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George M. Chalos

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A PRACTICAL GUIDE TO THE OIL SPILL LIABILITY TRUST FUND CLAIM SUBMISSION PROCEDURES

GEORGE M. CHALOS‡

I. OVERVIEW

The Oil Spill Liability Trust Fund ("OSLTF") was established, in the wake of the *EXXON VALDEZ* oil spill, to provide funds for those who have suffered loss or damages due to an oil spill.[1] Generally, a party who incurs a loss or cost or both as a result of an oil pollution incident must submit claims against the Responsible Party ("RP") or its guarantor for reimbursement and compensation. Under certain circumstances, such a claimant may be entitled to submit claims

‡ George M. Chalos, Esq. of The Chalos Law Firm, LLC, Americana House, 10 Audrey Avenue, Oyster Bay, New York 11771.

1. Michael G. Chalos, Esq., a senior member of The Chalos Law Firm, was the lead defense attorney for Captain Joseph Hazelwood, Master of the EXXON VALDEZ, in both the civil and criminal litigation that arose after the VALDEZ oil spill.

directly to the OSLTF.[2] In a similar fashion, an RP and its insurers may make a claim against the fund for reimbursement of certain costs and expenses incurred, as expressly authorized by the relevant regulations.[3]

On August 18, 1990, the Oil Pollution Act ("OPA") was enacted into law in response to the need for specific legislation governing the discharge or substantial threat of discharge of oil into navigable waters, adjoining shorelines, and exclusive economic zones of the United States.[4] OSLTF was designated the funding source for carrying out the statute. Administration of the fund was delegated to the Coast Guard, sparking the creation of the National Pollution Funds Center ("NPFC"). The NPFC is an independent Coast Guard unit, which is the fiduciary agent for the OSLTF. In accordance with OPA, and other pertinent laws and regulations, the NPFC executes programs to, *inter alia*: (1) provide funding to permit timely removal actions following pollution incidents; (2) provide funding for the initiation of natural resource damage assessments ("NRDA") for oil spill incidents; and (3) compensate claimants who demonstrate certain types of damages caused by oil pollution.[5]

The general requirements for submitting claims to the OSLTF are set forth in 33 C.F.R. § 136. This section prescribes regulations for presenting, filing, processing, settling, and adjudicating claims authorized for presentation to the OSLTF.[6] Specifically, 33 C.F.R. § 136.107 provides that all claimants must sign the presented claim. Claims of a subrogor and subrogee for removal costs, and damages arising from the same incident, must be presented together.[7] Accordingly, it is important to assemble a well-qualified and experienced oil spill response and crisis management team to address any pollution incident, as the interests of the insurer and its assured will necessarily merge with respect to claims for reimbursement from the OSLTF. Third-parties may also present claims to the OSLTF pursuant to applicable statutes.[8]

Congress established the OSLTF in 1986.[9] It was authorized for use as part of OPA and is primarily funded by a five cents per barrel tax on oil produced and imported to the United States.[10] The OSLTF provides necessary funding for oil spill removal, natural resource assessment, and restoration, as well as compensation to authorized claimants. An RP may also successfully claim against the OSLTF for removal costs and damages allowed under section 2708 of OPA if: (1)

2. NATIONAL POLLUTION FUNDS CENTER, USER REFERENCE GUIDE 569 (1999).
3. *Id.* at 571.
4. *Id.* at 13.
5. *Id.*
6. 33 C.F.R. § 136.1(a)(1) (1998).
7. 33 C.F.R. § 136.107(a) (1998), which, in pertinent part, provides: "The claims of subrogor . . .and subrogee . . . for removal costs and damages arising out of the same incident should be presented together and must be signed by all claimants."
8. 33 U.S.C. § 2713 (1994).
9. 26 U.S.C. § 9509 (1994).
10. *Id.*

the responsible party is entitled to OPA § 2703 defenses to liability; and (2) no exceptions to limitation of liability apply.[11]

The defenses to liability apply if the sole cause of discharge is: (1) an act of God; (2) an act of War; (3) an act or omission of an independent third-party, if the responsible party establishes by a preponderance of the evidence that it acted with due care and took precautions against foreseeable acts of such third-party; and (4) the responsible party reported the incident and provided cooperation in removal activities.[12]

There are certain exceptions to an RP's limitation of liability including an act of gross negligence, an act of willful misconduct, or the violation of a federal safety, construction, or operating regulation caused a spill.[13]

II. CLAIMS THAT MAY BE SUBMITTED TO THE OSLTF

A person or party may submit claims to the OSTLF for uncompensated removal costs and damages that result from an oil spill's damage to natural resources, real or personal property, subsistence use, revenues, profits and earning capacity, and public services.[14]

An RP, under OPA § 2708, may recover for damages in excess of the limits of liability provided in OPA § 2704. Under OPA § 2704, the limits for tank vessels is the greater of $1,200 per gross ton or $10 million for vessels 3,000 gross tons or greater ($2 million for vessels less than 3,000 gross tons). The limit is the greater of $600 per gross ton or $500,000 for vessels other than tanks.[15]

However, as stated above, under OPA § 2708, an RP may assert a claim to the OSLTF *only* if it can demonstrate its entitlement to a defense or limitation of liability under OPA.[16] In fact, this is the first step which an RP must successfully complete before the NPFC will proceed with the review of any claim.[17]

III. GENERAL REQUIREMENTS FOR PRESENTING A CLAIM AGAINST THE OSLTF

Pursuant to the Code of Federal Regulations the claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director of the NPFC to support the claim.[18]

In addition to complying with the general regulation

11. 33 U.S.C. § 2708(a) (1994).
12. 33 U.S.C. § 2703(a) (1994).
13. 33 U.S.C. § 2704(c)(1) (1994).
14. 33 U.S.C. § 2702(b) (1994).
15. 33 U.S.C. § 2704(a)(1)-(2) (1994).
16. 33 U.S.C. § 2708(a) (1994).
17. Presently, we are in involved with the presentment of a claim against the OSLTF, wherein the NPFC legal counsel requests that we demonstrate entitlement to limitation of liability prior to continuing with the claim review process.
18. 33 C.F.R. § 136.105(a) (1998).

requirements, a claimant must specify all of the claimant's known removal costs or damages arising out of a single incident and separately list, with a certain sum attributed to each, all removal costs and each separate category of damages when submitting a claim.[19] Further, the NPFC's Director retains the discretion to treat removal costs and each separate category of damages for claims submitted separately for settlement purposes.[20]

With respect to insurance, a claimant must provide any information that may cover the removal costs or damages for the claimed compensation.[21] In this regard, the claimant is to provide the name and address of each insurer, the kind and amount of coverage, the policy number, and whether any insurer has paid the claim in full or in part.[22]

IV. TIME LIMITS FOR THE FILING OF CLAIMS

The applicable period of limitations for the filing of claims are set forth in the United States Code and the Code of Federal Regulations.[23] The actual time limit varies depending upon the specific nature of the claim being presented and reasons fully detailed below. The OSLTF will only consider a claim if presented in writing to the NPFC's Director.[24] A claim is deemed presented on the date it is actually received at the NPFC office, unless otherwise indicated in writing by the NPFC'S Director.[25]

V. REMOVAL COSTS

A claim for recovery of removal costs must be presented in writing to the NPFC's Director within six years after the date of completion of all removal actions taken as a result of the oil spill.[26] Date of completion of all removal actions is defined as the earlier of either the actual date of completion of all removal actions for the incident, or the date the Federal On-Scene Coordinator ("FOSC") determines that the removal actions forming the basis for the cost being claimed are completed.[27]

VI. DAMAGES

A claim for the recovery of damages may be presented within three years after the date on which the injury and its connection with the oil

19. §§ 136.105, 136.109.
20. § 136.109(c).
21. § 136.111(a).
22. *Id.*
23. *See* 33 U.S.C. § 2712(h) (1994); 33 C.F.R. § 136.101 (1998).
24. 33 C.F.R. § 136.101(a) (1998).
25. *See* § 136.101(2)(b).
26. 33 U.S.C. § 2712(h)(1) (1994); 33 C.F.R. § 136.101(a)(2) (1998).
27. 33 C.F.R. § 136.101(a)(2) (1998).

discharge were reasonably discoverable with the exercise of due care.[28] If the claim is for recovery of natural resources damages, the claim must be presented within the later period of either the date prescribed in 33 C.F.R. § 136.101(a)(1), or within three years from the date of completion of the natural resources assessment under 33 U.S.C. § 2706(e).[29] Ostensibly, the relevant statute of limitations time period in question is the later of either: (1) the date the injury and its reasonably discoverable connection with the incident in question in the exercise of due care; or (2) three years from the date of completion of the natural resources assessment.[30]

VII. PROOF REQUIRED FOR EACH CLAIM FOR REMOVAL COSTS OR DAMAGES

A. REMOVAL COSTS

Any claimant may present a claim for removal costs.[31] The claimant must, however, establish that the actions taken were necessary for preventing, minimizing, or mitigating the effects of the oil spill; the removal costs were incurred as a result of those actions; and the actions taken were determined consistent with the National Contingency Plan by the FOSC or directed by the FOSC.[32] The amount of compensation allowable "is the total of uncompensated reasonable removal costs . . . that were determined by the FOSC to be consistent with the National Contingency Plan or were directed by the FOSC."[33]

B. NATURAL RESOURCES DAMAGES

An appropriate natural resource trustee may present claims for uncompensated natural resource damages.[34] In order to adequately prove such claims, a claimant must provide documented costs and cost estimates for the claim; identify all trustees who may be potential claimants for the same natural resources damaged; certify the accuracy and integrity of any claim submitted to the Fund; certify that any actions taken or proposed were or will be conducted in accordance with the applicable laws and regulations; certify whether the assessment was conducted in accordance with the applicable provisions of the natural resources damage assessment regulations (33 U.S.C. § 2706(e)(1)); and certify that, to the best of the trustee's knowledge and belief, no other trustee has the right to present a claim for the same natural resources damages and that payment of any subpart of

28. 33 U.S.C. § 2712(h)(2) (1994); 33 C.F.R. § 136.101(a)(1)(i) (1998).
29. 33 C.F.R. 136.101(a)(1)(ii) (1998).
30. *Id.*
31. 33 C.F.R. § 136.201 (1998).
32. § 136.203.
33. § 136.205.
34. § 136.207(a).

the claim presented would not constitute a double recovery for the same natural resources damages.[35]

The amount of compensation allowed for these claims is the reasonable cost of assessing damages, and the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources.[36] If any amounts received from the Fund exceeds the amount actually required to accomplish the activities for which the claim was paid, the trustees must reimburse the Fund for such sums.[37]

C. REAL OR PERSONAL PROPERTY DAMAGES

Destruction of real or personal property claims may be presented only by a claimant either owning or leasing the property.[38] A claimant must establish an ownership or leasehold interest in the damaged property; the property was injured or destroyed; the cost of repair or replacement; and the value of the property both before and after the injury occurred.[39]

For each economic damages claim, the claimant must establish that the property was not available for use and, if it had been, the value of that use; whether or not substitute property was available and, if used, the costs thereof; and that the economic loss claimed was incurred as the result of the injury to or destruction of the property.[40]

The amount of compensation allowable for damaged property is the lesser of three options. Allowable compensation is either the actual or estimated net cost of repairs necessary to restore the property to substantially the same condition that existed immediately before the damage; the difference between the value of the property before and after the damage; or the replacement value of the property.[41]

For economic losses resulting from the destruction of real or personal property, the amount of allowable compensation is the reasonable costs actually incurred for the use of substitute commercial property, or if substitute was not reasonably available, in amount equal to the net economic loss resulting from not having use of the property.[42] However, where substitute commercial property is reasonably available, but not used, "the allowable compensation for the loss of use is limited to the cost of the substitute commercial property, or the property lost, whichever is less."[43] No compensation is allowed for the loss of noncommercial property use.[44]

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35. § 136.209(f).
36. 33 C.F.R. § 136.211(a) (1998).
37. § 136.211(b).
38. § 136.213(a).
39. § 136.215(a).
40. § 136.215(b).
41. § 136.217(a).
42. 33 C.F.R. § 136.217(b) (1998).
43. *Id.*
44. *Id.*

D. SUBSISTENCE USE OF NATURAL RESOURCES

The Code of Federal Regulations sets forth the applicable regulations governing the procedure for obtaining compensation for the loss of subsistence use of natural resources.[45] A claim for the loss of subsistence use of natural resources may be presented *only* by a claimant who actually uses the natural resources for subsistence which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.[46] A claim for loss of profits or impairment of earning capacity caused by a loss of subsistence use of natural resources must be included as part of the claim.[47]

For subsistence claims, a claimant must specifically identify natural resources for which compensation for loss of use is claimed; describe the actual subsistence use made of each specific natural resource; describe how and to what extent the claimant's subsistence use was affected by the injury to or loss of each specific natural resource; describe efforts mitigating the claimant's loss of subsistence use; and describe alternative sources or means of subsistence available to the claimant during the period of time for the claimed subsistence loss and any available compensation to the claimant for loss of subsistence.[48]

The amount of allowable compensation for subsistence claims is "the reasonable replacement cost of the subsistence loss suffered by the claimant, if, during the period of time for which the loss of subsistence is claimed, there was no alternative source or means or subsistence available."[49] Such amounts must be reduced by all compensation made available to the claimant compensating for subsistence loss; all income derived by utilizing the time that would have been used to obtain natural resources for subsistence use; and overheads or other normal expenses of subsistence use not incurred as a result of the incident.[50]

E. GOVERNMENT REVENUES

The applicable regulations governing claims for lost government revenue are set forth at 33 C.F.R. §§ 136.225, 136.227, and 136.229. Only an appropriate claimant sustaining the loss may present a claim for net loss of revenues due to the injury, destruction, or loss of real or personal property or natural resources.[51] A claim for lost revenue includes taxes, royalties, rents, fees, and net profit shares.[52]

When seeking compensation, claimants must identify and describe

45. *See* §§ 136.219; 136.221; 136.223; 136.225.
46. § 136.219(a).
47. 33 C.F.R. § 136.219(b) (1998).
48. § 136.221.
49. § 136.223(a).
50. § 136.223(b).
51. § 136.225.
52. *Id.*

the economic loss, including the applicable authority, property affected, method of assessment, rate, and method and dates of collection.[53] Additionally, the claimant must establish that real or personal property or natural resources were injured, destroyed, or lost, resulting in a loss of revenue.[54] The amount of allowable compensation for this type of claim is the total net revenue actually lost.[55]

F. PROFITS AND EARNING CAPACITY

A claimant sustaining the loss or impairment may present a claim for loss of profits or impairment of earning capacity due to the injury to, destruction of, or loss of real or personal property or natural resources.[56] The claimant does not have to own the damaged property or resources to recover for lost profits or income.[57] A claim for loss of profits or impairment of earning capacity involving a claim for injuries or economic losses resulting from the destruction of real or personal property must be claimed under 33 C.F.R. § 136.213.[58] A claim for loss of profits or impairment of earning capacity involving a claim for loss of subsistence use of natural resources must be claimed under 33 C.F.R. § 136.219.[59]

Several factors are necessary to substantiate a claim for lost profits or earning capacity. Claimants must establish that real or personal property or natural resources were injured or lost; the claimant's income was reduced resulting from injury to, destruction of, or loss of property or natural resources, and the amount of the reduction; and the amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, established by income tax returns, financial statements and similar documents.[60] Additionally, a claimant must state whether alternative employment or business was available and undertaken and, if so, the amount of income received.[61] All income that a claimant received as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.[62]

The amount of allowable compensation for claims of lost profits and earning capacity is limited to the actual net reduction or loss of earnings/profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for all income resulting from the

53. 33 C.F.R. § 136.227(a) (1998).
54. § 136.227(b).
55. § 136.229.
56. § 136.231(a).
57. *Id.*
58. § 136.231(b).
59. 33 C.F.R. § 136.231(c) (1998).
60. § 136.233(a)-(c).
61. § 136.233(d).
62. *Id.*

incident; all income from alternative employment or businesses undertaken; potential income from alternative employment or business not undertaken, but reasonably available; saved overhead or normal expenses not incurred as a result of the incident; and state, local, and federal taxes.[63]

G. GOVERNMENT PUBLIC SERVICES

Only a state or state political subdivision incurring the costs may present a claim for the net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety or health hazards, caused by a discharge of oil.[64]

An authorized claimant must establish the nature and need of the specific public services provided; that the services occurred during or after removal activities; that the services were provided as a result of an oil discharge and would otherwise not have been provided; and the net cost for the services and the methods used to compute those costs.[65] The net cost of the increased or additional service provided by the state or political subdivision is the amount of allowable compensation.[66]

VIII. SETTLEMENT AND NOTICE TO CLAIMANT

A settlement payment in full or the acceptance a settlement offer is final and conclusive for all purposes, and upon payment, constitutes a release of the NPFC from the claim.[67] Upon completion of review, the NPFC will issue its recommendation and offer for each claim submitted. Once an offer is made, it is a firm and final offer. There will be no negotiation of the claim unless additional proofs are submitted.[68]

Acceptance of any compensation precludes the claimant from filing any subsequent action against any person to recover costs or damages that are the subject of the compensated claim, and constitutes an agreement by the claimant to assign to the NPFC subrogation rights.[69] The claimant's failure to accept an offer of settlement within sixty days after the date the offer was mailed by the NPFC voids the offer automatically.[70]

If the NPFC denies a claim, the claimant will be notified by certified or registered mail.[71] Furthermore, failure of the NPFC's Director to make final disposition of a claim within six months after

63. § 136.235(a)-(e).
64. § 136.237.
65. § 136.239(a)-(d).
66. 33 C.F.R. § 136.241 (1998).
67. § 136.115 (a).
68. NATIONAL POLLUTION FUNDS CENTER, *supra* note 2, at 579-80.
69. 33 C.F.R. § 136.115(a) (1998).
70. § 136.115(b).
71. § 136.115(c)

filing shall be deemed at the claimant's option a final denial of the claim.[72] Upon written request, including the factual or legal grounds for relief, the NPFC's Director may reconsider any claim denied.[73] The NPFC Director must receive such requests within sixty days after the date the denial was mailed to the claimant or within thirty days after receipt of the denial by the claimant, whichever date is earlier.[74] Disposition of the request for reconsideration will be made within ninety days after its receipt by the NPFC.[75] If the NPFC denies any motion for reconsideration, the claimant may then commence a federal court action, addressing the issues of obtaining reimbursement or compensation from the OSLTF.[76]

IX. REMEDY FOR DENIAL OF CLAIM

The Administrative Procedures Act ("APA") provides judicial review of a final agency action.[77] Based on the precedent of *International Marine v. Oil Spill Liability Trust Fund,* a denial of appeal for reconsideration is considered to be a final agency action.[78] A court will reverse a final agency action if an RP can affirmatively prove an abuse of discretion or that the agency action was arbitrary and capricious.[79]

If a claimant disputes a final determination by the NPFC, there are certain recourse avenues available. In *Gatlin Oil Co. v. United States,*[80] the plaintiff, Gatlin Oil Co., ("Gatlin"), commenced a suit seeking reimbursement for costs incurred in removing fuel that was discharged from its onshore storage tanks onto the surrounding land and into a local river.[81] Initially, Gatlin sought compensation from the OSLTF for removal costs.[82] The NPFC determined that some claims for compensation made by Gatlin for were not compensable under OPA.[83] Gatlin then filed suit in the United States District Court for the Eastern District of North Carolina. The court, applying the arbitrary and capricious standard of review for agency actions, reversed the NPFC's ruling holding that the Fund Director had acted in an arbitrary and capricious manner. The court determined Gatlin was entitled to

72. *Id.*
73. § 136.115(d).
74. *Id.*
75. 33 C.F.R. § 136.115(d) (1998).
76. The jurisdiction of the relevant district court rests on 28 U.S.C. § 1331 (1994) (which deals with issues of federal question); 33 U.S.C. § 2717(b) (1994) (original jurisdiction granted under the Oil Pollution Act); and section 10(a) of the Administrative Procedure Act, codified at 5 U.S.C. § 702 (1994).
77. 5 U.S.C. § 702 (1994).
78. International Marine v. Oil Spill Liab. Trust Fund, 903 F. Supp. 1097, 1102 n.3 (S.D. Tex. 1994).
79. 5 U.S.C. § 706(2)(A) (1994).
80. Gatlin Oil Co. v. United States, 169 F.3d 207 (4th Cir. 1999).
81. *Id.* at 209.
82. *Id.*
83. *Id.*

compensation for all its recovery costs and damages with interest.[84] Gatlin was entitled to a complete defense because the discharge had been caused by an unknown and unidentified vandal.[85] The court remanded the matter to the NPFC for further fact finding and reconsideration in accordance with its opinion.[86]

The United States appealed the district court's ruling. The Fourth Circuit reiterated that the Fund Director's findings must not be arbitrary, capricious, or an abuse of discretion.[87] The Fourth Circuit further held that a reviewing court should determine the reasonableness of the Fund Director's allowance or disallowance of compensation.[88] After reviewing the case, the Fourth Circuit vacated the district court's rulings and concluded that the Fund Director's findings were correct and remanded the matter to the district court for further proceedings.[89]

X. PRACTICAL CONSIDERATIONS IN PRESENTING CLAIMS ON BEHALF OF RESPONSIBLE PARTIES[90]

When presenting a claim to the OSLTF, each claimant has the burden of proving its entitlement to receive compensation. When presenting a claim on behalf of an RP, the RP is responsible for demonstrating its defenses and right to limitation of liability. Ostensibly, the RP must affirmatively prove that the spill was not caused by its own gross negligence. In meeting this burden, the RP can rely on the Coast Guard investigative findings, judicial determinations, and any other evidence the RP wishes to submit.

Difficulty may arise if the Coast Guard investigation report is delayed. The bureaucratic nature of the Coast Guard infrastructure tends to lend itself to requiring a substantial amount of time and internal review before the final findings are available. This may create an obstacle for a party proving its entitlement for further review of its claim.

While the NPFC provides an initial claim form for presenting a claim to the NPFC, there is no prescribed format for presenting a claim against the OSLTF. The claim regulations provide *some* guidance as to the content of general claim submissions.[91] A claim submission must be a signed written document with a sum certain stated. In addition to identifying the date, time, place of incident, and

84. *Id.*

85. *Id.* at 210.

86. *Gatlin Oil*, 169 F.3d at 210.

87. *Id.* at 212.

88. *Id.* (citing 33 C.F.R. §§ 136.205 and 136.235, providing for the type of compensation allowable under these regulations).

89. *Id.* at 214.

90. Based on the experience of The Chalos Law Firm, LLC in presenting claims against the OSLTF and the NPFC, this section is intended as a summary of experience and suggestions which may prove useful to others in presenting claims to the NPFC.

91. *See* 33 C.F.R. §§ 136.105-136.113 (1998).

identity of claimant, the claim submission must contain a statement certifying that all material facts are included therein and are accurate.

In providing factual narratives and other evidence as part of the claim process, the claimant must be very careful in selecting what statements to make. Such statements may be used as admissions in third–party litigation or by the Coast Guard to supplement its own findings.

The NPFC review process can be painstakingly slow, as undertaking such a review is a complex and tedious task. Once a claimant has demonstrated its entitlement for claim submission, an NPFC Claims Adjuster must review each and every item on each and every document submitted. In order to facilitate review and processing, a neat, detailed, and organized claim is necessary. The use of summary sheets and spreadsheet software is recommended. Summaries are useful as guides for reviewing supporting documentation such as invoices and daily job reports. Additionally, backup or supporting documentation segregated in binders for each spill responder or contractor with clear delineation of sub–contractor support, documents, and invoices is also recommended.

The neater and more organized a claim, the more likely it will be reviewed and adjusted "in–house" by the NPFC. A claimant may present summary spreadsheets by hard copy or on computer diskette, utilizing any major spreadsheet applications. Presenting a claim in this manner not only saves the NPFC time by way of facilitating its claim review process, but also may speed up the claim determination process, saving the claimant time and money. Haphazard submissions may result in unnecessary delay in the processing of a claim.

Some problems can arise, even when a neat and organized claim has been submitted. The NPFC Claims Adjuster will necessarily review each and every item on all invoices. Thorough review often reveals problems inherent in the supporting documentation. Due to the chaotic nature of an oil spill response, support documents, including sign–in logs or daily reports, are often missing or incomplete. Illegible documents and inconsistent subcontractor documents are problematic. Computation and transcription problems may become evident in summaries or support documents. Other discrepancies may occur when a response contractor's notes are inconsistent, missing, or otherwise objectionable to the NPFC Claims Adjuster.

The government, in an effort to pay what it deems to be an appropriate rate, will attempt to pay Basic Ordering Agreement ("BOA") rates rather than the contractor's actual response rate. However, in evaluating a claim, the government may allow for some reasonable mark–ups. In reviewing claims including overtime payments, "overtime" is generally considered only after the eight hours per day and forty hours per week threshold has been surpassed. New policy directives may be issued in the near future, providing better guidance in this regard.

XI. CONCLUSION

The relevant guidelines and regulations for presenting a claim against the OSLTF are clearly set forth in the United States Code and the Code of Federal Regulations. However, despite such legislation and the fact that OPA and the NPFC have been in existence for nearly a decade, the case law precedent concerning what is or is not a valid claim on behalf of an RP is scarce. In this author's opinion, the claims procedure and its controlling legislation are well drafted, however, without supplementation by specific court interpretations, comprehensive guidance is lacking.

There is a scarcity of case law interpreting the provisions of OPA, specifically section 2704, and case law defining when an RP has a limited liability entitlement. As discussed above, an RP must demonstrate its entitlement to a limitation of liability prior to the NPFC undertaking the task of reviewing a claim presented. However, from the current precedent available and the statutory legislative history, it seems clear that only a finding of *gross negligence* or *willful misconduct* will defeat the assertion of a limitation of liability under OPA § 2704.

In *National Shipping Co. v. Moran Mid-Atlantic Corp.*, the court interpreted OPA § 2704 with respect to a case of a tugboat that collided with another vessel and resulted in an oil spill.[92] The collision in that case was caused by the tugboat captain's "failure to properly control his vessel."[93] The court found that the captain's actions constituted a "lack of due care" amounting to "negligence under maritime law."[94] In discussing whether section 2704(c)(1)(a) should deny the tug operator's right to limit its liability, the court distinguished the captain's ordinary negligence from the "gross negligence or willful misconduct" language contained in the statute.[95] Holding that section 2704(c)(1)(a) did not apply, the court stated, "[t]his is simply a case of ordinary negligence, a failure to exercise reasonable care."[96]

The *National Shipping* decision does not elaborate on the distinction between ordinary negligence and the requisite level of gross negligence or recklessness required before an RP would otherwise be denied its right to limit its liability pursuant to OPA § 2704. Notwithstanding, it has been successfully argued to the NPFC that the only reasonable reading of the language of the governing statute and the court's decision in *National Shipping* must recognize that in order for section 2704(c)(1)(a) to apply, there must be a finding of something *significantly* more than mere carelessness or ordinary negligence.

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92. National Shipping Co. v. Moran Mid-Atlantic Corp., 924 F. Supp. 1436 (E.D. Va. 1996), *aff'g*, 1998 A.M.C. 163 (4th Cir. 1997).

93. *Id.* at 1452.

94. *Id.* (citing *Benedict on Admiralty* § 3.02[B][4] (7th ed. 1995)).

95. *Id.* at 1453.

96. *Id.*

The legislative history of OPA supports this interpretation. One congressman summed up section 2704(c)(1)(a) as follows: "[W]here gross negligence is the case, where there is willful misconduct, there is no limit on liability in this bill. Where there is simple negligence, where there is human error involved, there is a limit on liability."[97]

In speaking during a congressional debate concerning the removal of the "gross negligence or willful misconduct" language from § 2704(c)(1)(a), Mr. Miller of California stated to the House that "[t]he standard of breaking liability limits [under the unamended Act] . . . is gross negligence or willful misconduct."[98] He further stated that "[b]oth are very difficult to prove."[99] In describing the high burden of proving gross negligence, Mr. Miller stated, "Prosser on Torts describes gross negligence as the failure to exercise even that care which a careless person would use. Is that really the standard we want to attribute to the people who would ship oil in ships that hold up to a million barrels of oil?"[100]

Similarly, Mrs. Kenneally of Connecticut used a famous example by Justice Holmes to illustrate why she thought mere negligence should be the standard contained in section 2704(c)(1)(a). She stated:

> Take the simple law school banana peel example. If an individual shopping in a supermarket slips on a banana peel and breaks his leg, the supermarket is liable if negligence is proven; that is, if normal and reasonable maintenance was not performed to eliminate obstructions in the aisles of the store. If the liability standard was gross negligence, the burden of proof would rest on the prosecutor to show that the store owner knowingly, and in fact, intentionally placed the banana peel on the floor.[101]

Based upon the foregoing, it has been our position and contention that Congress envisioned a high standard of negligence when it ultimately enacted the final version of OPA. However, there has been no case law upon which to concretely rest such assertion. While it seems to be the clear and logical conclusion drawn from the legislative history and the case law most closely related, this author looks forward to the day when the issue of what constitutes mere negligence and what constitutes gross negligence in an oil pollution incident is decided. Accordingly, when such bright line distinctions are available, an RP may have some guidance and authority to rely upon in presenting its claims for reimbursement to the NPFC, and will not be required to rely so heavily upon the NPFC Director's learned discretion.

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97. 135 CONG. REC. H 8120, 8134 (1989) (statement of Mr. Carper).
98. 135 CONG. REC. H 8157, 8157(1989).
99. *Id.*
100. *Id.*
101. *Id.* at H 8165.