The ITC incident

On Sunday, March 17, 2019, at approximately 10:00 a.m., a storage tank caught fire at the Intercontinental Terminals Company (ITC) Deer Park facility, near Houston, Texas. The fire burned for several days, destroying numerous storage tanks, and eventually caused the closure of the Houston Ship Channel due to the release of petroleum products from the ITC facility into the navigable waters of the United States.

Business interruption claims

The ITC incident and associated spill have caused enormous disruption to many parties that rely on the ship channel for commerce. Specifically, the ITC incident has caused a number of entities who operate in the commodities trading industry, and other related industries, to incur significant business losses, including delay costs, profit losses, demurrage and detention costs, and lost business opportunities. In addition to demurrage and delay fees charged to the many vessels impacted by the ship channel closure, many entities have been forced back into the marketplace to obtain the products they can no longer access because of the events associated with the ITC incident.

The Oil Pollution Act (OPA)

Applying the “economic loss rule,” the Fifth Circuit and other Texas courts have placed restrictions on a party’s ability to recover economic damages in these types of situations and held, in cases involving general maritime law, that economic damages must be accompanied by some form of actual damage to the claimant’s property to be recoverable, absent a contract between the claimant and the Responsible Party. These restrictions can be overcome, however, by asserting a statutory claim for recovery of economic damages under the Oil Pollution Act (OPA). Responsible Parties under OPA are typically owners and operators of the facility or vessel where the discharge occurred as well as those causing the discharge. It seems a foregone conclusion that ITC will be designated as a Responsible Party in connection with the recent incident at its terminal. Congress passed OPA after the Exxon Valdez oil spill to streamline federal law to provide for quick and efficient cleanup of oil spills, to compensate victims of such spills, and to internalize the costs of spills within the petroleum industry. Not surprisingly, OPA played a critical role in the claims process related to the Deepwater Horizon/Macondo Oil Spill in 2010.

The ITC incident falls within OPA because the explosion resulted in the discharge of various petroleum products—including naphtha, gasoline blends, pyrolysis gasoline, and base oil—into the navigable waters of the United States, which further resulted in the Coast Guard closing the ship channel. Various
courts in the Fifth Circuit have recognized the viability of claims for economic damages under OPA in similar circumstances.

Claim submission—avoid the pitfalls

OPA includes several procedural hurdles that must be cleared before a claimant can successfully submit a claim under the statute. For example, parties must first submit their damages claim to the Responsible Party (as identified by the U.S. Coast Guard). Responsible Parties are strictly liable for cleanup costs and damages and first in line to pay any claims for removal costs or damages that may arise under OPA. If the claim is denied, the claimant then has the option of filing suit against the Responsible Party or making a claim against federal funds that have been set aside to compensate parties injured as the result of a spill. The initial claim requirement has been described as a “mandatory condition precedent barring all OPA claims” unless and until claimant has made a presentment to the Responsible Party. *Nguyen v. Am. Commercial Lines LLC*, 805 F.3d 134, 139 (5th Cir. 2015). OPA does not impose overly burdensome proof requirements for claims to the Responsible Party, requiring that the claimant submit “a request, made in writing for a sum certain, for compensation for damages or removal costs resulting from an incident.” 33 U.S.C. § 2701(3). Generally, the claim requirement is satisfied with proof of losses, such as tax returns, lost contracts, and business licenses, coupled with a specified amount of damages supported by the documentation.

Once a claim has been submitted, the Responsible Party has 90 days to settle the claim. 33 U.S.C. § 2713(c). If the Responsible Party denies the claim or does not settle the claim within the 90-day time frame, the claimant is entitled to pursue its claim against the Oil Spill Liability Trust Fund (OSLTF) or pursue an OPA claim in litigation. These options are generally treated as mutually exclusive because OPA precludes the approval of a claim against the OSLTF “during the pendency of an action by the person in court to recover costs which are the subject of the claim.” 33 U.S.C. § 2713(b)(2).

If the claimant opts to pursue its claim against the OSLTF, the claim requirements are more burdensome than those applicable to the claims presented to the Responsible Party. For example, the regulations governing OSLTF claims require, among other things, additional details regarding communications with the Responsible Party, potential insurance coverage, identifying each witness to the discharge, evidence of mitigation efforts, and itemized damages.

If the claimant decides to forego a claim against the OSLTF, the claimant may choose to file suit against the Responsible Party under OPA in federal court. Venue for the suit is appropriate in the district where the spill occurred or where the Responsible Party has its principal office. OPA’s statute of limitations expires three years after the date of loss, 33 U.S.C. § 2712(h), and any claim must be presented to the Responsible Party at least 90 days before the expiration of the
three-year limitations period. *Nguyen*, 805 F.3d at 142-45.

The liability of onshore facilities is capped at $350 million, 33 U.S.C. § 2704(a), but that $350 million cap is inapplicable if the damage resulted from gross negligence or the violation of federal safety, construction, or operating regulations by the Responsible Party, an agent or employee of the Responsible Party, or a person acting pursuant to a contractual relationship with the Responsible Party. 33 U.S.C. § 2704(c).

Under OPA, each Responsible Party is liable for damages, including "[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." 33 U.S.C. § 2702(b)(2)(e). Courts in the Fifth Circuit have refused to make oiling of physical property of the claimant a prerequisite for recovery of damages under the OPA; instead, they have found triable issues of fact as to causation when claimants seek damages for loss of business resulting from the closure or loss of use of a natural resource such as a river.

**There are substantial risks associated with pursuing economic loss claims without understanding the issues**

As described above, the path to recovery is marked by procedural hurdles. ITC has set an arbitrary deadline of June 25, 2019 for claim submission. By contrast, OPA simply provides for a three-year statute of limitations on claims, so long as any claims are presented to the Responsible Party at least 90 days before the expiration of the limitations period. ITC is also seeking full settlement of claims in violation of certain OPA provisions. OPA states that the Responsible Party shall establish a procedure for the payment or settlement of claims for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled. Any interim payment does not preclude recovery by the claimant for damages not reflected in the paid or settled partial claim. 33 U.S.C. § 2705. OPA also prevents the Responsible Party from refusing to consider claims submitted by a claimant’s attorney or imposing overly onerous documentation requirements. *Nguyen*, 805 F.3d at 139-42.

In summary, while ITC has established a website for submitting claims for business economic losses at itcclaims.com, the procedures established for doing so raise issues that bear careful consideration. Among other things, the ITC claims website imposes a very short three-month window for filing economic loss claims, requires extensive documentation, and states that the execution of a full release is a prerequisite to any payment. These requirements appear inconsistent with OPA and Fifth Circuit case law interpreting it. Businesses filing claims will want to consider how best to approach this process without waiving important legal rights.

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Legal Alert: Uncharted waters—the path to recovery for business interruption related to oil spills

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