Ballard Shipping Co. v. Beach Shellfish: The End Of The Era When Rohins Dry Dock Foreclosed State Jurisdiction Over The Recovery Of Economic Damages From Oil Spills

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In its 1994 decision, *Ballard Shipping Co. v. Beach Shellfish*, the United States Court of Appeals for the First Circuit allowed private parties to sue under state law for purely economic losses resulting from a marine oil spill. The court held that the Rhode Island Environmental Injury Compensation Act (the Compensation Act), which permits such plaintiffs to sue, is not preempted by federal admiralty law, which would have barred suit. The long-standing rule in admiralty, encapsulated in the case *Robins Dry Dock & Repair Co. v. Flint*, is that purely economic losses are not compensable in the absence of damage to property or person. The *Ballard Shipping Co. v. Beach Shellfish* litigation resulted from a major spill of heating oil from the tanker M/V World Prodigy into Rhode Island's Narragansett Bay in June 1989. The First Circuit's decision is noteworthy in two regards. First, in it the court applied a refinement in admiralty preemption analysis that had been laid down in 1994 by the United States Supreme Court in *American Dredging Co. v. Miller*. *Ballard Shipping*’s early application of the *American Dredging* preemption analysis gives the case visibility. Second, *Ballard Shipping*’s greater significance is in the First Circuit’s substantive holding that the *Robins*
Dry Dock rule is not a "characteristic feature" of maritime law the "material prejudice" of which would trigger preemption. The First Circuit's holding signals the end of Robins Dry Dock as a bar to claims under state law for purely economic damages caused by a marine oil spill.

Prior to Ballard Shipping, the Robins rule served as a nearly complete shield from liability for marine oil spills, until the effective date of the Oil Pollution Act of 1990. Before this time, state common law and statutory attempts to allow recovery to injured parties were generally preempted.

This Note discusses the role of the Ballard Shipping decision in signaling the end of the Robins Dry Dock era, when the recovery of purely economic losses from oil pollution was foreclosed.

II. LEGAL BACKGROUND

A. Admiralty Jurisdiction

The Constitution grants the federal courts authority over "all Cases of admiralty and maritime Jurisdiction." Oil spills that occur on navigable waters and arise out of traditional maritime activity are subject to federal admiralty jurisdiction, and federal maritime law, which is largely uncodified. The federal courts were vested with "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" by the Judiciary Act of 1789. The act, however, contained a provision "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." The modern version of this statute saves for suitors "all other remedies to which they are otherwise entitled." This means that the fact that a plaintiff's claim comes under admiralty jurisdiction doesn't necessarily foreclose remedies under state law as well. Such state claims may be brought in state court or, where there is a basis for federal jurisdiction, in federal court.

9. 1 Stat. 76-77 (1789).
10. Id.
12. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d at 623, 626 (1st Cir. 1994).
the state law applied needs to “conform to governing federal maritime standards.”

**B. Southern Pacific Co. v. Jensen, and American Dredging Co. v. Miller**

Two Supreme Court decisions, *Southern Pacific Co. v. Jensen*\(^\text{14}\) in 1917, and *American Dredging Co. v. Miller*\(^\text{15}\) in 1994, provide the legal framework to determine whether a state law conflicts with governing federal maritime standards sufficiently to justify preemption. In *Jensen*, the Court held that state law affecting maritime commerce is unconstitutional if it fails any of three prongs: first, if it “contravenes the essential purpose expressed by an act of Congress;” second, if it “works material prejudice to the characteristic features of the general maritime law;” or third, if it “interferes with the proper harmony and uniformity of that law in its international and interstate relations.”\(^\text{16}\)

In 1994, the three-prong test of *Jensen* was confirmed in *American Dredging*.\(^\text{17}\) The Supreme Court narrowly construed *Jensen’s* second prong by interpreting the term “characteristic feature” to apply only to a federal rule that either “originated in admiralty” or “has exclusive application there.”\(^\text{18}\) This is a critical narrowing because it means that if a federal rule did *not* originate nor find exclusive application in admiralty, concurrent state law does *not* need to be consistent to satisfy the second prong of the *Jensen* test.\(^\text{19}\)

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13. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 223 (1986) (citations omitted). “[T]he extent to which state law may be used to remedy maritime injuries is constrained by a so-called ‘reverse-Erie’ doctrine which requires that the substantive remedies afforded by the states conform to governing federal maritime standards.” *Id.*
17. American Dredging Co. v. Miller, 510 U.S. at 447 n.1 (decided after the District Court’s dismissal of the *Ballard Shipping* case, but before the First Circuit appellate decision).
18. *Id.* at 450.
19. The combined *American Dredging-Jensen* preemption test has been applied in several reported cases: Calhoun v. Yamaha Motor Corp., U.S.A., 40 F.3d 622, 627-629, 637 (3d Cir. 1994) (Pennsylvania wrongful death and survival statutes were not preempted by the Jones Act nor by the general maritime law under the *American Dredging-Jensen* test), aff’*d*, 116 S.Ct. 619 (1996); *In re Nautilus Motor Tanker Co.*, 900 F. Supp. 697, 702-03 (D.N.J. 1995) (New Jersey common law private right of action for purely economic
C. Rhode Island Environmental Injury Compensation Act

The Compensation Act became effective on September 30, 1990, but is applicable retroactively to any cause of action pending in court on that date or later, regardless of when the violation or negligent act occurred, so long as suit was commenced within the applicable statute of limitations. The Compensation Act provides that a person is entitled to recover for economic losses if he or she can show financial losses arising from damage to natural resources of the state of Rhode Island; where such damages are caused by a violation of any provision of the state's piloting or water pollution laws, or caused by negligence of the owner or operator...
of a seagoing vessel. 21 The injured party can recover for purely economic losses without sustaining physical injury to person or property. 22


46-12.3-2. Strict Liability. — The owner, operator, and/or his or her or its agent of any seagoing vessel . . . entering the waters or waterways of this state who shall violate the provisions of chapter 9 or 9.1 of title 46, regarding the obligation of a vessel to have a licensed pilot on board prior to entering a navigable waterway of the state or chapter 12 of title 46, regarding water pollution or any violation of any permit, rule, regulation, or order issued pursuant thereto, shall be strictly liable for any injury or damage resulting from the violation, including, but not limited to, damage or injury to the environment or natural resources of the state, injury to the person, property damage, or economic loss to any individual, corporation, partnership, or other business entity.

46-12.3-3. Action on negligence. — Any person who sustains personal injury, property damage, or economic loss as a result of the negligent act of any owner, operator, and/or his or her or its agent of any seagoing vessel . . . entering the waters or waterways of the state, shall be entitled to maintain an action to recover the damages pursuant to the provisions of § 46-12.3-1.


46-123-4. Recovery for economic loss. — A person shall be entitled to recover for economic loss . . . if the person can demonstrate the loss of income or diminution of profit to a person or business as a result of damage to the natural of the state of Rhode Island caused by the violation of any provision [of the piloting or water pollution laws] . . . by the owner or operator . . . of the seagoing vessel and/or caused by the negligence of the owner or operator . . . of the seagoing vessel.

(b) In any suit brought to recover economic loss it shall not be necessary to prove that the loss was sustained as a result of physical injury to the person or damage to his or her property, nor shall it be a defense to any claim that the defendant owed no special duty to the plaintiff or that the loss was the result of governmental action taken in response to the violation and/or negligence of the defendant.

(c) Without limiting the generality of the foregoing, persons engaged in commercial fishing or shellfishing and/or the processors of fish or shellfish, who can demonstrate that they have sustained a loss of income or profit as a result of damage to the environment resulting from [violations of law or negligence] . . . shall have a cause of action for economic loss. Persons employed by, or who operate businesses, who have sustained a loss of income or profit as a result of a decrease in the volume of business caused by the damage to the environment shall also be entitled to maintain an action for economic loss.

Id.
D. The Rule of Robins Dry Dock & Repair Co. v. Flint

Liability for purely economic tort damages resulting from maritime shipping activities has for many years been limited by the doctrine of Robins Dry Dock. In this 1927 case, a steamship's propeller was negligently damaged while the vessel was being serviced at the Robins Dry Dock & Repair Company. The damage extended the necessary time for repairs. George Flint sued the Robins company for lost profits that he would have earned if the ship had been available on time for him to charter as he had contracted. In the Supreme Court's majority opinion, Justice Holmes said:

[N]o authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make a tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. . . . The law does not spread its protection so far.

The holding of Robins Dry Dock can be read narrowly to limit only losses resulting from unintentional interference with contract. However, the majority view, and that adopted by the First Circuit, is that Robins Dry Dock is a bar to third parties' claims under federal maritime law for


25. Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1021-1028 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986). Circuit Court Judge Higginbotham's opinion for the majority carefully documents both the broad acceptance of the rule of Robins Dry Dock and the application by courts in America and England of a bar on recovery for purely economic damages from both maritime and nonmaritime torts for half a century before the Robins decision. Id. at 1021-23. This historical account was significant for the Ballard Shipping court because it clearly documents that the Robins Dry Dock rule did not originate in admiralty nor was it exclusive to admiralty.

any purely economic losses arising from an unintentional maritime tort in the absence of physical injury, with few exceptions.\textsuperscript{27}

E. Oil Pollution Act of 1990

The Oil Pollution Act of 1990 (OPA)\textsuperscript{28} was Congress' response to a series of major oil tanker spills that polluted American waters and shorelines in the 1980s.\textsuperscript{29} Prior to this enactment, the United States Congress had refused to sign onto several international oil pollution protocols, primarily because they would have barred oil spill liability under state law.\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{27}See Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974) (allowing claims by fishermen); Dick Meyers Towing Serv., Inc. v. United States, 577 F.2d 1023, 1025 (5th Cir. 1978), \textit{cert. denied}, 440 U.S. 908 (1979) (allowing claims for economic losses that are intentionally caused).
\item \textsuperscript{28}33 U.S.C. §§ 2701-2761 (1994).
\end{itemize}

\begin{itemize}
\item During the past two years, America's waters and shores were fouled repeatedly by oil spewed from the torn hulls of leaking tankers. Globs of oil from wrecked ships victimized the Texas coast and were commonplace in New York harbor. A similar fate struck the California shoreline, the Delaware River, Rhode Island's Narragansett Bay and, of course, Alaska's Prince William Sound. Virtually every major waterbody in our nation has been scarred by spilled oil.
\item Id. at 237-238.
\item \textsuperscript{30}Mitchell, \textit{supra} note 29, at 237.
\end{itemize}

This comprehensive oil spill legislation had been stymied for years because of a dispute over whether such a law should preempt state laws regarding oil spills, and in particular whether the United States should adopt international oil spill liability agreements which would preempt both state and federal oil spill liability schemes. Ultimately, in the OPA, Congress rejected preemption of state law by federal law and preemption of state and federal law by the international agreements. . . . Most importantly, the OPA specifically preserves the authority of the states to retain or establish more stringent liability schemes than the OPA itself provides.

Before passage of the OPA, efforts to enact a tough new oil pollution law had been stymied for more than ten years, principally by a fundamental disagreement concerning the wisdom of preemption state authority to impose additional liability requirements on the oil shipping industry.
OPA affects many aspects of oil spill liability, but in the context of the *Ballard Shipping* decision, two aspects are of particular importance. For oil spills that take place on or after the Act’s effective date, August 18, 1990, OPA allows compensation for purely economic losses. It also specifically allows concurrent jurisdiction for states by providing that neither OPA nor the Shipowner’s Limitation of Liability Act of 1851 preempts state imposition of additional liability, or requirements, with respect to “the discharge of oil or other pollution by oil within the state.”

III. *BALLARD SHIPPING CO. V. BEACH SHELLFISH*

A. Facts

The dispute in *Ballard Shipping* resulted from the June 23, 1989, spill of over 300,000 gallons of heating oil into Narragansett Bay, Rhode Island, from the oil tanker *M/V World Prodigy*. The tanker, owned by

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Id. at 237-239.


32. “Damages 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) (1994).


34. (a) Preservation of State authorities; Solid Waste Disposal Act

Nothing in this chapter or the Act of March 3, 1851, shall —

(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to —

(A) the discharge of oil or other pollution by oil within such State; or

(B) any removal activities in connection with such a discharge; or

(2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law . . . .

(c) Additional requirements and liabilities; penalties

Nothing in this chapter, the Act of March 3, 1851, (46 U.S.C. 183 et seq.), or section 9509 of Title 26, shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof —

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge, or substantial threat or a discharge, of oil.

Ballard Shipping Co., ran aground when it strayed from the designated shipping channel and collided with a rock about one mile south of Newport at the mouth of the bay. Due to the oil contamination, the State of Rhode Island closed Narragansett Bay to all fishing activities for two weeks during and after the oil spill clean-up operations.35

Almost 450 parties filed suit against Ballard Shipping claiming injuries from the oil spill.36 In December, 1989 the company filed a motion in admiralty37 for either the limitation of, or exoneration from, liability.38 The company also moved for dismissal of twenty-nine suits filed by various plaintiffs.39 These plaintiffs included: seafood dealers, tackle shop operators, restaurant owners and employees, a scuba equipment and canoe rental shop, and a variety of other shoreline businesses operating in the Narragansett Bay area. The parties claims were for purely economic injuries resulting from loss of business caused by the spill. At trial, Ballard did not deny that these parties may have suffered financial harm as a result of the oil spill, but argued that they were barred from legal remedies for these purely economic claims.40 The District Court for the District of Rhode Island determined that admiralty jurisdic-

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35. The captain was charged with violating state law by entering the bay without a local pilot on board as required. Both the captain and the company also were charged, pleaded guilty, and were fined for criminal violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c) (1994). In addition to fines of $30,500 from the captain and $500,000 from Ballard Shipping, the company agreed to pay $3.9 million in compensation for federal clean-up cost, $4.7 million for state clean-up costs and damage to natural resources, $500,000 of which was to be available to compensate individuals, and $550,000 to settle claims for lost wages by local shellfishermen. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 624 (1st Cir. 1994).


37. Admiralty court serves as the forum even for nonadmiralty motions for limitation of maritime liability. "The court of admiralty in [a limitation of liability] proceeding acquires the right to marshal all claims, whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the res and by judgment in personam against the owner, so far as the court may decree." Just v. Chambers, 312 U.S. 383, 386 (1941).


39. Id.

40. Id.
tion applied, and held that *Robins Dry Dock* barred suits in admiralty for purely economic injuries and granted Ballard’s motion to dismiss.41

**B. Arguments on Appeal**

A group of shellfish dealers appealed the district court’s dismissal to the United States Court of Appeals for the First Circuit. They alleged negligence under the general maritime law and Rhode Island common law, but emphasized their claims under the Compensation Act. The shellfish dealers alleged severe economic losses arising from the two week suspension of shellfishing during the busiest time of harvesting season.42

The First Circuit affirmed the district court’s holding that *Robins Dry Dock* foreclosed the shellfish dealers’ maritime law claims because they were “purely for economic losses, unaccompanied by any physical injury to their property or person.”43 Based on its review of the Compensation Act, the First Circuit determined that the statutory claims fully encompassed the shellfish dealers’ common law claims.44 The court, therefore, focused its analysis on the statutory claims. The central issues facing the First Circuit were “[h]ow far th[e] conformity requirement [(for state law to conform to federal maritime law)] extends, and whether the maritime law preempts the dealers’ state-law claims.”45 The court analyzed these questions by applying the three-prong *American Dredging-Jensen* test.

First, the court noted that no act of Congress was involved in the appeal, so the first prong of the *Jensen* test—whether the state law “contravenes the essential purpose expressed by an act of Congress”—was irrelevant.46 Next, the court took up the second prong: whether the state law works “material prejudice” to the characteristic features of the general maritime law.47 The First Circuit applied the *American Dredging* refinement of the second prong which asks whether the rule in question “originated in admiralty” or “was exclusive application there.”48 The

41. *Id.* at 369.
42. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 624 (1st Cir. 1994). The published opinion does not report a claimed dollar value of the shellfish dealers’ economic losses.
43. *Id.* at 625.
44. *Id.* at 626.
45. *Id.*
46. *Id.* at 627.
47. *Id.*
48. *Id.*
court then found "no evidence that Robins' denial of recovery for purely economic losses originated in admiralty." Additionally, the First Circuit found that the rule forbidding recovery for purely economic losses had not been applied exclusively in admiralty, but rather had been applied in other legal forums over the years. In sum, the First Circuit held "that Rhode Island's decision to depart from Robins does not materially prejudice a rule that originated in or is exclusive to general maritime law." Finally, the Ballard Shipping court looked to the third prong of Jensen: whether the state law "interferes with the proper harmony and uniformity" of maritime law. The court noted that the third prong involves a balancing of state and federal interests. After recognizing that admiralty does not require rigid uniformity, the court emphasized that the state has a "weighty" interest in protecting its navigable waters, shores, and people from oil pollution. The First Circuit also emphasized that preemption is not presumed, but rather that a court needs to "act with caution" when dealing with the constitutionality of a matter of great importance to a state. The federal interest in limiting remedies available

49. Id. "Justice Holmes's opinion in Robins presents the rule as a virtual truism for which 'no authority need be cited,' . . . and refers the reader to three other opinions in which '[a] good statement [of the rule] will be found.'" Id. (citations omitted). Of the three cases cited by Justice Holmes, two were maritime cases, Elliot Steam Tug Co., Ltd. v. The Shipping Controller, 1 K.B. 127, 139, 140 (1922), and The Federal No. 2, 21 F.2d 313 (2d Cir. 1927), but one was a nonmaritime case, Byrd v. English, 43 S.E. 419 (1903). Additionally, Justice Holmes referred to a second nonmaritime case, National Savings Bank v. Ward, 100 U.S. 195 (1879). The Ballard Shipping court also noted that the rule against recovery for purely economic damages is sometimes traced to the 1875 nonmaritime case of Cattle v. Stockton Waterworks Co., 10 Q.B. 453 (1875). Ballard Shipping Co. v. Beach Shellfish, 32 F.3d at 628.

50. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d at 628.

51. Id.

52. "Our circuit has acknowledged that 'the Supreme Court . . . no longer construes the Admiralty Clause as requiring 'rigid national uniformity in maritime legislation' . . . and that the preemption issue 'ordinarily requires a delicate accommodation of federal and state interests.'" Id. at 628-29 (quoting Carey v. Bahama Cruise Lines, 864 F.2d 201, 207 (1st Cir. 1988)).

53. In balancing the state interest in regulation against a potential overriding federal need for harmony or uniformity, we start with Rhode Island's interest in implementing its Compensation Act. No one can doubt that the state's interest in avoiding pollution in its navigable waters and on its shores, and in redressing injury to its citizens from such pollution, is a weighty one. Id. at 629.

54. Id. at 630.
to claimants is more subtle but not unimportant; in this case, it is the federal interest in the "out-of-court behavior of ships and sailors."\textsuperscript{55} The greatest risk of direct conflict between federal and state requirements comes when they both control such "primary conduct" of a regulated party. The Compensation Act does not regulate primary conduct, but rather is directed at results of conduct that is already unlawful, so it does not directly interfere with federal interests.\textsuperscript{56}

The court reasoned that the federal interest in controlling maritime conduct is analogous, though not identical, to the federal concern under the Commerce Clause\textsuperscript{57} to prevent states from imposing an impermissible burden on interstate commerce.\textsuperscript{58} Specifically, the court explained that the federal interest in maritime matters is to ensure that state standards do not create barriers to maritime commerce and travel, and also that they do not place unreasonable burdens on shippers. The court noted that the Compensation Act incorporates the standard tort limitations of foreseeability and proximate cause recognized in admiralty; therefore a plaintiff's burden to prove foreseeability and proximate cause will not alter the financial and administrative burdens currently placed on shippers under the maritime law.\textsuperscript{59}

Finally, in assessing the question of interference with the "proper harmony and uniformity" of the maritime law, the First Circuit evaluated Congress' intent in passing the Oil Pollution Act of 1990. Although OPA is not retroactive and therefore did not apply directly to the 1989 \textit{Ballard Shipping} oil spill, the Act allows injured parties to recover for purely

55. \textit{Id.} at 629.
56. \textit{Id.}
57. "Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8.
58. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d at 630.
59. \textit{Id.} The liability limiting effect of the plaintiff's burden to prove proximate cause and foreseeability is well exhibited in the Ninth Circuit's decision in \textit{Benefiel v. Exxon Corp.}, 959 F.2d 805 (9th Cir. 1992). In \textit{Benefiel}, the plaintiffs sought to recover for the increased prices they were forced to pay to purchase gasoline in California as a result of the \textit{Exxon Valdez} oil spill. The Ninth Circuit held that the complaint set forth a claim under the federal Trans-Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. §§ 1651-1655 (1988), but that in enacting strict liability provisions of TAPAA, Congress did not intend to abrogate all principles of proximate cause. Even without considering the rule of \textit{Robins Dry Dock}, proximate cause could not reasonably be established under the facts alleged by the plaintiffs, so the case was dismissed. \textit{Benefiel v. Exxon Corp.}, 959 F.2d at 808.
economic losses and allows states to legislate liability for oil spill pollution concurrently with the federal law. Therefore, the court concluded that OPA was substantial evidence of Congress’ intent that concurrent state jurisdiction allowing recovery for purely economic damages does not overburden maritime commerce.60

The First Circuit affirmed the district court’s dismissal of the federal admiralty claims, reversed its dismissal of the shellfish dealers’ state claims, and remanded the case for further proceedings consistent with its opinion. In short, although their general maritime law claims were barred by the rule of Robins Dry Dock, the shellfish dealers were allowed to proceed and to litigate their claims on the merits under state law.

IV. DISCUSSION

A. The Second Prong: Nonpreemption Depended on American Dredging

The First Circuit’s application of American Dredging distinguished the nonpreemption holding in Ballard Shipping from earlier oil or chemical spill cases.61 Presumably, without this application of American Dredging,

60. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d at 631.

A marine oil spill case with many similarities to Ballard Shipping, but decided before American Dredging, was In re Exxon Valdez, 767 F. Supp. 1509 (D. Alaska 1991) (where various Alaskan business interests sued for the recovery of purely economic damages in wake of Exxon Valdez oil spill). Here, the United States District Court for the District of Alaska found that general maritime law preempted state law above a $100-million liability limit set by the federal Trans-Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. §§ 1651-1655 (1988), but that general maritime law did not govern liability below $100 million because it had been displaced by Congress’ passage of TAPAA. The district court held that to the extent that Alaska state law imposed unlimited strict liability on oil polluters which exceeded the limit of strict liability imposed by TAPAA, the state law was preempted by the general maritime law. Consequently, the Robins rule then barred private recovery for purely economic losses above TAPAA’s $100-million liability limit. Below $100 million, however, the state law was not preempted because it was a “valid exercise of the state’s police power” and did not conflict with TAPAA. In re Exxon Valdez, 767 F. Supp. at 1514. Looking just at the decision concerning liability above TAPAA’s $100-million limit, the opposite outcome in 1991 in In re Exxon Valdez compared to Ballard Shipping three years later was due to the intervening 1994 Supreme Court decision, which established the American Dredging rule. See also Pruitt v. Allied Chem. Corp., 523 F. Supp. 975 (E.D. Va. 1981).
the First Circuit would have affirmed the district court’s ruling in its entirety, on the grounds that the Compensation Act and state common law were preempted by the general maritime law and that recovery for the plaintiffs’ losses was, therefore, barred by Robins Dry Dock.

Before the First Circuit’s Ballard Shipping decision, the Robins Dry Dock rule played two distinct roles in state law cases of this kind. First, the rule was considered to be a “characteristic feature” of the general maritime law, which would preempt any state law that caused it “material prejudice.” Second, once preemption occurred, the Robins Dry Dock rule, as substantive law, barred recovery under the general maritime law.

The Ballard Shipping court distinguished these two roles; it found that the American Dredging clarification of what it means to be a “characteristic feature” of the general maritime law under Jensen was not satisfied by the Robins Dry Dock rule. Therefore, the conflict between Rhode Island law and the Robins Dry Dock rule did not result in preemption. This allowed the plaintiffs to pursue recovery under state law unhindered by Robins Dry Dock. For those claims brought in admiralty, however, the Robins Dry Dock rule was indisputably an effective bar to recovery.

The Ballard Shipping court’s holding—that the Robins Dry Dock rule is not a “characteristic feature” of the general maritime law—significantly narrows the power of the Robins doctrine. This holding opens the door for concurrent state laws to regulate other purely economic marine tort damages where such state law would have been preempted on account of the second prong in the past. As a result, the First Circuit’s application of the American Dredging-Jensen test represents a significant enhancement of states’ power to legislate such remedies.

This is not to say that a state statute or common law granting a private right of action for purely economic damages cannot be preempted by the general maritime law for other reasons. All three prongs of the American Dredging-Jensen test remain in full force as grounds for preemption and each needs to be satisfied. Ballard Shipping holds that the Robins Dry Dock rule does not trigger preemption under the second prong. Other

“characteristic features of the general maritime law” may still trigger preemption under the second prong.63

B. The Third Prong:
Traditional Tort Limitations Protect Shippers

The Ballard Shipping court found that the third prong of the American Dredging-Jensen preemption test—whether a state law “interferes with the proper harmony and uniformity” of maritime law—was not violated by the Compensation Act.64 As the First Circuit concluded, the fact that the state statute included the standard tort limitations of foreseeability and proximate cause minimized any harm that the state law might cause to the harmony and uniformity of maritime law.65 The court further explained that these traditional tort limitations moderate the financial and administrative burdens on maritime shippers that result from state regulation of maritime pollution.

In reaching this conclusion, the First Circuit applied a rationale that mirrors the reasoning offered a decade ago in a dissent by Judge Wisdom in Louisiana ex rel. Guste v. M/V Testbank.66 In a detailed opinion opposing the application of Robins Dry Dock, Judge Wisdom advocated the superiority of applying “a rule of recovery based on conventional tort principles of proximate cause and foreseeability and limit[ing] eligibility

63. See Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co., 85 F.3d 44 (2d Cir. 1996) (maritime attachment is a characteristic feature of maritime law under the American Dredging rule and triggers preemption of competing state setoff statute). It should also be borne in mind that even in the absence of preemption, state law itself may bar recovery for purely economic losses.

64. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d at 628-631.

65. See supra note 59 and accompanying text.

66. 752 F.2d 1019 (5th Cir. 1985). A huge spill of toxic chemicals in the Mississippi River Gulf outlet in 1980 resulted in temporary suspension of all fishing, shrimping, and related activity. Commercial fishermen, shippers, marina and boat rental operators, wholesale and retail seafood businesses, seafood restaurants, tackle and bait shops, and recreational fishermen sued. The Fifth Circuit held that, on the basis of Robins Dry Dock, plaintiffs other than commercial fishermen who sustained no physical damage to property from the spill and subsequent closure of the waterway could not recover for purely economic maritime tort injuries, despite having brought claims under common law tort theories and under federal and state statutes. This case is widely cited by other courts. See, e.g., In re Cleveland Tankers, Inc., 791 F. Supp. 669, 671 (E.D. Mich. 1992).
only by the requirement that a plaintiff prove ‘particular’ damages." Judge Wisdom reasoned that the application of negligence concepts of foreseeability and proximate cause, assigns liability to tort-feasors in a fair manner which is balanced by the plaintiffs' burden to prove their case. This “alternate rule of recovery,” as Judge Wisdom called it, would offer the following advantages: compensation for damaged plaintiffs, imposition of the cost of damages upon those who have caused the harm, and consistency with economic principles of modern tort law. Such an application would also “free[ ] courts from the necessity of creating a piecemeal quilt of exceptions to avoid the harsh effects of the Robins rule.”

C. Parameters of the First Circuit's Third Prong Analysis: Congress Does Not Consider State Regulation of Oil Spills to Interfere With Proper Harmony and Uniformity of Maritime Law

In reaching its decision under the third prong of American Dredging, the First Circuit relied upon congressional intent that neither OPA nor the Shipowner’s Limitation of Liability Act of 1851 be able to completely preempt state jurisdiction over oil spill liability. In preserving state authority to regulate oil pollution, Congress’ action established that such state authority does not interfere with the “proper harmony and uniformity” of the maritime law.

68. See In re Kinsman Transit Co. v. City of Buffalo, 388 F.2d 821 (3d Cir. 1968) (injuries to the plaintiffs were too remote or indirect a consequence of the defendants’ negligence to have been foreseeable).
69. Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d at 1051.
70. Id. In addition, the plaintiffs’ burden of proving particular damages in order to bring a private action for public nuisance confronts them with an uphill battle to recovery. See, e.g., Burgess v. M/V Tamano, 370 F. Supp. 247, 250-251 (D. Me. 1973), aff’d mem., 559 F.2d 1200 (1st Cir. 1977) (in private action for public nuisance caused by marine oil spill, commercial fishermen and clam diggers were allowed to maintain suit against alleged oil spillers because the fishermen and clam diggers suffered loss different than the public generally, while the owners of motels, trailer parks, camp grounds, restaurants, grocery stores, and similar establishments, whose businesses were dependent on tourism, were denied recovery because the damages they suffered resulted indirectly from oil pollution).
71. See supra note 60 and accompanying text.
72. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 631 (1st Cir. 1994).
Those who would oppose the First Circuit’s analysis under the third prong would likely argue that the application of *Robins Dry Dock* is essential to the proper harmony and uniformity of the maritime law. Such opponents would point to benefits of improved administration of the law and predictability of case outcomes, as well as avoidance of “double counting.” However, the cost of those benefits is denial of recourse for legitimate victims; the economic losses become externalities borne not by the tort-feasors but by others in society.

In contrast, those advocating abandonment of the bright-line bar would approve of the effect which is achieved by the First Circuit’s decision. These advocates would let plaintiffs have their day in court—the opportunity to bear the burdens of proving foreseeability and proximate cause for negligence claims, or particular damages for public nuisance claims—in order to pursue the merits of their cases. Under this approach,

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73. See *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d at 1029, where the court stated:

> The bright line rule of damage to a proprietary interest, as most, has the virtue of predictability with the vice of creating results in cases at its edge that are said to be “unjust” or “unfair.” Plaintiffs point to seemingly perverse results, where claims the rule allows and those it disallows are juxtaposed—such as vessels striking a dock, causing minor but recoverable damage, then lurching athwart a channel causing great but unrecoverable economic loss. The answer is that when lines are drawn sufficiently sharp in their definitional edges to be reasonable and predictable, such differing results are the inevitable result—indeed, decisions are the desired product. But there is more. The line drawing sought by plaintiffs is no less arbitrary because the line drawing appears only in the outcome—as one claimant is found too remote and another is allowed to recover. The true difference is that plaintiffs’ approach would mask the results. The present rule would be more candid, and in addition, by making results more predictable, serves a normative function. It operates as a rule of law and allows a court to adjudicate rather than manage.

74. Barring recovery by remote victims ensures that tort-feasors are not forced to pay multiple times for the same damage as its impact passes through many transactions in the economy.

One meaningful distinction to be made among the various categories of plaintiffs here arises from a desire to avoid double-counting in calculating damages. Any seafood harvested by the commercial fishermen here would be bought and sold several times before finally being bought and sold for consumption. Considerations both of equity and social utility suggest that just as defendant should not be able to escape liability for destruction of publicly owned marine life entirely, it should not be caused to pay repeatedly for the same damage.

society in general and the environment would benefit from the higher standards of performance practiced by the oil shipping industry due to greater accountability for damages caused by oil spills.\textsuperscript{75}

The \textit{Ballard Shipping} decision will likely be unpopular with opponents of concurrent state jurisdiction over oil pollution liability. Such opponents would bemoan the loss of the partial immunity formerly provided by \textit{Robins Dry Dock} in oil spill cases when state law was preempted by admiralty jurisdiction. Being subject to state laws greatly increases the liability exposure of shipping companies,\textsuperscript{76} potentially subjecting them to a multiplicity of liability regimes from state to state. One analyst worries that:

\begin{quote}
[I]n those states recognizing actions for non-\textit{Robins} damages, a significant number of new claimants will have a cause of action. An "oil spill foreseeably harms not only ships, docks, piers, beaches, wildlife, and the like, that are covered with oil, but also harms blockaded ships, marina merchants, suppliers of those firms, the employees of marina businesses and suppliers, the suppliers' suppliers, and so forth." Second, in such states, "liability for pure financial harm [can be] vast, cumulative and inherently unknowable in amount." One result of the economic
\end{quote}

\textsuperscript{75}. Senate Majority Leader Mitchell noted in 1991 that OPA has this same important effect:

While most proponents of the [international] Protocols argue that liability laws have little to do with ensuring accountability for oil spills and deterring behavior that makes such spills more likely, a key objective of any oil pollution regime should be to prevent spills by inducing a high standard of care in the handling and transporting of oil. Legislation by the Congress and the states clearly reflect the view that an effective method of encouraging a high standard of care is to ensure that all those responsible for oil spills are held liable for their actions.

The liability provisions of the OPA are intended to prevent spills by imposing unlimited liability in cases in which spills are caused not only by gross negligence or willful misconduct but also by a violation of an applicable federal operation, safety, or construction regulation. Similarly, state officials have maintained in testimony before the Senate Subcommittee on Environmental Protection that their strict and unlimited liability laws are designed to encourage responsible behavior by those persons engaged in handling and transporting oil and to ensure that the polluter pays for the cleanup costs and damages that result from spills, to the extent of the polluter's resources.

Mitchell, \textit{supra} note 29, at 241-42 (footnote omitted).

\textsuperscript{76}. \textit{See} Louisiana \textit{ex rel. Guste v. M/V Testbank}, 752 F.2d at 1029.
disincentive created by this unpredictability could be "insurance premiums too expensive for the average [shipper]."\textsuperscript{77}

Responding to such arguments in 1991, Senate Majority Leader Mitchell commented:

It is true that the bankruptcy laws of the United States may ultimately impose limits on the amount that can be recovered from a polluter or any other person in our society. That fact, however, does not diminish the value of federal and state laws that hold polluters liable for the costs and damages incurred from some or all of their actions. These laws serve to prevent oil transporters from making business judgments that insurance is sufficient to cover the potential costs of any spill. Thus, oil transporters factor into their business decisions regarding handling and transportation of oil the steps necessary for providing a high standard of care. These laws also minimize the extent to which federal and state revenues are used to pay cleanup costs and damages that are incurred as a result of the actions of shipowners or other persons responsible for handling and transporting oil.\textsuperscript{78}

The First Circuit was correct in concluding that Congress is in a superior position to evaluate the merits of these opposing viewpoints and to decide whether such burdens interfere with the "proper harmony and uniformity" of the maritime law to a degree that is excessive.\textsuperscript{79} This is a fundamentally legislative decision, and although the maritime law is generally a body of judge-made law, the courts need to listen when Congress has spoken on the subject.

\textsuperscript{77} Eubank, \textit{supra} note 29, at 157-58 (quoting Barbour Lines A/S v. M/V Donau Maru, 764 F.2d 50, 54-55 (1st Cir. 1985)).

\textsuperscript{78} Mitchell, \textit{supra} note 29, at 243.

\textsuperscript{79} Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 631 (1st Cir. 1994). [W]e think that the IOPA statute is compelling evidence that Congress does not view either expansion of liability to cover purely economic losses or enactment of comparable state oil pollution regimes as an excessive burden on maritime commerce. Given the Congress' superior ability to weigh the very practical considerations relating to such a judgment, we give Congress' conclusion substantial weight. For this purpose, the non-retroactivity of the statute is irrelevant.

\textit{Id.}
One federal court outside the First Circuit has already followed the *American Dredging-Jensen* preemption analysis as applied in *Ballard Shipping* and concluded that *Robins Dry Dock* did not trigger the preemption of state common law.\(^8\) The decision in *Ballard Shipping* is particularly important because at least thirteen coastal states currently have oil pollution liability statutes that explicitly permit injured parties to sue for purely economic marine damages.\(^8\) If additional circuits follow the First Circuit’s decision, *Ballard Shipping*—together with OPA for spills on or after August 18, 1990—will effectively allow an increasing number of plaintiffs to seek remedies under state law for purely economic damages resulting from marine oil spills.

V. CONCLUSION

The decision of the First Circuit in *Ballard Shipping Co. v. Beach Shellfish* is an important, early application of the Supreme Court’s 1994 *American Dredging* refinement of the *Southern Pacific Co. v. Jensen* preemption test. The First Circuit’s nonpreemption decision is consistent with Congress’ intent to allow concurrent state jurisdiction over the recovery of purely economic losses arising from maritime oil spills. As a result of the *Ballard Shipping* decision, plaintiffs who have been financially harmed, by a forced cessation of their livelihoods due to an oil spill before OPA’s effective date, are able to seek compensation under state law. This is an important step forward in protecting oil spill victims, the environment and states’ rights to legislate remedies. Furthermore, the court’s holding that the *Robins Dry Dock* rule is not a “characteristic feature” of the general maritime law, and therefore does not trigger preemption under the second prong of the *American Dredging-Jensen* test, is likely to have broad ramifications for recovery under state law for many

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80. *See In re Nautilus Motor Tanker Co., Ltd.*, 900 F. Supp. 697 (D.N.J. 1995). The plaintiff in this case sought recovery for purely economic damages resulting from a June 1990, pre-OPA marine oil spill. The United States District Court for the District of New Jersey followed the First Circuit’s *Ballard Shipping* application of the *American Dredging* rule. The district court held that New Jersey common law of negligence was not preempted by *Robins Dry Dock*. In this case, unlike *Ballard Shipping*, there was no state statutory private right of action for purely economic damages. *Id.* at 702-05.

kinds of purely economic maritime tort losses that have been barred in the past.