdictions for family members.[12] The third exception is for oil release victims.[13]

The disparity in compensation for victims of oil and non-oil hazardous substance releases is illustrated by comparing outcomes in the following two scenarios. In January 2014, a West Virginia coal company's 48,000-gallon storage tank ruptured, leaking approximately 10,000 gallons of the coal wash 4-Methylcyclohexane methanol and propylene glycol phenyl ether into the nearby Elk River, ultimately contaminating the public water supply.[14] Administrators quickly declared a state of emergency, and over 300,000 residents were banned from using water for all purposes except to flush toilets or for fire-fighting purposes.[15] The injury was immediate.[16] Among many

10. Delayed compensation is not particular to hazardous release victims. Hazardous spills, however, have long been the subject of particular public legislative focus. As discussed in Part II, there are policy reasons to expedite compensation for victims of hazardous releases. While this Article's focus is on hazardous substance releases, it is certainly possible that many of the policy arguments about interim damages might inform a discussion about expedited claims processing in other contexts.

11. *See infra* Part II.A.

12. *See infra* Part II.A.

13. *See infra* Part II.A.

14. *See, e.g.*, Coral Davenport & Ashley Southall, *Critics Say Chemical Spill Highlights Lax West Virginia Regulations*, N.Y. TIMES, Jan. 13, 2014, at A8 (describing release of 4-methylcyclohexane methanol from Freedom River Industries, Inc.'s, Elk River storage facility); Ashley Southall, *Chemical Spill Fouls Water in West Virginia*, N.Y. TIMES, Jan. 10, 2014, at A14. On January 17, 2014, eight days after the leak, the company filed for bankruptcy. *See, e.g.*, Tom Hals, *Company in West Virginia Chemical Spill Files for Bankruptcy*, REUTERS (Jan. 17, 2014, 5:38 PM), *available at* http://www.reuters.com/article/2014/01/17/freedomindustries-bankrutpcy-idUSL2N0KR1OA20140117, *archived at* http://perma.cc/DQX4-3825.

15. W. VA. BUREAU FOR PUB. HEALTH & THE AGENCY FOR TOXIC SUBSTANCES DISEASE REGISTRY, ELK RIVER CHEMICAL SPILL HEALTH EFFECTS: FINDINGS OF EMERGENCY DEPARTMENT RECORD REVIEW (2014), *available at* http://www.dhhr.wv.gov/News/chemical-spill/Documents/ElkRiverMedicalRecordSummary.pdf, *archived at* http://perma.cc/CX27-TJM9; Trip Gabriel, *Thousands Without Water After Spill in West Virginia*, N.Y. TIMES, Jan. 11, 2014, at A9. A "do not use" order for the public water supply went into effect on January 9, 2014, and was gradually lifted beginning on January 13, 2014. Michael Wines, *Chemical Company Owners Are Charged in Spill that Tainted West Virginia Water*, N.Y. TIMES, Dec. 18, 2014, at A25; *see also* Davenport & Southall, *supra* note 14, at A8.

categories of injury, businesses and schools had to shut their doors.[17] Some victims suffered health effects.[18] Residents had to arrange for alternative water.[19] One early study estimated that the chemical spill cost the West Virginia economy $19 million a day for each business day the water ban was in effect.[20] These are but a few examples of the economic loss experienced by the 2014 West Virginia Elk River release victims.

In the second situation, an oil company's 18,000-foot deep exploratory deep oil well located in the Gulf of Mexico ruptured, ultimately leading to a three-month long oil leak of approximately 4.9 million barrels of crude.[21] As with the release in West Virginia, the economic injury was immediate. A ban on Gulf fishing affected not

16. *See, e.g.*, Gabriel, *supra* note 15.

17. Jonathan Matisse, *Businesses Incur Losses After Chemical Spill*, WASH. TIMES (May 11, 2014), http://www.washingtontimes.com/news/2014/may/10/businesses-incur-losses-after-chemical-spill/?page=all, *archived at* http://perma.cc/JZ9L-VN84; Evan Osnos, *Chemical Valley*, NEW YORKER, Apr. 7, 2014, at 38, 41.

18. W. VA. BUREAU FOR PUB. HEALTH & THE AGENCY FOR TOXIC SUBSTANCES DISEASE REGISTRY, *supra* note 15. Approximately 369 people were treated at emergency departments complaining of symptoms relating to exposure to contaminated water. *Id.* Of those, 13 were hospitalized and 356 were treated in the emergency room and released. *Id.*

19. Matisse, *supra* note 17 (describing business loss, cost of buying alternative water, and lack of insurance and public relief); Osnos, *supra* note 17, at 41 (describing residents fighting each other in an attempt to secure waning supplies of water, and efforts to drive eighty miles to purchase water).

20. *See* Clark Davis, *Businesses Lose $61 Million Because of Elk River Spill*, W. VA. PUB. BROADCASTING (Feb. 13, 2014), http://wvpublic.org/post/businesses-lose-61-million-because-elk-river-spill, *archived at* http://perma.cc/GN8F-7KFV (describing Marshall University Center for Business and Economic Research findings estimating that in the four business days immediately following the ban—two business days and two weekend days—the impact was about $61 million, affecting about 75,000 workers each day, or about 41% of the area work force, and lower-wage service-producing workers were more affected than those in higher wage industries).

21. *See* MARCIA MCNUTT ET AL., U.S. DEP'T OF THE INTERIOR, ASSESSMENT OF FLOW RATE ESTIMATES FOR THE DEEPWATER HORIZON/MACONDO WELL OIL SPILL (2011), *available at* http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=237763; Marcia K. McNutt et al., *Review of Flow Rate Estimates of the* Deepwater Horizon *Oil Spill*, 109 PROC. NAT'L ACAD. SCI. U.S. 20260 (2012) (quantifying a discharge rate of 50,000–70,000 barrels a day, totaling nearly 5 million barrels of oil released from the well between April 20 and July 15, 2010, when the leak was capped). The oil was discharged along with copious amounts of dispersants—about 1.8 million gallons total—in an attempt to break up the oil and, theoretically, make it easier for microorganisms to digest. *See* PAUL F. ZUKUNFT, OPERATIONAL SCIENCE ADVISORY TEAM (OSAT) UNIFIED AREA COMMAND, SUMMARY REPORT FOR SUB-SEA AND SUB-SURFACE OIL AND DISPERSANT DETECTION: SAMPLING AND MONITORING 6 (2010), *available at* http://www.restorethegulf.gov/sites/default/files/documents/pdf/OSAT_Report_FINAL_17DEC.pdf.

only commercial fisherman but also individuals who depended upon the Gulf resources for both sustenance and livelihood.[22] Gulf tourism plummeted.[23] Many businesses lost earnings, laid workers off, or shut their doors entirely.[24] The anxiety and stigma associated with the oil contamination had ripple effects that arguably led to a decline in seafood consumption and a travel aversion to the Gulf region, affecting numerous individuals and businesses that persisted even after the moratorium ceased.[25] Those are just a few examples of the economic loss experienced by the 2010 BP Gulf oil spill victims.

The two scenarios are similar. In both instances victims lost business income, profit, and out-of-pocket expense. Yet in the Gulf, victims had the ability not only to recover compensation for pure economic loss but also to recover it rapidly. In fact, $2.4 billion was paid to 170,000 individuals and businesses through its interim claims processing within three months of the Gulf spill.[26] Compare that with the fact that most West Virginia victims might not receive any compensation.[27] Even those who can recover will experience delay before their claims are settled or adjudicated.[28] In the meantime, they carry the cost of their harm.

This Article endeavors to articulate normative policy for expanding interim payments and pure economic damages to a larger class of private-party hazardous release victims than commercial fishermen, family members, or those injured by oil. Interim payments refer to pre-final and partial payments of a claimant's ultimate damage award.

22. *See* Palmer, *supra* note 1, at 109, 116 n.49 (after $1.5 billion in funds were disbursed to claimants in Louisiana, 99% of the claims filed were for economic damage while only 1% was for property damage); Davis, *supra* note 5, at 2.

23. Maureen Mackey, *BP Oil Spill: Gulf Tourism Takes a Huge Hit*, FISCAL TIMES (Jun. 24, 2010), http://www.thefiscaltimes.com/Articles/2010/06/24/BP-Oil-Spill-Gulf-Tourism-Takes-a-Huge-Hit, *archived at* http://perma.cc/K667-2UR9.

24. Davis, *supra* note 5, at 2–3.

25. *Id.* at 2.

26. KENNETH R. FEINBERG, WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL 141 (2012). Compare that with the fact that, at the same time, no litigant had received payment in court. That is not to say that there were not issues with the operation of the Gulf Coast Claims Facility (GCCF); however, under extraordinary time and public pressure, the GCCF facilitated large-scale, rapid compensation to many victims. Additional detail about the GCCF interim claims process experience is provided in Part IV.B.

27. *See* Hals, *supra* note 14.

28. Five months after the West Virginia spill those victims had not yet received compensation. *See* Matisse, *supra* note 17, at 1.

Approximately 25,000 to 35,000 chemical incidents occur each year.[29] Releases often damage un-owned public resources.[30] Thus, as a practical matter many release victims will incur only pure economic harm and will be barred from recovery. The exceptions that exist for commercial fisherman, family members, and oil spill victims are unduly restrictive and create compensation inequity for otherwise similarly situated victims of other types of hazardous spills.[31]

Moreover, the delay between the injury and any eventual compensation award further harms release victims.[32] Delay affects a victim's financial stability, causes stress, and can detour a victim's funds away from supporting sound health and lifestyle choices. The time lag generally favors the polluter. The threat of delayed compensation puts pressure on the victims to settle their claims for less than full value in order to achieve more rapid payment and permits the polluter to at least temporarily shift the cost of harm to the victim.[33] Interim payments are a particularly beneficial remedy to counteract delay-related harm.[34] The expedited damages, moreover, better compensate populations that are already disproportionately impacted by the negative externalities of pollution-related activities.

Interim and economic damage payments invoke a number of concerns about unlimited liability and over-deterrence, procedural and substantive due process, and judicial economy.[35] Those concerns raise important issues that need to be addressed by structuring a system

29. U.S DEP'T OF HEALTH AND HUMAN SERVS., NATIONAL TOXIC SUBSTANCE INCIDENTS PROGRAM ANNUAL REPORT 2011, at 8 (2011).

30. Palmer, *supra* note 1, at 109.

31. Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 AM. J. COMP. L. 111, 113 (Supp. 1998); John C.P. Goldberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Spill*, 30 MISS. C. L. REV. 335, 337 (2011); Note, *The Limits of Liability: Can Alaska Oil Spill Victims Recover Pure Economic Loss?*, 10 ALASKA L. REV. 87, 102 (1993).

32. *See* Benjamin R. Civiletti, *Zeroing in on the Real Litigation Crisis: Irrational Justice, Needless Delays, Excessive Costs*, 46 MD. L. REV. 40, 40, 48 (1986) ("The real [civil justice system] crisis can be seen from the fact that injured parties carry the burden of their injury under appalling circumstances for extreme periods of time and at staggering economic and human costs. . . . [¶] The delay and cost involved in the tort litigation system, in themselves, supply ample justification for civil justice reforms . . . . Reforms are needed to assure reasonable, timely compensation, to preserve access to the courts for injured parties, and to discourage wrongful conduct.").

33. *See id.* at 44.

34. *See id.* at 46–47.

35. *See, e.g.*, Gregory C. Sisk, *Interim Attorney's Fee Awards Against the Federal Government*, 68 N.C. L. REV. 117, 121–25 (1990); Davis, *supra* note 5, at 8–9.

designed to facilitate interim payments and pure economic damages while minimizing procedural and substantive due process impact, that adopts scope-limiting rules to reduce concerns about unlimited liability, and that is judicially manageable.

This Article is comprised of three parts. Part II describes the type of economic damages private victims receive and the timing of when those victims receive compensation. It also evaluates why the current recovery system is inadequate to compensate private-party victims of hazardous releases. Part III analyzes the benefits of and concerns with pure economic damage compensation. Part IV addresses the benefits of and concerns with interim payments. Understanding and responding to these concerns helps shape an approach that best balances competing interests.

II. ECONOMIC DAMAGES FOR PRIVATE-PARTY HAZARDOUS RELEASE VICTIMS

Hazardous releases leave victims in a precarious position. Victims are in immediate need of funds to address the consequences.[36] While some victims suffer physical harm to person or property, many do not.[37] However, most will incur some degree of economic harm that might include lost earnings or job opportunities.[38] Many release victims have no legal recourse to recover these damages.[39] Even for damages that are compensable, the long time delay between injury and claims payment can be costly and anxiety-provoking.[40]

This Section addresses the question of what economic damages spill victims are entitled to recover and when they receive compensation. Part A addresses private-party recovery for economic loss, Part B addresses when release victims receive interim damages, and Part C describes the role of insurance to compensate victims.

36. *See, e.g.*, Lt. Col. Millard, *Disaster Claims—Advance and Emergency Partial Payments*, ARMY LAW., June 1995, at 63.

37. *See, e.g.*, Palmer, *supra* note 1, at 109.

38. *See, e.g.*, Clark, *supra* note 3, at 511–12.

39. *See id.* at 513.

40. By way of but one example, the *Exxon Valdez* claimants had to wait nearly twenty years to receive their damage award. *See* J. Steven Picou, *When the Solution Becomes the Problem: The Impacts of Adversarial Litigation on Survivors of the* Exxon Valdez *Oil Spill*, 7 U. ST. THOMAS L. REV. 68, 73–75 (2009).

A. The Scope of Economic Damage Recovery

The pure economic loss rule took hold in German, English, and English common-law-influenced systems around the late nineteenth century.[41] In 1927, it was adopted into admiralty law in *Robins Dry Dock & Repair Co. v. Flint*.[42]

The *Robins Dry Dock* case involved damage to a boat that was under time charter.[43] After the owners brought the boat in for routine docking, the dry dock operators negligently damaged the boat's propeller.[44] The time charterer plaintiffs brought action to recover for the lost use of the boat while the propeller damage was being repaired.[45] The Court held that the plaintiffs could not recover because, as time charterers, they were not the boat owners and therefore had not personally suffered property damage.[46] Put another way, they had suffered non-compensable pure economic loss, not compensable loss that was a consequence of damage to their personal property.

What is now known as the "Rule in Robins Dry Dock" is coterminous with the preexisting common law "pure economic loss rule." Case law involving hazardous releases has overwhelmingly embraced this exclusionary recovery rule, normalizing as a general legal matter a broad bar to recovering for economic loss that is not accompanied by physical injury or personal property damage.[47]

The pure economic loss rule is so effective a recovery bar that an exception developed for commercial fisherman and other users of the sea.[48] This "commercial fisherman exception" has been justified on a

41. Palmer, *supra* note 1, at 114.

42. 275 U.S. 303 (1927); Palmer, *supra* note 1, at 116–19 (discussing maritime law's adoption of the rule).

43. 275 U.S. at 307.

44. *Id.*

45. *Id.*

46. *Id.* at 308–09.

47. *See, e.g.*, Lloyd's Leasing Ltd. v. Conoco, 868 F.2d 1447, 1448–49 (5th Cir. 1989) (denying pure economic loss claims to over 375 claimants in oil spill in Calcasieu River Bar Channel); Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985) (denying various claimants including shipping interests, marine and boat rental operators, seafood enterprises, and tackle and bait shops pure economic loss claims in PCP spill into Mississippi River Gulf); Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974) (denying pure economic loss claims for 1969 Santa Barbara oil spill). *But see* Pruitt v. Allied Chem. Co., 523 F. Supp. 975 (E.D. Va. 1981) (permitting charter boat owners, marinas, and tackle and bait operators to maintain suit for pure economic loss while dismissing claims of seafood wholesalers, retailers, processors, distributors, and restaurateurs).

48. Note, *supra* note 31, at 102.

variety of grounds, most frequently on the basis of a special relationship between the tortfeasor and "fisherman and other users of the sea" requiring the tortfeasor to "refrain from negligent conduct . . . which . . . reasonably and foreseeably could have been anticipated to cause a diminution in the aquatic life."[49] Thus, fisherman, crabbers, oystermen, and shrimpers have been compensated their pure economic loss under this "commercial fisherman" exception.[50]

In some jurisdictions, another exception to the pure economic loss rule is given to family members to compensate them for lost familial services when their family member was negligently injured or killed.[51] The underlying theory is that the family member suffered a violation of a "quasi-property right" or was in a special relationship status with the victim and they consequently suffered economic harm.[52]

Legislatures have also expanded pure economic loss recovery to private-party oil spill claimants.[53] For example, the 1990 Oil Spill Act (OPA) expanded oil release liability to permit private-party recovery of "[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant."[54] As a result of OPA's express language and legislative

49. *Id.* (alteration in original) (quoting *Union Oil*, 501 F.2d at 568) (internal quotation mark omitted).

50. *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 479–80, 508 n.21 (2008) (recognizing a limited exception for pure economic loss by commercial fisherman); Alaska Native Class v. Exxon Corp., 104 F.3d 1196, 1197–98 (9th Cir. 1997) (granting pure economic loss to native Alaskans who lost fishing resources); *M/V Testbank*, 752 F.2d at 1049–50 (granting limited exception for pure economic loss recovery for commercial fisherman, oystermen, shrimpers, and crabbers who used the embargoed water); *Union Oil*, 501 F.2d at 570 (granting limited exception for pure economic loss recovery for commercial fisherman); s*ee also* Perry, *supra* note 7, at 22–23.

51. Bernstein, *supra* note 31, at 113.

52. *Id.* at 113–14.

53. *See* Goldberg, *supra* note 31, at 337.

54. 33 U.S.C. § 2702(b)(2)(E) (2012). OPA also codifies private recovery for economic loss accompanied by physical injury by including "[d]amages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property" and provides a right of recovery for economic loss associated with lost subsistence use by including "[d]amages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed or lost, without regard to the ownership or management of the resources." *Id.* § 2702(b)(2)(B)–(C).

history, courts now award pure economic damages for victims of oil spills.[55]

The Trans-Alaska Pipeline Authorization Act (TAPAA) also imposes strict liability for pure economic loss associated with oil releases.[56] TAPAA expands oil release liability to permit recovery to "all damaged parties, public or private, without regard to fault for such damages, and without regard to ownership of any affected lands, structures, fish, wildlife, or biotic or other natural resources relied upon by Alaska Natives, Native organizations, or others for subsistence or economic purposes."[57] TAPAA is limited to oil releases stemming from the Trans-Alaska Pipeline System.[58]

A small number of states have enacted legislation to include private recovery for pure economic loss.[59] While federal victim compensation bills have periodically been introduced in the Legislature, they have not met with success. For example, Congress considered victim compensation legislation when passing Superfund; however, the issue was too politically controversial and it was ultimately deleted from the bill.[60]

A few courts have expanded recovery for pure economic loss to cover claimants in chemical spill cases.[61] Cases such as these, although a rarity, can serve as the basis for release litigants to argue that the common or maritime law should be expanded to permit pure economic recovery for hazardous substance releases.

55. *See, e.g.*, S. Port Marine, LLC v. Gulf Oil Ltd. P'ship, 234 F.3d 58, 64 (1st Cir. 2000); Secko Energy, Inc. v. M/V Margaret Chouest, 820 F. Supp. 1008, 1014–15 (E.D. La. 1993).

56. 43 U.S.C. §§ 1651–1656 (2012).

57. *Id.* § 1653(a)(1).

58. *Id.* §§ 1652(a), 1653(a).

59. *See, e.g.*, ALASKA STAT. §§ 46.03.822–.824 (2012); MINN. STAT. ANN. § 115B.05 (West 2014); R.I. GEN. LAWS § 46-12.3-4 (2007).

60. Theodore L. Garrett, *Compensating Victims of Toxic Substances: Issues Concerning Proposed Federal Legislation*, 13 ENV. L. REP. 10172, 10172 (1983).

61. *See* Pruitt v. Allied Chem. Co., 523 F. Supp. 975 (E.D. Va. 1981) (allowing limited category of claimants to bring action for pure economic loss caused by Kepone spill into Chesapeake Bay); People Express Airlines, Inc. v. Consol. Rail Corp., 495 A.2d 107 (N.J. 1985) (allowing airline to bring action for pure economic loss after chemical spill from tank car caused evacuation of its office and lost profits).

B. The Timing of Damages: Interim Payments

Interim payments are granted when a claimant makes an evidentiary showing of entitlement to a damage award.[62] Because they are partial and pre-final, interim payments are designed to provide victims with expeditious recovery.[63] While it is possible that a payment may satisfy the full value of a particular claim, interim payments are typically partial payments and are not designed to compromise the claimant's ability to pursue the entire outstanding value of a claim to which a victim may be entitled.[64] A claimant's final judgment is reduced by the amount of any interim payments received.[65]

Interim damage payments are available to oil release victims. At the same time that Congress provided a statutory strict liability mechanism to recover pure economic loss in OPA, Congress also provided for interim damage payments to timely recover that loss.[66] OPA requires a responsible party to establish a procedure for handling short-term damage claims.[67] Responsible parties must advertise the available claims procedures to potential claimants no later than fifteen days after they are designated a responsible party and continue that advertisement for no less than thirty days.[68]

Courts will likely refrain from granting interim relief absent statutory authority like that contained in OPA.[69] Court-ordered monetary interim relief is exceptional. In the select instances where it is granted, it is typically limited to attorney fees, litigation costs, or both. For example, courts have sparingly awarded interim attorney fees and litigation costs when authorized by fee shifting statutes, in contexts such as civil rights,[70] freedom of information,[71] divorce,[72] bankruptcy,[73] and

62. *See* 33 U.S.C. § 2705(a) (2012); Hanrahan v. Hampton 446 U.S. 754, 758 (1980).

63. *See* Millard, *supra* note 36, at 63–64.

64. 33 U.S.C. §§ 2705(a), 2713(d), 2715(b)(2).

65. *See id.* § 2713(d).

66. *See id.* § 2705.

67. *Id.* § 2705(a) ("The responsible party shall establish a procedure for the payment or settlement of claims for interim, short-term damages."); *see infra* Part IV for additional detail about the structure of OPA's interim payment system.

68. 33 U.S.C. § 2714(b)(1).

69. *See* Palmer, *supra* note 1, at 129.

70. *See, e.g.*, Hanrahan v. Hampton, 446 U.S. 754, 758 & n.4 (1980) (holding § 1988 authorized interim fee awards); Brown v. Marsh, 707 F. Supp. 21 (D.D.C. 1989) (permitting interim attorney's fee awards against the United States in litigation under Title VII of the Civil Rights Act).

emergency school aid litigation.[74] Even in those situations, they are granted in exceptional circumstances when justified for equitable reasons, such as leveling the litigation playing field or providing funds to facilitate potentially meritorious lawsuits that would not otherwise be brought.[75] Courts have also recognized the authority of arbitral tribunals to issue interim awards under such statutes as the Federal Arbitration Act,[76] the Military Personnel and Civilian Employees Claims Act,[77] and the Military Claims Act.[78]

Interestingly, other countries have more comfort with, and have established procedures for, interim damage awards. For example, in England and Wales, interim payment may be awarded in catastrophic injury cases.[79] A claimant needs to show that the interim payment is a reasonable proportion of the damages likely to be awarded to obtain

71. 5 U.S.C. § 552 (A)(4)(E) (2012); 37A AM. JUR. 2D *Freedom of Information Acts* §§ 567, 574 (2013).

72. *See, e.g.*, Young v. Young, 898 So. 2d 1076, 1077 (Fla. Dist. Ct. App. 2005) (granting interim fees "to ensure that both parties to a dissolution case have similar access to counsel and that neither has an unfair ability to obtain legal assistance"); *see also* Kasm v. Kasm, 933 So. 2d 48 (Fla. Dist. Ct. App. 2006).

73. *Cf., e.g.*, *In re* Unitcast, Inc., 219 B.R. 741 (B.A.P. 6th Cir. 1998).

74. *See, e.g.*, Bradley v. Sch. Bd. of Richmond, 416 U.S. 696, 723–24 (1974) (holding Emergency School Aid Act allowed interim fee awards); Rosenfeld v. United States, 859 F.2d 717, 724 (9th Cir. 1988) (same).

75. *See, e.g.*, *Young*, 898 So. 2d at 1077; *Brown*, 707 F. Supp. at 23–24.

76. James M. Gaitis, *The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Awards In Domestic and International Arbitrations*, 16 AM. REV. INT'L ARB. 1, 9 (2005) ("[E]ven in the absence of a statutory provision specifically authorizing arbitral tribunals to issue interim and partial awards that are final in nature, federal courts have long acknowledged that tribunals have such authority."). Congress indirectly codified this authority in the 1988 amendments to the FAA. *Id.*

77. *See* Millard, *supra* note 36, at 63–64 (discussing implementing regulations to the Military Personnel and Civilian Employees Claims Act authorizing emergency partial payments for damage to or loss of personal property incident to natural or manmade disasters caused by "fire, flood, hurricane or other unusual occurrences").

78. *See id.* at 65 (discussing authorization in the Military Claims Act for advance partial payments to alleviate immediate hardship in situations where the victim or the victim's family have an "immediate need for food, clothing, shelter, medical, burial expense or other necessities").

79. *See* Gordon Exall, *Interim Payments and the Seriously Injured Claimant: Somewhere to Live or Down at EELES?*, CIV. LITIG. BRIEF (June 24, 2013), http://civillitigationbrief.wordpress.com/2013/06/24/interim-payments-and-the-seriously-injured-claimant-somewhere-to-live-or-down-at-eeles/, *archived at* http://perma.cc/XBQ7-RJ47.

interim payment.[80] Interim payment is not restricted to past losses but may also include future loss.[81]

C. The Availability of Public and Private Insurance

Currently, insurance is the available compensation mechanism for most private spill victims' pure economic loss. Some commentators argue that excluding liability is a more efficient means of loss spreading because it provides victims with incentives to self-protect against loss at a lower administrative cost than shifting liability to the polluter.[82] Potential victims who are vulnerable to harm can purchase first-party insurance, like business interruption coverage, to cover eventual loss.[83] Governments also may provide public, or social, insurance.[84]

However, insurance is not a comprehensive gap filler. First-party insurance may not be available or widely obtained.[85] The extent to which potential victims are in fact availing themselves of insurance is uncertain. Potential victims might not purchase advance protection because they are inattentive to their needs, fail to appreciate their risk, choose to ignore their risk, or take a chance that they will not be injured.[86] Only those most aware of their potential risk, in a financial position to insure against it, and desirous of taking advanced protective measures will be motivated to preemptively purchase insurance.[87] When there is no insurance, the cost of pollution is either born by the victim or publicly absorbed through social insurance, the costs of which are diffusely spread to the tax base.[88]

80. *See* Cobham Hire Services Ltd. v. Eeles, [2009] EWCA (Civ) 204, [2], [2010] 1 W.L.R. 409 (Eng.).

81. *See, e.g.*, Harris v. Roy, [2010] QBD (Eng.) (rejecting the argument that interim payment was confined to past loss); *see also, e.g.*, Szatmari v. Oxford Radcliffe Hospitals NHS Trusts, [2012] EWHC (QB) 1339 (Eng.) (interim payments to fund housing or vehicular adaptations to address resulting disabilities); Kirby v. Ashford & St. Peters Hospital NHS Trust, [2011] EWHC (QB) 624 (Eng.); Exall, *supra* note 79.

82. *See, e.g.*, Perry, *supra* note 7, at 20.

83. *See* Fleming James, Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 52 (1972).

84. *Id.*

85. *See* Stephen D. Sugarman, *Roles of Government in Compensating Disaster Victims*, ISSUES LEGAL SCHOLARSHIP, Jan. 26, 2007, at 6, http://www.bepress.com/cgi/viewcontent.cgi?article=1093&context=ils, *archived at* http://perma.cc/K3PT-VETJ.

86. *Id.* at 8.

87. *See id.*

88. *See* James, *supra* note 83, at 53.

III. PURE ECONOMIC DAMAGES: BENEFITS AND CONCERNS

Pure economic damages advance a number of tort goals. They provide more comprehensive victim compensation; promote environmental justice, including distributive, procedural, corrective, and social justice; and deter tortious behavior. A proper structure advances these goals while responding to concerns about unlimited liability and judicial manageability.

A. Compensation Benefits

As discussed in Part II, there is a gap in tort coverage for many hazardous release victims. Often, releases damage un-owned resources like water, air, wildlife, and other natural resources, and the resulting harm is of a purely economic nature.[89] Because common and maritime law routinely denies recovery in such situations—and because the existing exceptions for fisherman, family members, and victims of oil releases are unduly restrictive—problematic gaps in compensation remain for many other hazardous release victims. Expanding liability for pure economic damages serves to better fill in those gaps.

Victim compensation, or full and fair redress of civil legal wrongs, is one of the essential goals of tort law.[90] Pure economic damage recovery provides more complete and fair compensation. Because spills are indeed "excellent engines of pure economic loss," permitting recovery better responds to the type of harm many release victims will experience.[91]

B. Environmental Justice Benefits

In a variety of ways, expanding hazardous release liability to cover pure economic loss provides a more environmentally just compensation system. While there is no uniformly agreed upon definition of "environmental justice," the U.S. Environmental Protection Agency defines it as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental

89. Palmer, *supra* note 1, at 109.

90. John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 435 (2006).

91. *See* Palmer, *supra* note 1, at 109 (discussing oil spills).

laws, regulations, and policies."[92] Fair treatment, in turn, requires that "no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies."[93] To be "meaningfully involved" means that people must "have an opportunity to participate in decisions about activities that may affect their environment and/or health," their involvement must be such that it can influence regulatory decisions, their concerns must be considered by decision makers, and decision makers must facilitate the involvement of potential victims.[94] Robert R. Kuehn proposes an approach to environmental justice issues that evaluates how well they achieve distributive justice, procedural justice, corrective justice, and social justice.[95] These justice theories are all components of fair and meaningful environmental justice.[96]

Framed through the lens of distributive justice, enlarging the class of victims entitled to pure economic recovery redistributes the risk of hazardous substance releases, providing a more equitable distribution among the parties.[97] This risk redistribution is particularly beneficial for socioeconomically disadvantaged populations and communities of color.[98] Research focusing on the 2010 Gulf oil spill reflects that there were documented disproportionate impacts that the Gulf spill had on such populations and existing legal mechanisms were insufficient to protect vulnerable populations.[99] Expanding pure economic damages to

92. *Basic Information*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/environmentaljustice/basics/ejbackground.html (last updated May 24, 2012), *archived at* http://perma.cc/5VL8-279Z.

93. *Id.*

94. *Id.* See Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10681 (2000) for an interesting history and discussion of "environmental justice" definitions.

95. Kuehn, *supra* note 94.

96. *Id.*

97. For purposes of environmental justice, distributive justice means the right to "the same distribution of goods and opportunities as anyone else has or is given" and includes not only the equitable distribution of the burdens of polluting activities (i.e., a shifting or redistribution of risks) but also a lowering of risks. *Id.* at 10683–84. Distributive justice focuses on fairly distributed outcomes, not on the process of arriving at those outcomes. *See id.*

98. *See* Hari M. Osofsky et al., *Environmental Justice and the BP* Deepwater Horizon *Oil Spill*, 20 N.Y.U. ENVTL. L.J. 99, 101, 110–27 (2012) (analyzing the amount of spill waste and health impacts that disproportionately impacted socioeconomically disadvantaged or of color communities).

99. *See id.* at 102.

a larger category of release victims eases an already disproportionate burden associated with the negative externalities from hazardous substance industries.[100] Expanded liability better distributes those risks, minimizing the disparate impact. It also achieves victim equity, giving at least the same damages to victims of non-oil hazardous releases as those to which oil release victims are entitled.[101]

Expanded liability promotes victim access to the justice system. This facilitates procedural justice by empowering those who otherwise lack political power to tap into the justice system. Through access, these groups can potentially change pollution-creating policies and practices.[102]

Viewed through a corrective justice lens, there is a duty to repair victim losses.[103] As between victims of pollution and the polluter, the costs of pollution should be born by the party creating the pollution even if it extends liability or creates a greater burden on courts. Shifting liability makes a strong statement that pollution is a wrong that must be rectified.

C. Deterrence Benefits

One of tort law's primary functions is deterring undesirable conduct.[104] "Legal theory suggests that when liability rules are narrow in scope, categorically exclude certain forms of loss, and permit the spiller to perfect various defenses, the spiller may not have sufficient incentives to invest in prevention and safety."[105]

But the actual deterrent effect that additional hazardous substance liability may yield is arguably nominal or nonexistent.[106] Entities that deal in hazardous substances are already exposed to potentially large-scale liability for such things as environmental remediation and loss

100. *See id.* at 194–95.

101. *See generally* Daniel A. Farber, *Tort Law in the Era of Climate Change, Katrina, and 9/11: Exploring Liability for Extraordinary Risks*, 43 VAL. U. L. REV. 1075, 1125–26 (2009).

102. Procedural justice refers to procedurally equal treatment of "equal concern and respect in the political decision about how . . . goods and opportunities are to be distributed." Kuehn*, supra* note 94, at 10688.

103. *Id.* at 10693 ("Corrective justice involves not only the just administration of punishment to those who break the law, but also a duty to repair the losses for which one is responsible.").

104. Farber, *supra* note 101, at 1114.

105. Palmer, *supra* note 1, at 110.

106. Perry, *supra* note 7, at 17.

accompanied by physical injury or property damage.[107] Even if there is some deterrent effect, the costs involved in shifting liability may outweigh the additional deterrence.

Another concern is that allowing recovery for pure economic loss could result in a liability shift for private loss, or "wealth transfers," that do not reflect true social costs.[108] When liability shifts for private loss rather than true social costs, there is a concern it will lead to over-deterrence.[109] This can cause those who handle hazardous waste to unduly invest in protective mechanisms and pass those costs along to consumers:

> According to economic theory, efficient deterrence requires internalization of the social cost of every inefficient act by the actor. In assessing social costs, it is important not to add private losses that reflect "wealth transfers," namely diminution of personal wealth that generates corresponding gains to others. Such gains do not mitigate the private loss, but cancel it out in the calculation of the externalized social cost. Internalization of private losses irrespective of the parallel gains may lead to over-deterrence. Arguably, many [pure] economic losses correspond to resulting economic gains. If the competitors of an interrupted business can easily increase their production during the interruption at no cost beyond normal production costs, their gain will offset the unfortunate business' loss.[110]

Financial responsibility requirements like mandatory insurance to cover liability risk have the potential to increase deterrence.[111] Financial requirements increase health and safety by internalizing the cost of significant accident risks.[112] Such requirements also reduce levels of risky behavior by preventing insolvency as a way to externalize cost and encouraging insurers to regulate risky activities as a precondition of

107. *See, e.g.*, 33 U.S.C. §§ 2701–62 (2012) (OPA); 42 U.S.C. §§ 6901–92 (2012) (Resource Conservation and Recovery Act); *id.* §§ 9601–28 (Comprehensive Environmental Response, Compensation, and Liability Act).

108. *See, e.g.*, Davis, *supra* note 5, at 13–14.

109. *See, e.g.*, *id.*

110. Perry, *supra* note 7, at 16 (footnotes omitted).

111. Jeffrey Kehne, Note, *Encouraging Safety Through Insurance-Based Incentives: Financial Responsibility for Hazardous Wastes*, 96 YALE L.J. 403, 405 (1986) ("Financial responsibility provisions improve safety by preventing insolvency from undermining the deterrent effects of liability rules.").

112. *See id.* at 404–06.

coverage.[113] Insurers "encourage safety improvements . . . [by conducting] risk assessments that precede the issuance or renewal of policies, [selecting] premium schedules that categorize insured[] [parties] based on differences in expected losses, and [utilizing] contract provisions that require . . . specified safety practices."[114]

D. Unlimited Liability and Over-Deterrence Concerns

The most widely invoked concern about expanding pure economic damage recovery is that it exposes defendants to a potentially unlimited scope of liability and may lead to over-deterrence.[115] Without mechanisms to limit liability, the "ripple effect" potential for open-ended claims is significant. One spill can implicate a seemingly limitless number of claimants, including businesses, customers, creditors, suppliers, employees, shareholders, and consumers near the spill locus or around the globe. In spill situations, "where the number of victims is not only uncertain ex ante but potentially enormous, where procedural mechanisms reduce per capita cost of litigation thereby inducing victims to sue, and where the defendant may be a deep-pocketed corporation," the potential for open-ended exposure is realistic.[116] There is further concern this could lead to disproportionate liability between the relative culpability of the wrong and the amount of liability.[117] At its core, the pure economic loss exclusion is a proximate cause rule aimed at limiting the scope of a defendant's liability to avoid shifting costs for unforeseeable damages or damages that are too remote from the harm to justify the imposition of liability.[118]

Open-ended liability can burden responsible parties to the point of insolvency. While there is a legitimate concern that catastrophic liability might lead to insolvency, the bankruptcy laws do permit reorganization.[119] Also, catastrophic liability is itself a means of risk spreading.[120]

113. *Id.*

114. *Id.* at 406.

115. *See, e.g.*, Farber, *supra* note 101, at 1078; James, *supra* note 83, at 45; Perry, *supra* note 7, at 12.

116. Perry, *supra* note 7, at 13.

117. *Id.* at 14; *see also* James, *supra* note 83, at 50.

118. *See, e.g.*, Davis, *supra* note 5, at 27–30.

119. *See* Farber, *supra* note 101, at 1122–23.

120. *Id.* at 1122 ("If private firms have tort liability, the burden is put on the shareholders and thereby spread through the securities markets. . . . To the extent that

Moreover, when there are limited funds to compensate victims, the result might be an inequitable distribution of those assets to the first claimants, leaving arguably more legally deserving claimants without compensation.[121] Insolvent or low capitalized firms will pay the first claimants, leaving other worthy victims with little or no recovery. The scope of liability might entirely deter organizations from entering markets that might otherwise be socially beneficial for them to engage in.[122]

There are ways to provide certainty about the scope of liability. Alternatives include damage caps, financial assurance provisions, and proximate cause rules. Certainty permits those dealing in hazardous substances to better prepare and insure contingencies.[123] If the liability potential is too uncertain and vast, insurers might stop offering coverage or price the premium at a prohibitively high amount.[124] This is problematic because losses are not optimally spread.[125]

Damage caps are particularly effective at providing certainty as to the scope of liability. For example, for offshore releases, OPA liability is limited to $75 million plus all remedial costs, and for onshore facilities, liability is limited to $350 million.[126] In general, responsible parties are liable without limit only if the incident resulted from gross negligence, willful misconduct, a violation of operational safety regulations, or if the responsible party fails to report the incident or cooperate with removal activities.[127]

The success of a capped damage system depends upon whether the cap is set at an amount that provides sufficient victim compensation and encourages safety measures while avoiding open-ended liability. OPA's damage cap has been widely criticized for being an insufficient compensation amount. For example, one commentator refers to this as

private insurers are in the market, the burden of covering catastrophic risks can be reduced if they are allowed to subrogate to the tort claims of their insureds. In any event, to a much greater extent than is true of more easily insurable risks, such as routine auto accidents or house fires, the tort system's ability to spread risks is a major advantage.").

121. Some commentators posit that claimants with accompanying physical injury or property damage have superior claims than those who suffer a purely economic loss. *See, e.g.*, Perry, *supra* note 7, at 15.

122. *Id.* at 14–15.

123. *Id.* at 20.

124. Garrett, *supra* note 60, at 10176; Perry, *supra* note 7, at 15.

125. Perry, *supra* note 7, at 15.

126. 33 U.S.C. § 2704(a) (2012).

127. *Id.* § 2704(c).

a figure "so paltry in relation to the potential costs of oil spills that, arguably, it would produce less safety than the old [pure economic loss] exclusionary rule."[128] When the cap is too low to satisfy victim loss, it provides insufficient compensation and creates equity problems because the earliest claimants may possibly tap the limit of the cap, leaving otherwise worthy victims without recourse.

Financial assurance provisions, too, provide certainty. The costs of increased liability can be spread through private or public insurance. Financial responsibility provisions can be included that require firms to post bonds or maintain sufficient insurance to cover the damage cap amount.[129] When done in tandem with damage caps, there is a reasonable degree of certainty about the extent of liability. In turn, this provides insurers with a more accurate ability to assess the level of risk and needed investment in safety measures.[130]

Proximate cause rules also provide a level of certainty. For example, liability can be expanded only to those victims who have a right to put the injured resource to commercial use.[131] Another possibility is to expand liability only for victims that the defendant should have foreseen would incur economic loss.[132] Further limitations can be placed on the types of hazardous substance releases that shift liability.[133] Also, threshold minimum release quantities can be established to limit liability.[134]

In the context of oil releases, scholarly disagreement exists about the extent to which OPA contains proximate cause limitations on the class

128. Palmer, *supra* note 1, at 111; *see also* Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 399–400 (2014) (referring to OPA's cap as "almost quaint"). Note that a 2012 report by the Department of Homeland Security reflects that OPA's $75 million dollar statutory cap has been exceeded once for an offshore facility with the explosion of the *Deepwater Horizon* and Macondo Well; once for an onshore facility with the Enbridge Pipeline release; and fifty-nine times from offshore vessels. *See* DEP'T OF HOMELAND SEC., OIL POLLUTION ACT LIABILITY LIMITS IN 2012, at iii (2012), *available at* www.uscg.mil/npfc/docs/PDFs/Reports/Liability_Limits_Report_2012.pdf, *archived at* http://perma.cc/J5S6-KE8G.

129. *See* Kehne, *supra* note 111, at 403.

130. *See id.* at 410.

131. *See* Goldberg, *supra* note 31, at 337.

132. *See* Clark, *supra* note 3, 549–53.

133. *See* Clark, *supra* note 3, at 549.

134. *Cf.* A&W Smelter & Refiners, Inc. v. Clinton, 146 F.3d 1107, 1110–11 (9th Cir. 1998).

of claimants entitled to recover pure economic damages.[135] In OPA's broadest reading, "any claimant" may recover pure economic lost profits or earnings upon proving (i) the victim incurred economic loss, and (ii) that "but for" the release the victim's economic loss would not have occurred.[136] This reading would permit recovery by claimants far removed from where the release actually occurred.[137]

Kenneth Feinberg appears to have required a showing of proximate causation in order to receive interim payments from the Gulf Coast Claims Facility (GCCF) in response to the 2010 Gulf oil spill.[138] However, the claims paid were generally expansive. For example, compensated GCCF claimants included hotels, restaurants, real estate agents and developers, retail businesses, builders, contractors, doctors, veterinarians, small and large businesses, and individuals living paycheck to paycheck, unable to rely on savings to get by while claims were being processed.[139]

John C.P. Goldberg argues that OPA is proximally limited to situations where claimants can prove that their economic loss was caused because the spill "has damaged, destroyed or otherwise rendered physically unavailable to them property or resources *that they have a right to put to commercial use*."[140] Vernon Valentine Palmer, on the other hand, argues that OPA does not contain a proximate cause limitation.[141] Rather, he argues OPA contains only "a unitary cause-in-fact analysis" coupled with the question of whether the economic loss falls within the intended scope and purpose of OPA.[142] Limitation on liability, he posits, is accomplished through OPA's damage cap.[143]

135. *Compare* Goldberg, *supra* note 31, *and* Davis, *supra* note 5, at 27–30, *with* Palmer, *supra* note 1, 136–38.

136. *See* Goldberg, *supra* note 31, at 349.

137. *See id.* at 346–48 (citing examples).

138. BDO CONSULTING, INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY REPORT OF FINDINGS & OBSERVATIONS TO THE U.S. DEPARTMENT OF JUSTICE 38 (2012), *available at* http://www.justice.gov/iso/opa/resources/66520126611210351178.pdf, *archived at* http://perma.cc/FKB3-AUCT. The GCCF claims eligibility criteria reflect that some attention was paid to issues of proximity to the locus of events. *See* Palmer, *supra* note 1, at 113 n.42.

139. BDO CONSULTING, *supra* note 138, at 47.

140. Goldberg, *supra* note 31, at 337 (emphasis added). Ultimately, the GCCF did not adopt this approach, opting instead for a more expansive, claimant-favorable approach to proximate cause. BDO CONSULTING, *supra* note 138, at 39 n.25.

141. Palmer, *supra* note 1, at 136–37.

142. *Id.* at 137.

143. *Id.* at 138.

OPA's lack of clarity about the extent to which there are proximate cause limitations diminishes the benefits that greater clarity can provide. As much as possible, an effective system should provide clarity about the scope of liability.

E. Judicial Manageability Concerns

Another concern about expanding liability to cover pure economic loss is that it invites a flood of litigation that can overwhelm the court system. Mass tort liability like that associated with asbestos exposure requires a meaningful investment of judicial time and resources; it is appropriate to think of the implications of expanding pure economic loss recovery with the lessons from mass tort litigation in mind.[144]

While there are rightly concerns about judicial manageability, there are numerous potential mechanisms that can increase judicial effectiveness in handling voluminous cases.[145] Procedural devices like consolidation and class action, improvements in civil procedure, moving compensation from the judiciary to an administrative agency, and placing some limits on the degree to which liability rules are expanded are all vehicles to increase judicial manageability.[146]

IV. INTERIM PAYMENTS: BENEFITS AND CONCERNS

Interim payments, too, advance a number of tort remedy goals. They provide faster, fuller, and fairer victim compensation. They also further environmental justice. A proper structure advances these goals while responding to due process and judicial manageability concerns.

A. Compensation Benefits and Litigation-Related Trauma

Interim payments facilitate more expeditious recovery that avoids at least some of the harm that victims incur when they are forced to bear the cost of their injuries. The shorter the period of time that victims front the expense of their loss, the better positioned they are to avoid further costs. Some victims do not have the money or are placed in severe financial difficulty by the cost of their harm. Without interim

144. *See, e.g.*, Farber, *supra* note 101, at 1104–07 (discussing the consequences of mass torts like asbestos litigation on the legal system).

145. *Id.* at 1106 (quoting AM. BAR ASS'N, RULE OF LAW IN TIMES OF MAJOR DISASTER 6 (2007), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/litigation/rol_disaster.authcheckdam.pdf), *archived at* http://perma.cc/88SJ-VGZ2.

146. *See id.* at 1127–28; Perry, *supra* note 7, at 14.

funding, some victims will not be financially positioned to make sound health and lifestyle choices.

Moreover, faster recovery potentially mitigates, although it might not fully alleviate, the amount of stressful entanglement a victim has with the litigation system. Because interim payments provide early re-shifting of the costs of hazardous release injuries, they minimize the amount of economic loss suffered and also mitigate a secondary type of harm social scientists describe as "litigation-related trauma."[147] Litigation-related trauma refers to the harm litigants experience as a result of their exposure to the legal process.[148] That trauma involves a variety of harmful effects correlated with a victim's stressful interaction with and exposure to adversarial litigation. Litigation-related trauma causes litigants to experience a variety of symptoms that in some instances mimic Post-Traumatic Stress Disorder (PTSD), including anxiety, sleeplessness, depression, obsessive fixation on litigation, panic attack, stress, and fear.[149] While all litigants experience a diverse array of perceptions and feelings about litigation, as a general matter, litigation tends to involve some degree of litigation-related trauma.[150]

147. Scholarship reflects such classification labels as "Litigation Response Syndrome," and "Forensic Stress Disorder," characterized by anxiety, depression, and stress. *See, e.g.*, Larry J. Cohen & Joyce H. Vesper, *Forensic Stress Disorder,* 25 LAW & PSYCHOL. REV. 1 (2001) (discussing Forensic Stress Disorder); Paul R. Lees-Haley, *Litigation Response Syndrome: How Stress Confuses the Issues,* 56 DEF. COUNS. J. 110 (1989) (discussing Litigation Response Syndrome); Tamara Relis, *Civil Litigation from Litigants' Perspectives: What We Know and What We Don't Know About the Litigation Experience of Individual Litigants*, 25 STUD. L., POL. & SOC'Y, 151, 179–82 (2002) (discussing litigant anxiety).

148. Marvin H. Firestone & Robert I. Simon, *Intimacy Verses Advocacy: Attorney–Client Sex*, 27 TORT & INS. L.J. 679, 684 (1992) ("The legal client often experiences significant psychological stress during the litigation process. Some litigants become so distressed that they are rendered dysfunctional. Symptoms of anxiety, depression, and other manifestations of mental disorders occur. A Litigation Response Syndrome (LRS) has been described [as a response to] the stress of being involved in litigation. Anxiety and depression are the most common manifestations. Such symptoms may interfere with the capacity of these litigants to act appropriately in their own interests and cause them to rely excessively on their attorneys for guidance." (footnote omitted)).

149. *See, e.g.*, Cohen & Vesper, *supra* note 147, at 3–4; Firestone & Simon, *supra* note 148, at 684; Lees-Haley, *supra* note 147, at 112.

150. *See* Relis, *supra* note 147, at 153 ("Undeniably, litigants are hugely diverse in every conceivable respect including their perceptions and feelings. . . . For some, litigation will be nothing new, whereas for others it will have great emotional significance. . . . But throughout the findings lies a common thread.").

Social scientists explain that hazardous release victims who become litigants are particularly vulnerable to litigation-related trauma.[151] Social scientists studying the psychological impact of litigation-related trauma on the victims of the *Exxon Valdez* oil spill found strong empirical evidence that those victims suffered particularly acute litigation-related trauma.[152] Their initial spill-related trauma led to a second type of trauma—litigation stress—associated with adversarial litigation, trying to understand complex legal issues and recurrent thoughts about the spill.[153]

Delay contributes to or compounds litigation-related injury.[154] "Delay has significant negative effects on claimants (even 'successful claimants' who eventually prevail) and society."[155] Prolonged exposure to litigation lengthens exposure to this stress-inducing trigger, thus potentially compounding this psychological injury.

Interim payments have the potential to mitigate litigation-related injury by minimizing the length of victim exposure to litigation and by providing expedited financial compensation that can reduce the amount of the victim's general financial anxiety. It reduces the amount of time

151. *See* Lewis Robert Shreve, Note, *Lessons from* Exxon-Valdez*: Employing Market Forces to Minimize the Psychological Impact on Oil Spill Plaintiffs*, 35 LAW & PSYCHOL. REV. 239, 243 (2011) ("When litigation is in response to a major disaster, its psychological effects can be more severe, often significantly worsening the plights of these plaintiffs."); *see also* J. Steven Picou, Brent K. Marshall & Duane A. Gill, *Disaster, Litigation, and the Corrosive Communit*y, 82 SOC. FORCES 1493, 1498 (2004). Spill disaster victims experience two discrete harmful events. Both the primary spill trauma and the secondary litigation-related trauma create qualitative and quantitative harm to spill victims. *See* Brent K. Marshall, J. Steven Picou & Jan R. Schlichtmann, *Technological Disasters, Litigation Stress, and the Use of Alternative Dispute Resolution Mechanisms*, 26 LAW & POL'Y 289, 291–98 (2004); Shreve, *supra* (applying literature on litigation-related psychological harm to the Gulf oil spill context and advocating for a wider use of market-valuation of claims to minimize injury).

152. Picou et al., *supra* note 151, at 1497, 1514; Shreve, *supra* note 151, at 243.

153. *See* Picou, *supra* note 40, at 80; Picou et al., *supra* note 151, at 1515 ("Our findings suggest that the legal system itself can become a secondary disaster, exacerbating and prolonging psychological stress and perceived community damage. Indeed, as technological disasters increase and as natural disasters increasingly are viewed as human caused, the legal system in an already litigious society will play an even more prominent role in postdisaster damage awards.").

154. *See* Relis, *supra* note 147, at 170 ("Though few empirical examples exist to prove that delays actually result in injustice, what is known is that delays are and have historically been common reasons for litigants' distress."); *see also* Daniel W. Shuman, *When Time Does Not Heal: Understanding the Importance of Avoiding Unnecessary Delay in the Resolution of Tort Cases*, 6 PSYCHOL., PUB. POL'Y & L. 880, 881 (2000).

155. *See* Shuman, *supra* note 154, at 882.

in which victims need to outlay or borrow funds during the injury period. This minimizes interest payments victims make on borrowed funds, penalties paid if unable to make payments, and any attendant negative credit impact. In turn, it maximizes the extent to which victims can invest and realize a return on their own funds. While interim payments might not expedite final resolution of litigation, they can alleviate some of the stress associated with delayed claims payment.

B. Environmental Justice Benefits and the Story of the 2010 Gulf Oil Spill Interim Payment Process

As discussed in Part II, hazardous releases and attendant protracted litigation can have particularly pronounced impact on socioeconomically disadvantaged populations and persons of color.[156] Long delays between harm and compensation further injure these already-burdened victims.[157]

In addition to economic harm, release victims also face stigma and discrimination. Social scientists Johan M. Havenaar and Wim van den Brink describe the social rejection and discrimination that victims of toxicological disasters experience:

> Victims of toxicological disasters may suffer from discrimination, as though they were carriers of some mysterious and noxious [contagion]. Lifton described how survivors of the nuclear bombings of Hiroshima, the so called "Hibakusha," suffered from discrimination, for example as marriage candidates. Social rejection and discrimination of evacuees and inhabitants from contaminated regions has been reported following many toxicological events, for example, after the Seveso accident, the Love Canal crisis, and in victims exposed to asbestos and pesticides.[158]

Social scientist J. Steven Picou focused on a variant of this phenomenon known as the "corrosive community."[159] The corrosive

156. *See generally* Osofsky et al., *supra* note 98, at 149–50.

157. *Id.* ("To the extent that plaintiffs who are low-income or persons of color win monetary settlements or at trial, this compensation may alleviate some harms incurred by the BP *Deepwater Horizon* Oil Spill. On the other hand, long delays and eventual losses may strain an already-burdened population.").

158. Johan M. Havenaar & Wim van den Brink, *Psychological Factors Affecting Health After Toxicological Disasters*, 17 CLINICAL PSYCHOL. REV. 359, 362 (1997) (citations omitted).

159. Picou, *supra* note 40, at 79–80.

community relates to certain characteristics displayed in communities affected by hazardous releases, such as "a loss of trust in civic institutions, social isolation, group conflict, mental health problems, deteriorating social relationships, and . . . 'corrosive social cycles.'"[160] Providing early compensatory funds shifts money toward, not from, already-stigmatized communities. This can help mitigate some of the corrosive community effects in the aftermath of release disasters.

Interim payments promote the goals of environmental justice by expediting payment to a wider category of victims, including groups or communities that are disproportionately impacted by environmental harm and that are most in need of expedited compensation. To the extent victims are socioeconomically disadvantaged, they are most in need of timely interim financial compensation. Early compensation better positions victims to make sound health and lifestyle choices because they will not be forced to bear the costs of the harm for lengthy periods of time.

Also, interim payments further procedural justice goals because early funding facilitates victim access to the justice system without foreclosing a victim's ability to obtain complete judicial relief.[161] This empowers victims to possibly affect policy change through active litigation.

The 2010 Gulf oil spill presented an opportunity to observe a mass interim claims payment process and draw environmental justice lessons from that experience. BP's interim claims payment obligations for the 2010 spill derived from OPA.[162]

Immediately after the well blowout, BP began processing interim damage claims.[163] Initially, BP began processing such claims in house. BP set up 35 field offices in the Gulf region, received over 154,000

160. *Id.*; s*ee also* J. Steven Picou, *Toxins in the Environment, Damage to the Community: Sociology and the Toxic Tort, in* WITNESSING FOR SOCIOLOGY: SOCIOLOGISTS IN COURT 211, 213–14 (Pamela J. Jenkins & Steve Kroll-Smith eds., 1996) ("Substantial sociological evidence exists to suggest that toxins in the environment contaminate more than air, water, or soil; they also damage the social fabric of a community, its neighborhoods, its families, and its residents' self-esteem. Environmental contamination, in short, is often both a biospheric and a sociological disaster.").

161. *See* 33 U.S.C. § 2705(a) (2012).

162. *See id.* ("The responsible party shall establish a procedure for the payment or settlement of claims for interim, short-term damages.").

163. *See* BDO CONSULTING, *supra* note 138, at 12 (describing how BP began paying interim compensation thirteen days after the explosion). See *supra* Part I for further background information about the 2010 Gulf oil spill.

claims, and paid 127,000 payments.[164] From May 3, 2010, to August 22, 2010, BP paid over $399 million to claimants.[165]

A little over three months after the spill, BP established and utilized a more formal claims processing facility called the GCCF.[166] The GCCF was created under unique circumstances. It resulted from a private negotiation between BP executives, President Obama, and other key members of the Obama Administration.[167] After the meeting, BP acknowledged it was a responsible party under OPA.[168] BP agreed to place $20 billion into a trust fund to establish the GCCF to fulfill BP's legal obligations.[169] This was well over OPA's $75 million liability cap that many were concerned BP would invoke to limit its liability for the release.[170] To "assure independence" from BP, the White House secured Kenneth Feinberg—a well-respected and seasoned mass claims processing executive—to administer the GCCF.[171]

The GCCF, at least in theory, was an expedited, procedurally more accessible, and lower cost damage recovery alternative to litigation.[172] In the GCCF, claimants could obtain prompt payment and avoid filing or litigation fees.[173] While claimants could—and many did—hire attorneys, professional fees were typically lower than litigation costs to

164. BDO CONSULTING, *supra* note 138, at 12.

165. *Id.*

166. The GCCF operated from August 2010 until it was closed in June 2012. FEINBERG, *supra* note 26, at 159; *Important Announcement*, GULF COAST CLAIMS FACILITY, http://www.gulfcoastclaimsfacility.com/ (last visited Apr. 9, 2015), *archived at* http://perma.cc/G264-4PU8.

167. This was later referred to as a "woodshed lecture." FEINBERG, *supra* note 26, at 129. Kenneth Feinberg described the novelty as follows:

> Nothing like this had ever occurred in American history. There was no new statute, no congressional hearings, no official administrative regulations, no court order—just a private agreement orchestrated by the president to be implemented by BP and monitored by the Department of Justice. An escrow agreement signed by BP and the department would formalize the commitment. One of the world's giant oil companies simply agreed to enter the claims compensation business.

Id.

168. *See* Office of the Press Sec'y, *Statement by the President After Meeting with BP Executives*, WHITE HOUSE (June 16, 2010, 2:25 PM), http://www.whitehouse.gov/the-press-office/statement-president-after-meeting-with-bp-executives, *archived at* http://perma.cc/U7MC-K8XZ.

169. *Id.*

170. Issacharoff & Rave, *supra* note 128, at 399–400.

171. Office of the Press Sec'y, *supra* note 168.

172. Issacharoff & Rave, *supra* note 128, at 398.

173. *See id.*

reflect the decreased professional effort and risk involved in bringing a claim in the GCCF.[174] Moreover, bringing a claim in the GCCF was a no-risk alternative to litigation because claimants could obtain interim relief and still file a lawsuit for claims that were not available in the GCCF such as punitive damages.[175]

The GCCF offered claimants a menu of payment options that took place in two discrete phases. In Phase I, the GCCF began paying "Emergency Advance Payments" for the loss of "earnings or profits, removal and clean-up costs, real or personal property damage, loss of subsistence use of natural resources and physical injury or death caused by the Spill by submitting a lesser level of documentation than would be required in Phase II"[176] During Phase II, the GCCF offered three options: (i) "interim payments" designed to compensate claimants for past losses, (ii) final payments designed to compensate claimants for past and future losses, and (iii) a "Quick Pay" cash out that was more streamlined and required less documentary support to substantiate a claim.[177]

174. *See* D. Theodore Rave, *Settlement, ADR, and Class Action Superiority*, 5 J. TORT. L. 91, 119 (2012).

175. OPA further clarifies that when the responsible party publicly advertises its designation, it also includes in that advertisement notice to claimants that interim payment shall not preclude recovery for the remainder of the claimant's unpaid damages, 33 U.S.C. § 2714(b)(2) (2012), and that claimants are protected in their ability to seek any unpaid damages or any other damages allowed by law beyond those recoverable in OPA. *Id.* § 2715(b)(2) ("Payment of such a claim shall not foreclose a claimant's right to recovery of all damages to which the claimant otherwise is entitled under this Act or under any other law."); *id.* § 2705(a) ("Payment or settlement of a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled shall not preclude recovery by the claimant for damages not reflected in the paid or settled partial claim.").

176. BDO CONSULTING, INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY EXECUTIVE SUMMARY 3 (2012), *available at* http://www.justice.gov/iso/opa/resources/697201241917226179477.pdf, *archived at* http://perma.cc/AB7J-6W3S. Phase I began almost immediately upon the start of the GCCF on August 23, 2010, and concluded on November 23, 2010. FEINBERG, *supra* note 26, at 159.

177. BDO CONSULTING, *supra* note 138, 34–35.

> As a general matter, the GCCF subjected claims filed during Phase II to more stringent documentation requirements than those applied . . . during Phase I . . . . [A]t the same time, it expanded the types of businesses . . . eligible for compensation and granted automatic eligibility to claimants . . . involved in businesses that were particularly reliant upon Gulf resources . . . .

BDO CONSULTING, *supra* note 176, at 3.

Many GCCF claimants did not select the interim payment method, opting instead for either the quick or final settlement options.[178] Both the quick and final pay options were final settlements. Claimants were required to waive their future right to sue BP in order to obtain payment.[179] Feinberg explained that phenomenon as follows:

> [C]laimants want closure. It is unsettling and troublesome to be reminded over and over again about tragedy. So although thousands of claimants would opt for an interim payment, many thousands more would decide to move on, close the oil spill chapter, and look to the future. The choice was theirs."[180]

The GCCF was widely publicized as independent.[181] The implication was that *independent* referred to structural autonomy from BP.[182] Unlike a PRP-led interim claims process, the GCCF actively marketed itself as autonomous.[183] That independence, combined with Feinberg's gravitas, imbued the GCCF with a more credible ability to assess damage claims than a BP-led claims process.[184]

Attorneys in the multi-district litigation (MDL), however, argued that the GCCF was not truly autonomous but, rather, linked to BP.[185] They argued that the independent branding mislead GCCF claimants, who might have thought they were dealing with a fully independent entity when claimants settled their claims and waived their future right

178. FEINBERG, *supra* note 26, at 167–71.

179. *Id.* at 168, 171.

180. *Id.* at 171.

181. *See, e.g.*, Office of the Press Sec'y, *FACT SHEET: Claims and Escrow*, WHITE HOUSE (June 16, 2010), http://www.whitehouse.gov/the-press-office/fact-sheet-claims-and-escrow, *archived at* http://perma.cc/3F2L-VR6F ("Independent Claims Facility[:] A new, independent claims process will be created with the mandate to be fairer, faster, and more transparent in paying damage claims by individuals and businesses. To assure independence, Kenneth Feinberg, who previously administered the September 11th Victim Compensation Fund, will serve as the independent claims administrator. . . . Escrow Account[:] BP has agreed to contribute $20 billion over a four-year period at a rate of $5 billion per year, including $5 billion within 2010. BP will provide assurance for these commitments by setting aside $20 billion in U.S. assets." (capitalization omitted)).

182. *See* Office of the Press Sec'y, *supra* note 168.

183. GULF COAST CLAIMS FACILITY, GULF COAST CLAIMS FACILITY: FREQUENTLY ASKED QUESTIONS 1 (2011), http://www.restorethegulf.gov/sites/default/files/imported_pdfs/library/assets/gccf-faqs.pdf, *archived at* http://perma.cc/PMZ5-RSYW*; see also* FEINBERG, *supra* note 26, at 143–44.

184. *See* FEINBERG, *supra* note 26, at 144.

185. *See* Order and Reasons at 2–3, *In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179, 2011 WL 323866, at *1–2 (E.D. La. Feb. 2, 2011), ECF No. 1098; *see also In re* Oil Spill by the Oil Rig "Deepwater Horizon," 910 F. Supp. 2d 891, 946 (E.D. La. 2012).

to sue BP.[186] The MDL transferee Judge Carl Barbier agreed and held that, while Feinberg might independently evaluate the merits of claims, the GCCF and Feinberg were not neutral or independent of BP.[187]

After settlement negotiations, BP agreed to pay about $7.8 billion for remaining economic claims.[188] The GCCF closed its doors and a court-supervised successor entity administered by Pat Juneau began operations in its stead.[189] BP, in turn, continued to process claims for any claimants who wished to deal directly with BP.[190]

From an environmental justice standpoint, the GCCF lacked an essential element of procedural fairness because of its failure to transparently disclose all BP ties. Because of its blended interim and final payment incentives, it served more as a claims resolution facility than one limited to interim claims processing. This was problematic, particularly for those claimants who were socioeconomically vulnerable and in need of immediate funds. It is difficult to assess whether all of those claimants would have finally resolved their claims in the GCCF, waiving future right to sue, if they had fully understood the linkage between BP and the GCCF and known that they could potentially join the MDL class action lawsuit. In other words, did they truly "want closure" as explained by Feinberg, or were they drawn to the dangling carrot of immediate, easy, higher, and available payout? While one can only guess at the answer, it is certainly conceivable that at least some of the claims can be explained in the latter fashion.

To best comport with procedural justice, interim claims processes should have adequate safeguards to protect a victim's ability to obtain complete relief and to understand the material affiliations of the parties with whom they are negotiating. This is critical when interim claims processing is combined with final claims resolution.

But in many other ways, the GCCF was a remarkable success. GCCF interim claims processing was significantly faster than litigation

186. *See* Order and Reasons, *supra* note 185, at 2–3.

187. *Id.* at 8–11. The court held that this lack of transparency led to a misunderstanding by claimants, particularly by the claimants unrepresented by counsel, and ordered certain corrective measures such as requiring Feinberg, his law firm, and the GCCF to refrain from self-referencing as "independent" or "neutral," and to disclose in all communications that they were acting on behalf of BP. *Id.* at 12–14.

188. Campbell Robertson & John Schwartz, *How a Gulf Settlement that BP Once Hailed Has Become Its Target*, N.Y. TIMES, Apr. 27, 2014, at A1.

189. *See In re Oil Spill*, 910 F. Supp. 2d at 904–05.

190. *Claims*, BP, http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/claims-information.html (last visited June 5, 2015), *archived at* http://perma.cc/8NS7-Q5E4.

in terms of its ability to intake, process, and deliver short-term damage payments to claimants. Consider that, during the one and one-half years of GCCF operations, the facility paid over $6.2 billion to claimants.[191] The number of claims processed was enormous. Over 1 million claims were processed to over 220,000 individuals and businesses.[192] Money flowed to victims almost immediately.[193] In its second full month of operation, it paid over $840 million in emergency advance payments.[194] That is over $27 million per day.[195] Most of those claims were for economic injury, not property damage.[196] Lost earnings or profits constituted 90.3% of the claims received, 96.8% of the amounts paid, and 99.8% of the claims paid.[197] It was not until the attorneys in the MDL took over the settlement process that litigation resulted in money flow to victims. While it was not without flaws, in terms of overall immediate money flow to compensate victims of documented damages, interim claims processing in the GCCF worked.

C. Due Process Concerns

Interim relief implicates issues of procedural and substantive due process. Because interim relief is by definition expeditious and provisional, defendants are concerned that payment prior to adjudication unfairly deprives them of due process of law.[198] After all, if a defendant who has paid interim damages ultimately succeeds on the merits of a claim or defense, the defendant will have been made to pay damages unnecessarily.[199] While the losing party may be forced to repay interim damages that are improperly awarded, this recoupment may not be feasible if the claimant is judgment proof or if the cost of seeking recoupment outweighs the likelihood of collection. Defendants may also find themselves without recourse to seek contribution because other parties do not exist, have not been identified, or successfully

191. BDO CONSULTING, *supra* note 176, at 8.

192. *Id.*

193. *See id.* at 1.

194. *Id.*

195. *Id.*

196. Palmer, *supra* note 1, at 109.

197. BDO CONSULTING, *supra* note 138, at 4.

198. *See, e.g.*, Trustees of the Tampa Maritime Ass'n–Int'l Longshoremen's Ass'n Pension Plan & Trust v. S.E.L. Maduro (Fla.), Inc., 849 F. Supp. 1535, 1538 (M.D. Fla. 1994); Robbins v. Pepsi-Cola Metro. Bottling Co., 636 F. Supp. 641, 677–78 (N.D. Ill. 1986).

199. *Cf.* Sisk, *supra* note 35, at 121–23.

contest liability. Thus, as a practical matter, the defendant may never be able to recapture improperly paid interim damages.

One possible response is to limit recovery for interim damages to situations in which defendants are strictly liable for releases. This ensures that defendants pay interim damages where there is a strong case that the defendants have a legal obligation to pay. This would create a strict liability compensation scheme for private parties and provide a mechanism for interim recovery—the approach that Congress took in OPA.[200] There are only three defenses under OPA, and thus, as a practical matter, responsible parties have little basis for denying liability.[201]

While interim damages could be imposed for negligence, such fault-based claims involve complex issues of reasonableness of behavior that cloud liability obligations. And, although interim damages could be awarded upon a showing of a likelihood of success on the merits, requiring such an individualized showing greatly complicates the judicial burden, potentially outweighing the benefits of the device. Moreover, it increases the chances of improper payment of interim damages.

Another response to due process concerns is to limit interim payments to situations where there is a readily identifiable responsible party.[202] As a practical matter, this limits the number of releases that will be suitable for interim payments because many releases are discovered that have weak or no factual traceability to an identified

200. *See* Palmer, *supra* note 1, at 137–38.

201. The defenses are an act of God, an act of war, or an act solely attributable to the negligence of a third party with whom the responsible party is not in a contractual relationship. 33 U.S.C. § 2703(a) (2012). Note, too, that even in situations where a responsible party alleges the discharge was caused by a third party act or omission, OPA requires the responsible party to pay the claimant's damages and then provides the responsible party the right to seek indemnity from that third party. *See id* § 2702(d)(1)(B).

202. In OPA, the obligation to provide interim payments is triggered in situations when the oil release is traceable to an identifiable responsible party, typically the owner or operator of a vessel or the terminal from which the substance is emanating. *See* 33 U.S.C. § 2714(a). The President designates a "responsible party," at which point the responsible party has five days to contest the designation. *Id.* § 2714(a) ("When the President receives information of an incident, the President shall, where possible and appropriate, designate the source or sources of the discharge . . . ."); *id.* § 2714(b)(1) ("If a responsible party or guarantor fails to inform the President, within 5 days after receiving notification of designation . . . , such party . . . shall advertise the designation . . . ."). Once officially designated, then the responsible party must advertise its status, pay to clean up the release, and pay damages up to the limit of its liability. *See id.* §§ 2704(a), 2714(b).

party.[203] There are far stronger due process concerns about imposing liability when there is a weak nexus between the defendant and the release. Limiting interim claims payments to situations where there is an identified party responsible for the contamination source addresses these concerns.

To be protective of defendant's due process concerns, payment of interim damages should not compromise a defendant's ability to fully litigate available claims or defenses. The legislature can include a provision clarifying that any interim payments made to claimants before a final disposition of a defendant's liability is not an admission of liability nor does it prejudice the responsible party's ability to prosecute any right, claim, or defense.[204]

D. Judicial Manageability Concerns

If the interim payments require judicial action, there is a concern that the time and resources required to evaluate each individual claim, address arguments over documentation, and handle appeals will be costly and overwhelming.[205] It can be extremely expensive to handle small, individual claims, review documentary support, and secure any necessary expert assistance.[206]

Interim payment does not need to be handled by the judiciary, however. Payments can be processed privately by the responsible party, a third party, or by a delegated executive agency.[207] By incentivizing

203. *See* Jason Scott Johnston, *Is the Polluter Pays Principle Really Fundamental? An Economic Explanation of the Relative Unimportance of Environmental Liability and Taxes in US Environmental Law*, *in* MARITIME POLLUTION LIABILITY AND POLICY: CHINA, EUROPE AND THE US 111, 116 (Michael G. Faure, Han Lixon & Shan Hongjun, eds., 2010).

204. *See generally* MD. CODE ANN., Insurance § 19-104 (LexisNexis 2011) (Maryland Insurance Code, Health Care Malpractice Insurance); 32 C.J.S. *Evidence* § 532 (2008) (discussing how tender of payment may be an admission of liability and discussing statutes prohibiting admission of advance payments as evidence of admission of liability).

205. *See* FEINBERG, *supra* note 26, at 131–32.

206. J. David Prince, *Compensation for Victims of Hazardous Substance Exposure*, 11 WM. MITCHELL L. REV. 657, 700 (1985).

207. *See* Farber, *supra* note 101, at 1124 ("The desirability of compensation does not necessarily mean that a judicial forum is optimal. A legislatively established administrative system might offer several advantages over courts. It could operate under a more comprehensive set of rules. Transaction costs could be lower because agency expertise would produce more efficient decisions. It might also be easier for an agency to produce standardized protocols and payment schedules, which would also simplify the adjudicatory process." (footnote omitted)).

private payments, concerns about manageability are minimized. Courts are generally not involved.

OPA accomplishes this by utilizing financial incentives that encourage responsible parties to promptly and privately pay documented interim damages. OPA contains an interest penalty if a responsible party does not expeditiously pay claims.[208] Specifically, the responsible party is liable for interest beginning on the thirtieth day following presentment up to the date on which the responsible party pays the claim.[209] Prejudgment interest furthers the goal of complete compensation by awarding damages for the lost use of funds, including the opportunity to invest and earn interest from the time of the release to the time of judgment.[210] OPA removes incentives for defendants to delay settlement by compounding damages that are not fully satisfied within ninety days.[211] The statute permits parties who do not have their claims fully satisfied or settled within ninety days to elect to either litigate against the responsible party or to recover the amount of their unsatisfied claim from the Oil Spill Liability Trust Fund (OSLTF).[212] If the OSLTF pays a claim, the OSLTF can then seek recoupment of that amount from the responsible party, along with interest, administrative costs, and attorney's fees.[213] Under this structure, delay causes further damages to accrue, the liability for which encourages responsible parties to provide prompt compensation. Under OPA, recalcitrance does not pay.

208. 33 U.S.C. § 2705(b)(1) (2012) (stating that OPA requires a responsible party to pay interest on claims "beginning on the 30th day following the date on which the claim is presented"). Interest penalties are built into other damage schemes to facilitate prompt payment. For example, state laws governing vehicular insurance coverage include interim payment structures encouraged by interest penalties. *See* Micah J. Penn, 2006 Survey of Rhode Island Law Cases, Metropolitan Property and Casualty Insurance Company v. Barry*, 892 A.2d 915 (R.I. 2006)*, 12 ROGER WILLIAMS U. L. REV. 618, 620 (2007).

209. 33 U.S.C. § 2705(b)(1).

210. Dean Richard, Note, *"An Award Fit for Alice in Wonderland"—Texas Allows Prejudgment Interest on Future Damages:* C&H Nationwide, Inc. v. Thompson*,* 37 *Tex. Sup. Ct. J. 149 (Nov. 24, 1993)*, 25 TEX. TECH. L. REV. 955, 959, 980 (1994).

211. *See* 33 U.S.C. § 2713(c)(2) ("If a claim is presented in accordance with subsection (a) of this section and . . . the claim is not settled by any person by payment within 90 days . . . , the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.").

212. *Id.*

213. *Id.* § 2715(c) ("[A]ction[s] on behalf of the Fund [will include] interest (including prejudgment interest), administrative and adjudicative costs, and attorney's fees.").

Without legislative encouragement, there is little incentive for a party to voluntarily pay interim damages. It is economically advantageous to the responsible party to delay resolution of the damage award and often in a defendant's best interest to zealously litigate outstanding questions of liability, damages, and contribution.

V. CONCLUSION

One of the fundamental roles of government is to facilitate the availability of compensation in the event of a disaster.[214] As a component of this role, governments should create enforceable tort rights where necessary against those who cause man-made disasters to achieve justifiable compensation for victims.[215] This is particularly true for hazardous substance releases, which have the potential to create mass harms, sometimes transforming the harm into a larger, arguably "quasi-public," disaster.[216]

Expanding private victim recovery to include pure economic loss and permitting recovery on an interim basis achieves more full and fair compensation, promotes environmental justice, encourages safe practices and behaviors, and avoids undue litigation-related stress. Without interim payments and pure economic damage recovery, there is a problematic compensation gap. Many hazardous releases damage public resources like water and air. Because many victims did not experience private physical or personal property harm, the pure economic loss rule effectively bars them from recompense. Yet, those victims suffered economic loss. In some instances, that loss can be catastrophic.

Limited exceptions exist permitting recovery for commercial fisherman, family members, and victims of oil releases, but those exceptions are not sufficiently broad to cover the full gamut of victims who should recover. Even when pure economic loss is recoverable as a consequence of physical or property injury, there is a problematic delay in compensating private victims that further compounds their harm.

On the other hand, interim payments and pure economic damages raise concerns. The most widely recited fear is of open-ended liability

214. *See* Sugarman, *supra* note 85, at 14.

215. *See id.*

216. *See* Issacharoff & Rave, *supra* note 128, at 401 (Man-made disasters have the potential to create mass harms which "take on the quality of public law litigation, even if played out in thousands of claims for public recompense." (footnote omitted)).

that will cause insolvency and industry exodus, make insurance difficult or too pricey to obtain, or cause firms to overspend on deterrence measures that they pass onto consumers.[217]

Because these damage mechanisms provide just, equitable, and fair compensation, and advance tort goals, concerns such as the fear of open-ended liability, while important to consider, need not defeat the endeavor. As a policy matter, these concerns raise important issues that need to be addressed in the ultimate design of a system that facilitates interim payments and pure economic damage recovery. Damage caps, in tandem with financial assurance requirements, for example, although imperfect vehicles to fully compensate all victims, provide a policy compromise that balances expanded compensation with limitations on the scope of liability. Other devices, including proximate cause rules and limitations on the type and amount of releases to trigger recovery, serve to provide a measure of certainty about the scope of liability. Imposing interim damage liability only in strict liability situations where there is a readily identifiable responsible party mitigates due process concerns and lessons the judicial burden.

"In tort law, 'big' is not necessarily 'bad.' The scale of litigation is not by itself a reason for courts to flinch."[218] When the goal is worthwhile, it is a question of how, not whether, to structure the system.

217. Perry, *supra* note 7, at 14–16.

218. Farber, *supra* note 101, at 1128.