Intangible Economic Loss in Louisiana

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Phillips v. G & H Seed Co.: Intangible Economic Loss in Louisiana

I. INTRODUCTION

Friday evenings in south Louisiana during the Lenten season and early days of summer provide the backdrop for a celebrated tradition, the family or neighborhood crawfish boil. This routine forms an inherent part of south Louisiana life during that four month stretch. The absence of crawfish, or a dramatic increase in price having effectively the same result, would be a shock to the system of any south Louisiana resident, calling forth immediate questions. Consumers would want to know what is responsible for the loss of that cherished and sentimental tradition. Seafood restaurants would wonder at the gaping hole in the headline of their seasonal menu, and the subsequent loss in seasonal business. Seafood processors and distributors would fret over the sudden loss of a core part of their seafood supply, and as a result, the sudden loss of a substantial portion of their budgeted revenue. Furthermore, the employees of these operations might very well now have to be let go, as the companies downsize to stay
solvent, at least for the season. And of course, the crawfish farmers themselves would simply be devastated.

Now suppose that this search for answers started pointing to a corporation’s negligent introduction of a fatal-to-crawfish chemical directly into the crawfish farmers’ crops. The ensuing desire to allocate blame would likely follow two main tracks. One group would demand that the corporation be liable to anyone injured by the loss of crawfish as caused by the corporation, especially where the loss affects someone’s livelihood.\(^1\) Another group, while calling for some measure of liability, would caution against extending liability to the point of creating precedent that would allow entire corporations to be financially razed.\(^2\)

The obvious question then, after determining who is causally at fault, is where to draw the line as to which potential plaintiffs can bring an action, or phrased in an even broader sense, how the courts should handle this type of scenario, where a negligent act causes economic loss to several parties, in many cases separated from any property or ownership right in the thing initially damaged or any other tangible injury, each party a step more distant in relation to the

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delictual actor than the party before it. In Louisiana, no clear answer exists to this dilemma, and thus the courts have no reliable process to handle these types of claims.  

The similar story of Phillips v. G & H Seed Co. (Phillips III) encounters many of the issues posed in the hypothetical above, and also reveals the overall confusion in Louisiana courts encountering similar factual scenarios. This paper examines the Louisiana legal history that has led to this current state of confusion in light of Phillips III and concludes with a suggested four-step process that attempts to allow for worthy claims while providing pragmatic limitations on possible plaintiffs.

II. FACTS AND HOLDING

The Phillips III decision finds its legal headwaters in the search for an answer to the devastating loss in the 1999 South Louisiana crawfish crop, including who might be liable for

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3 Robertson, supra note 1, at 741-42 (discussing “chain-reaction” economic harm cases).

4 Id. at 761.

5 Phillips v. G & H Seed Co., 2010-1405, p. 2 (La. App. 3d Cir. 3/7/12); 86 So. 3d 773, 775, cert. granted, 2012-0775 (La. 6/22/12); 90 So. 3d 447 (mem). Three decisions of the Third Circuit, Louisiana Court of Appeals, going by the same name will be frequently referred to throughout the paper. For simplification, they will receive the following names: Phillips I in place of Phillips v. G & H Seed Co., 2008-934 (La. App. 3d Cir. 4/8/09); 10 So. 3d 339, cert. denied, 2009-1504 (La. 10/30/09), 21 So. 3d 284 (mem.); Phillips II in place of Phillips v. G & H Seed Co., 2010-1405 (La. App. 3d Cir. 5/11/11); 66 So. 3d 507,reh'g denied (July 27, 2011), cert. granted, cause remanded, 2011-1861 (La. 11/18/11), 75 So. 3d 460 (mem.), aff'd en banc, Phillips, 86 So. 3d 773; and, Phillips III, the subject of this casenote, in place of Phillips v. G & H Seed Co., 2010-1405 (La. App. 3d Cir. 3/7/12); 86 So. 3d 773, cert. granted, 2012-0775 (La. 6/22/12); 90 So. 3d 447 (mem). This parallels the same manner of reference used in Phillips III. Phillips III, 86 So. 3d at 774.

6 Phillips III, 86 So. 3d 773.
that loss and who might be able to recover from those liable parties.\(^7\) Affected crawfish buyers, processors, and resellers, with Patrick Phillips and Atchafalaya Processors as the named representatives, attempted to organize a class action lawsuit under the Louisiana Products Liability Act against a group of primarily corporate defendants associated with the recent introduction of a new insecticide into the South Louisiana co-existent crawfish/rice farming cycle.\(^8\) Importantly, this group of plaintiffs did not include the most immediately and apparently affected group – the crawfish and rice farmers.\(^9\)

The plaintiffs claimed that this insecticide, ICON, used to treat rice seed and thus present in the rice/crawfish ponds, caused the mass deaths and sterilizations of crawfish.\(^10\) As participants in the crawfish industry, the plaintiffs asserted that their resultant economic damages constituted particularly foreseeable losses.\(^11\) The plaintiffs laid the blame at the doorstep of

\(^7\) Id.

\(^8\) Phillips I, 10 So. 3d at 341. Due to similar needs for both crops and efficiencies of cost, a farmer will often use the same pond for the production of both crawfish and rice. Brief of Appellees, Bayer Cropscience LP, Michael G. Redlich, and Allianz Global Risks US Insurance Co. at 2, Phillips II, 66 So. 3d 507 (No. 10-1405).

\(^9\) Phillips III, 86 So. 3d at 775 (citing West v. G & H Seed Co., No. 99 C 4984 A, La. Dist. 27th Ct.). In West, the crawfish farmers comprised the class of plaintiffs. West v. G & H Seed Co., 2001-1453, p. 16 (La. App. 3d Cir. 8/28/02); 832 So. 2d 274, 286.

\(^10\) Phillips III, 86 So. 3d at 775.

\(^11\) Original Brief of Appellants Patrick E. Phillips, Jr., et al. at 3, Phillips II, 66 So. 3d 507 (No. 10-1405). The Phillips III court also employs the phrase “particularly foreseeable” when talking about its vision for a duty/risk
ICON’s manufacturer, Bayer CropScience LP, its salesman Michael Redlich, and the intermediary ICON-treated rice seed providers, G & H Seed Co., Inc., Crowley Grain Drier, Inc., Delhi Seed Co., Inc., Terral Seed Co., Inc., and Mamou Rice Drier & Warehouse, Inc.  

After encountering difficulty in certifying a class, the action continued in the court as a mass joinder of seventy-two individual actions. In the interests of judicial manageability, the trial court judge deemed it proper to proceed with bellwether plaintiffs, namely Patrick Phillips of Phillips Seafood, James Bernard of Bernard Seafood Processors, Inc., and Lisa Guidry of Guidry’s Crawfish.

From the very start of litigation, the core issue took center stage – whether the court would choose to apply a bright-line rule limiting recovery for economic damages only to

analysis in a case of intangible economic loss. *Phillips III*, 86 So. 3d at 782. Although not defined in its opinion, the court likely means to use this phrase in one of two ways. The first way would be only to emphasize that a court needs to be even more careful in its scope of duty analysis in a case with economic loss absent any injury to one’s person or property than in typical negligence cases. *Id.*. The second way though might be suggested by its language that recovery should be available “in certain circumstances for limited groups of people with a special interest in or relationship with the damaged property.” *Id.* Although not cited, this forms the core of the idea proposed in *People Express Airlines, Inc. v. Consol. Rail Corp.* Robertson, *supra* note 1, at 747 (citing People Express Airlines, Inc. v. Consol. Rail Corp., 495 A.2d 107, 116 (N.J. 1985)).

12 *Phillips III*, 86 So. 3d at 774-75.

13 *Id.* at 775; It should be noted that due to the numerous events in this action’s procedural history, the following review, in deference to brevity and clarity, will highlight only those events pertinent to intended discussion.

situations where a proprietary interest could be shown, or if the court would instead simply apply
the standard duty/risk analysis without a prerequisite showing by the plaintiff of a proprietary
interest.\textsuperscript{15} This choice by the court makes the difference between whether or not a plaintiff so
situated will have a day in court.\textsuperscript{16}

Under the first choice, a plaintiff alleging economic loss due to another’s negligence
would be required to show that the economic loss stemmed from an injury to his own person or
property in order to survive the summary judgment stage, in which case the \textit{Phillips III} plaintiffs
could not recover.\textsuperscript{17} The straightforward determination of whether a plaintiff has this necessary
proprietary interest draws a “bright line” between the presence or absence of a cause of action
available to a potential plaintiff (hereafter the “bright-line rule”).\textsuperscript{18}

Under the second choice, the court would undertake Louisiana’s general negligence
analysis, examining whether the alleged conduct actually caused the injury, whether the

\textsuperscript{15} \textit{Phillips III}, 86 So. 3d at 776. The phrase “proprietary interest” is employed at times in this paper as a substitute
to explicating “an interest derived from a connection to one’s own property or person.” See \textsc{American Heritage}
Dictionary of the English Language 1406 (4th Ed. 2000); PPG Industries, Inc. v. Bean Dredging, 447 So. 2d
1058, 1060 (La. 1984) (citing Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927)).

\textsuperscript{16} Robertson, \textit{supra} note 1, at 752 (explaining that a prohibitory rule results in a quick “no” from the courts).

\textsuperscript{17} Fleming James, Jr., \textit{Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal}, 25
Vand. L. Rev. 43, 43 (1972); see generally \textit{Phillips III}, 86 So. 3d at 774.

\textsuperscript{18} Robertson, \textit{supra} note 1, at 743.
defendant had a duty which encompassed that risk of harm suffered by that plaintiff in that situation (the “scope of duty”), whether the defendant negligently breached that duty, and finally, whether plaintiff suffered a compensable injury of any type (hereafter the “duty/risk analysis”); under this analysis, the Phillips III plaintiffs would have a chance to recover.19

    In denying defendant Bayer CropScience’s exception of no cause of action, while simultaneously granting plaintiffs’ motion for directed verdict as to a duty owed by defendants because of the ease of association between defendants’ actions and plaintiffs’ harm, the trial court indicated that it found the latter route, the duty/risk analysis, to be the correct method.20 A jury returned a verdict in favor of the plaintiffs, finding Bayer CropScience LP 94% at fault, Michael Redlich 1% at fault, and force majeure, a drought that occurred contemporaneously with the 1999 loss of the crawfish crop, 5% at fault.21


20 Phillips v. G & H Seed Co. (Phillips III), 2010-1405 (La. App. 3d Cir. 3/7/12); 86 So. 3d 773, 776, cert. granted, 2012-0775 (La. 6/22/12); 90 So. 3d 447 (mem).
On appeal, a five-judge panel of the Third Circuit, Louisiana Court of Appeals, reversed the trial court judgment (hereafter “Phillips I”). The court found this case to be a “supply chain” fact pattern and then went on to express its interpretation of Louisiana “supply chain” jurisprudence to bar recovery for economic damage where no proprietary interest can be shown. Therefore, having determined that the plaintiffs had shown no proprietary interest in the crawfish crops by failing to provide any evidence of ownership or other derivative property rights, the panel found the cause must fail. Plaintiffs’ application for rehearing and their subsequent writ to the Louisiana Supreme Court were denied.


22 Phillips v. G & H Seed Co. (Phillips I), 2008-934, p. 7 (La. App. 3d Cir. 4/8/09); 10 So. 3d 339, 344, cert. denied, 2009-1504 (La. 10/30/09); 21 So. 3d 284 (mem.). This same court had previously denied writs after the trial court’s denial of defendants’ exception of no cause of action. Phillips III, 86 So. 3d at 776. Thus, plaintiff also argued that the “law of the case” doctrine should have precluded consideration of the duty on appeal, but the Third Circuit, Louisiana Court of Appeals did not find this persuasive. Phillips I, 10 So. 3d at 344. Prior to the appeal, the trial court denied defendants’ motions for Judgment Notwithstanding the Verdict, New Trial, and Remittitur. Phillips III, 86 So. 3d at 776.

23 Phillips I, 10 So. 3d at 342, 344 (citing PPG Industries, Inc. v. Bean Dredging, 447 So. 2d 1058 (La. 1984); La. Crawfish Producers Ass’n-W. v. Amerada Hess Corp., 2005-1156 (La. App. 3d Cir. 7/12/06); 935 So. 2d 380.

24 Phillips I, 10 So. 3d at 344. As a harbinger of decisions to come, Judge Saunders dissented due to his contrary view that the PPG Industries decision (explored in great detail in subsection “D” of section III) did away with a bright-line rule barring recovery of economic damages where no proprietary interest existed, and instead instituted a duty-risk analysis. Phillips I, 10 So. 3d at 345 (Saunders, J., dissenting) (citing PPG Industries, 447 So. 2d at 1061; 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228, 234 (La. 1989)). Judge Saunders also opined that one should distinguish the present facts from the PPG Industries decision, as in this case the plaintiffs had no alternative source of crawfish, whereas in PPG Industries the plaintiff could obtain gas from other sources. Phillips I, 10 So. 3d at 346 (Saunders, J., dissenting) (citing PPG Industries, Inc., 447 So. 2d 1058).

The Fifth Circuit, Federal Court of Appeals, largely agreed with the Phillips I view in a case based upon the same fact pattern with a plaintiff not allowed to intervene in the state action, and another who intervened in the federal action. Wiltz v. Bayer CropScience, Ltd., 645 F.3d 690, 694 (5th Cir. 2011) cert. denied, 132 S. Ct. 1145,
Proceeding from the appellate court’s declaration of the necessity of a proprietary interest and the absence of such an interest in the bellwether plaintiff processors, buyers, and suppliers, defendants moved for summary judgment against the larger, remaining gathering of similarly-situated plaintiffs. 26 The trial court, considering itself bound by the appellate court’s decision, reluctantly granted the motion for summary judgment and dismissed the entire group of plaintiffs. 27

This prerequisite of a proprietary interest did not last long. A three-judge panel of the Third Circuit, Louisiana Court of Appeals, reversed the trial court’s granting of summary judgment as to these remaining plaintiffs (hereafter “Phillips II”). 28 The panel, dismissing

181 L. Ed. 2d 1019 (U.S. 2012) (citing Phillips v. G & H Seed Co., Inc., 09-1102 (La. App. 3d Cir. 3/10/10); 32 So.3d 1134, cert. denied, 2010-0822 (La. 2010); 38 So.3d 325 (mem.). Although issuing its opinion following a Third Circuit, Louisiana Court of Appeals decision disagreeing with the prior interpretation and application of the five judge panel decision mentioned above, the federal appellate court still determined that an application of Louisiana law and the PPG Industries decision would bar recovery in this case. Wiltz, 645 F.3d at 699, 702-03 (citing Phillips I, 10 So. 3d 339; Phillips v. G & H Seed Co., 2010-1405 (Phillips II) (La. App. 3d Cir. 5/11/11); 66 So. 3d 507, reh’g denied (July 27, 2011), cert. granted, cause remanded, 2011-1861 (La. 11/18/11), 75 So. 3d 460 (mem.), aff’d en banc, Phillips, 86 So. 3d 773; PPG Industries, 447 So. 2d 1058). Although applying a duty/risk analysis to some degree, the Fifth Circuit found that the jurisprudence for pure economic loss in Louisiana would not allow for recovery in this case. Wiltz, 645 F.3d at 699. The Fifth Circuit also found it persuasive that the Louisiana Supreme Court had denied review in the Phillips I case and a similar case denying recovery for pure economic loss. Id. at 702-03 (citing Phillips I, 10 So. 3d 339; La. Crawfish Producers Ass’n-W., 935 So. 2d at 382.

25 Phillips III, 86 So. 3d at 776.

26 Id. at 777.

27 Phillips II, 66 So. 3d at 511 (noting that the trial judge expressed his disagreement with the appellate court’s decision in oral reasons).
defendants’ contention that the “law-of-the-case” doctrine confined them to the ruling in the prior *Phillips* decision, found that the five-judge panel in the 2009 decision erred in utilizing a bright-line rule based on proprietary interest. The court subsequently remanded for a duty/risk analysis. The Louisiana Supreme Court granted defendants’ application for writs, and then issued a brief statement that the case should be “remanded to the Third Circuit Court of Appeal for *en banc* opinion after briefing and argument.”

In a 7-4 *en banc* decision, the Third Circuit, Louisiana Court of Appeals, voted to adopt the three-judge panel’s opinion in the May 11, 2011 *Phillips* decision as its controlling opinion (hereafter “*Phillips III*”). In doing so, the court held that Louisiana jurisprudence had definitively signaled Louisiana’s departure from a bright-line rule barring recovery absent a

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28 *Id.* at 516.

29 *Id.* (citing *Phillips I*, 10 So. 3d 339; *PPG Industries*, 447 So. 2d 1058). In their appeal, plaintiffs contended in the alternative that if a bright-line rule based on proprietary interest does apply, than this should only require an interest “derived from the owner,” not actual ownership. *Phillips II*, 66 So. 3d at 511.

30 *Phillips II*, 66 So. 3d at 516.

31 *Phillips v. G & H Seed Co.*, 11-1861 (La. 11/18/11); 75 So. 3d 460.

32 *Phillips III*, 86 So. 3d at 775.
proprietary interest in cases of pure economic loss, and instead set forth a case-by-case duty/risk analysis incorporating some measure of limitation for the determination of a party’s liability.\textsuperscript{33}

\section*{III. BACKGROUND}

\subsection*{A. Economic-Loss Rule Generally}

Under the economic-loss rule, a party cannot recover where his economic harm stems only from the personal or property injury suffered by another.\textsuperscript{34} Due to this lack of attachment to any tangible harm to the plaintiff, one scholar has suggested that “intangible economic loss” is a more accurate term for this type of injury.\textsuperscript{35}

Two camps have aligned themselves on separate sides of the bright-line rule.\textsuperscript{36} Under one banner marches those in support of retention of the bright-line rule.\textsuperscript{37} As their champions, the bright-line camp marshals forth a combination of arguments. They argue, first, as a pragmatic concern, that in cases such as these, foreseeability cannot serve as an efficient brake

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\textsuperscript{33} Phillips v. G & H Seed Co., 2010-1405 (\textit{Phillips III}), (La. App. 3d Cir. 3/7/12); 86 So. 3d 773, \textit{cert. granted}, 2012-0775 (La. 6/22/12); 90 So. 3d 447 (mem). The dissenting opinions will be discussed at length in Section III, “The Court’s Decision,” below.

\textsuperscript{34} Wiltz v. Bayer CropScience, Ltd., 645 F.3d 690, 695 (5th Cir. 2011) \textit{cert. denied}, 132 S. Ct. 1145, 181 L. Ed. 2d 1019 (U.S. 2012); James, \textit{supra} note 17, at 43; Robertson, \textit{supra} note 1, at 737.

\textsuperscript{35} Robertson, \textit{supra} note 1, at 737.

\textsuperscript{36} This tension between worthwhile principles has in part led to the current state of confusion in Louisiana law, as will be discussed in the last subsection of this section.

\textsuperscript{37} \textit{E.g.} State of La. ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1028 (5th Cir. 1985); James, \textit{supra} note 17, at 44.
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on what could otherwise be an all-consuming liability “in an indeterminate amount for an
indeterminate time to an indeterminate class.” Second, they argue that economic theory and
policy explain that profit loss should not be covered by tort liability, and furthermore, the more
efficient remedy can be found in contractual arrangements or first-party loss insurance. And
third, they argue that an assessment of administrative considerations shows that a case-by-case
approach would be just as arbitrary, and the bright-line rule at least increases efficiency.

Proponents conclude that these factors culminate in the bright-line rule as an explicit and
straightforward policy decision.

Those forming under the other banner have a more easily summarized, yet no less worthy
call to action. Essentially, they take the view that someone has been hurt due to another’s fault,

38 E.g. James, supra note 17, at 44-45 (quoting Ultraceomes Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931)); Wiltz, 645 F.3d at 696; Robertson, supra note 1, at 741; E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 874 (1986); Testbank, 752 F.2d at 1033-34 (Williams, J., concurring) (to allow such liability “could visit destruction on enterprise after enterprise); In re Taira Lynn Marine Ltd. No. 5, 444 F.3d 371, 377 (2006) (containing an extensive list of plaintiffs that helps to show just how far the damage, and thus liability, could extend)

39 Wiltz, 645 F.3d at 696-97; see Rhee, supra note 2, at 60, 79 (stating, where merely loss of profit expectations, “courts should not interfere with the normal business functions of market risk and uncertainty by rearranging outcomes through the courtroom); Testbank, 752 F.2d at 1029; James, supra note 10, at 53; Wiltz, 645 F.3d at 696-97; contra Rhee, supra note 2, at 68, 82-84 (explaining the economics behind why such insurance would likely be infeasible).

40 Wiltz, 645 F.3d at 696; Testbank, 752 F.2d at 1028; E. River S.S. Corp., 476 U.S. at 875 (internal citations omitted).

41 E.g. Rhee, supra note 2, at 65; Testbank, 752 F.2d at 1025. Many other cases characterizing this rule as a policy decision come up in the context of an analysis of PPG Industries, and thus will be addressed in the last subsection of this section. See generally PPG Industries, Inc. v. Bean Dredging, 447 So.2d 1058 (La. 1984).
and barring recovery on the arbitrary basis of a physical “proprietary” interest, when economic interests weigh equally, is inherently unjust.\footnote{Robertson, supra note 1, at 745.}

Taking into account these concerns, one should have sympathy for a court trying to strike a balance between the two thoughts, struggling to come up with an approach it views as more just. As one scholar has put it, “in the end, the challenge is to fashion a rule that limits liability but permits the adjudication of meritorious claims.”\footnote{Testbank, 752 F.2d at 1046 (Wisdom, Rubin, Politz, Tate, and Johnson, JJ., dissenting); Robertson, supra note 1, at 745.} The Louisiana Supreme Court’s review of the bright-line rule in \textit{PPG Industries} reveals that court’s struggle to balance these interests.\footnote{Robertson, supra note 1, at 747.}

The lack of clarity has given rise to nearly thirty years of confused opinions, the latest representative victim of which appears in the \textit{Phillips} chain of decisions.\footnote{See generally \textit{PPG Industries}, 447 So.2d 1058.}

While courts will frequently avoid having to address the issue of recovery for intangible economic loss under general negligence principles where they can turn instead to subrogation or third-party-beneficiary actions, an established line of jurisprudence has nonetheless firmly

\footnote{See generally Phillips v. G & H Seed Co. (\textit{Phillips I}), 2008-934, p. 7 (La. App. 3d Cir. 4/8/09); 10 So. 3d 339, cert. denied, 2009-1504 (La. 10/30/09), 21 So. 3d 284 (mem.); Phillips v. G & H Seed Co., 2010-1405 (\textit{Phillips III}), (La. App. 3d Cir. 3/7/12); 86 So. 3d 773, cert. granted, 2012-0775 (La. 6/22/12); 90 So. 3d 447 (mem).}
entrenched the bright-line rule requiring a proprietary interest in the canon of American caselaw.\textsuperscript{47} Although a few courts have attempted to lead valiant charges at the bulwark of the rule by attacking its justifications and proposing alternate methods to determine liability, even fewer courts have followed -- a remarkable result at a time when tort liability itself was expanding at unprecedented rates.\textsuperscript{48}

The genesis of the economic-loss rule emanated from Justice Holmes in his 1927 \textit{Robins Dry Dock & Repair Co. v. Flint} opinion.\textsuperscript{49} In that case, a time charterer had a contract with a vessel whereby payment hinged on the vessel being in operable condition.\textsuperscript{50} A dock operator negligently damaged the propeller of the vessel, thereby decreasing the time charterer’s expected profits.\textsuperscript{51} The time charterer then filed suit against the owner of the dock seeking to recover

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\item \textsuperscript{47} Robertson, \textit{supra} note 1, at 740; Wiltz, 645 F.3d at 695 (citing several sources to show the spread of the rule among the different jurisdictions of the nation).
\item \textsuperscript{48} James, \textit{supra} note 17, at 47-48; Rhee, \textit{supra} note 2, at 56 (noting the attempt to depart from the rule in People Express Airline v. Consolidated Rail, 495 A.2d 107 (N.J. 1985), and the lack of followers it attracted); Testbank, 752 F.2d at 1023 (5th Cir. 1985) (majority opinion) (remarking on the resilience of the rule and its defense even by leaders of the legal realism movement); E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 874-75 (1986) (reaffirming the rule presented in Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927)).
\item \textsuperscript{49} E.g. Wiltz, 645 F.3d at 695 (citing \textit{Robins Dry Dock}, 275 U.S. 303, as the progenitor of the rule). For a thorough and extensive history of the rule, please see the oft-cited scholarly work by Professor James, “Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal.” James, \textit{supra} note 17, at 43.
\item \textsuperscript{50} \textit{Robins Dry Dock}, 275 U.S. at 307.
\item \textsuperscript{51} \textit{Id}.
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these lost profits.\textsuperscript{52} The court declined to extend liability of a negligent actor for causing purely economic loss to another where no contractual interest existed.\textsuperscript{53} In doing so, Justice Holmes noted that “[t]he law does not spread its protection so far.”\textsuperscript{54}

\textit{Robins Dry Dock} concerned itself with the question of negligent interference with contractual relations.\textsuperscript{55} Nonetheless, courts have since utilized its holding for the bright-line rule barring recovery for intangible economic loss regardless of a connection in contract, the proposed legal theory (\textit{e.g.}, a maritime claim versus products liability), or damage whether as a loss of profit or damage as increased costs.\textsuperscript{56} Notwithstanding the occasional pleas of some scholars to confine this rule to its initial factual context, most courts, including those in Louisiana, have maintained a broader reading of the rule.\textsuperscript{57}

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\textsuperscript{52} Id.
\textsuperscript{53} Id. at 308-09
\textsuperscript{54} Id. at 309
\textsuperscript{55} Id. at 308-09
\textsuperscript{56} Rhee, supra note 2, at 56; State of La. ex rel. Guste v. M/V Testbank (“Testbank”), 752 F.2d 1019, 1023 (5th Cir. 1985); La. Crawfish Producers Ass’n-W. v. Amerada Hess Corp., 2005-1156 (La. App. 3d Cir. 7/12/06); 935 So. 2d 380, 382; Wiltz v. Bayer CropScience, Ltd., 645 F.3d 690, 696 (5th Cir. 2011) cert. denied, 132 S. Ct. 1145, 181 L. Ed. 2d 1019 (U.S. 2012); see generally Restatement (Second) of Torts § 766 (c) (1979) for the application to a negligent interference with contractual relations action.
\textsuperscript{57} Compare Testbank, 752 F.2d at 1022, (phrasing the rule in its broader application) with Testbank, 752 F.2d at 1044 (Wisdom, Rubin, Politz, Tate, and Johnson, JJ., dissenting) (arguing that the rule should be confined to the factual context of Robins Dry Dock, 275 U.S. 303).
B. Economic-Loss Rule in Louisiana Pre-PPG Industries

Prior to the Louisiana Supreme Court’s 1984 landmark decision in *PPG Industries, Inc. v. Bean Dredging*, except for an early brief experimental phase, Louisiana courts had employed the bright-line rule whenever addressing an intangible economic-loss case separated from any proprietary injury. Louisiana had formally adopted the bright-line rule, as espoused in *Robins Dry Dock*, in the 1957 Louisiana Supreme Court case, *Forcum-James Co. v. Duke Transp. Co.* The court did so on the argument that this type of loss should be handled through other avenues, such as contractually providing for subrogation, as well as on the argument that extending liability would lead to a “multiplicity of suits.” These justifications, while often cited in support of the bright-line rule, do not portray a complete picture of the conflicting interests facing the courts as to the validity of the rule. Eventually, the courts had the opportunity to settle the dispute, but the result of that suit left an unclear environment,

58 Desormeaux v. Cent. Indus., Inc., 333 So.2d 431, 433-34 (La. App. 4 Cir. 1976) (stating that *Robins Dry Dock*, 275 U.S. 303, has been followed by both Louisiana state courts and federal courts applying Louisiana law); Robertson, supra note 1, at 751.


60 Forcum-James, 93 So.2d at 231.

61 Compare Wiltz, 645 F.3d at 696-97, with Testbank, 752 F.2d at 1052 (Wisdom, Rubin, Politz, Tate, and Johnson, JJ., dissenting).
C. *PPG Industries* and the Attempt to Clarify the Approach

A brief analysis of the wording in the *PPG Industries* decision helps to explain the contradictory opinions reached by the Third Circuit, Louisiana Court of Appeals in the *Phillips* history of decisions.\(^{62}\) In *PPG Industries*, a dredging operation had negligently damaged a gas pipeline, forcing a customer supplied by that pipeline to acquire gas from an alternative source at an increased cost.\(^{63}\) That customer sued the dredging company seeking to recover for these increased costs.\(^{64}\) The Louisiana Supreme Court granted writ after the Third Circuit, Louisiana Court of Appeals affirmed an exception of no cause of action based on Louisiana’s adoption of the bright-line rule in *Forcum-James*.\(^{65}\)

Under one reading of the *PPG Industries* case, the Louisiana Supreme Court seems to say that a duty/risk analysis should now be applied to intangible economic-loss cases, maybe with an eye towards the need to show “particular loss.”\(^{66}\) For example, the court mentions that when

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\(^{62}\) See *PPG Industries*, Inc. v. Bean Dredging, 447 So.2d 1058 (La. 1984); *Phillips v. G & H Seed Co.*, 2010-1405 (*Phillips III*), (La. App. 3d Cir. 3/7/12); 86 So. 3d 773, *cert. granted*, 2012-0775 (La. 6/22/12); 90 So. 3d 447 (mem).

\(^{63}\) *PPG Industries*, 447 So.2d at 1059-60.

\(^{64}\) *Id.* at 1060.

\(^{65}\) *Id.*
determining the reach of a rule allowing recovery, judges need to look at the duty/risk analysis factors involved in each particular case. The majority also seems to criticize the previous “mechanical [and] . . . unreasoned” applications of Robins Dry Dock and Forcum-James, and the dissent “applaud[s] the majority’s applying a duty/risk analysis.”

However, under another reading, the court never overrules Forcum-James, and while giving some deference to the general negligence principles of La. C.C. art. 2315, seems to allow the bright-line rule to have the same effect, but with the rule now exercising its influence through the scope of duty policy choice of a duty/risk analysis rather than an immediate suppression of the action at the outset. Understandably, this creates even more confusion as to the court’s stance on the bright-line rule. For example, although acknowledging that the dredging company

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67 PPG Industries, 447 So.2d at 1061.

66 Id. at 1061-62. Similar to the Phillips III court’s use of “particularly foreseeable” damages, the PPG Industries court does not define “particular loss.” Id.; Phillips III, 86 So.3d at 782. This most likely refers to the especial importance of scope of duty considerations in this context. Louisiana’s scope of duty analysis frequently employs the term “particular,” such as “particular risk” or “particular circumstances.” E.g. Roberts v. Benoit, 605 So. 2d 1032, 1044-45 (La. 1991). On the other hand, such a reference could be meant to invoke some similarities to the “particular damage” concept under public nuisance law. See generally State of La. ex rel. Guste v. M/V Testbank (“Testbank), 752 F.2d 1019, 1047 (5th Cir. 1985) (Wisdom, Rubin, Politz, Tate, and Johnson, JJ., dissenting).

68 Id. at 1060 (citing Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927); Forcum-James Co. v. Duke Transp. Co., 93 So. 2d 228 (1957)); PPG Industries, 447 So.2d at 1062 (Calogero, J., dissenting).

69 Prof’il Answering Serv., Inc. v. Cent. La. Elec. Co., 521 So.2d 549, 551 (La. App. 1 Cir. 1988) (declaring that PPG Industries, 447 So.2d 1058, did not overrule Forcum-James, 93 So. 2d 228); PPG Industries, 447 So.2d at 1061.

The PPG Industries court notes that “the question in this case falls literally within the expansive terms of La. C.C. art. 2315.” PPG Industries, 447 So.2d at 1059 [emphasis added]. Such an admission expresses fidelity to underlying principles of Louisiana law, namely that our code takes precedence to caselaw. See LA. CIV. CODE ANN. art. 3 (2012).
represented the “but for” cause of the customer’s losses, the court went on to explain that rules of conduct can only protect some parties from some circumstances.\textsuperscript{70} The court then drew a parallel to the broad policy reasons underlying the Robins Dry Dock decision, such as the unforeseen extension of liability, and went on to point out that “policy considerations determine the reach of the rule.”\textsuperscript{71}

Therefore, while adopting a duty/risk analysis, the court’s heavy focus on policy comes close to mirroring a bright-line rule. The only substantive difference is that now the plaintiff’s complaint can survive an exception of no cause of action, but will then fail under a duty/risk analysis, for many of the identical policy reasons that provided the basis for the prohibitory rule formerly used. In other words, determining the scope of the duty in Louisiana’s duty/risk analysis depends on a balancing of numerous considerations, including the ease of association between the conduct and the harm, administrative concerns, moral factors, economic issues, and

\textsuperscript{70} PPG Industries, 447 So.2d at 1061.

\textsuperscript{71} Id. (citing F. Harper and F. James, The Law of Torts, § 6.10 (1956); Wex S. Malone, Ruminations on Cause-in-Fact, 9 Stan. L. Rev. 60 (1956); Hill v. Lundin & Associates, Inc., 256 So.2d 620 (1972)). The court at other places quotes the fear of Justice Cardozo in the Ultramares decision as to “indeterminate” liability, and remarks that “[b]ecause . . . economic damages might be expanded indefinitely, the court necessarily makes a policy decision on the limitation of recovery of damages.” PPG Industries, 447 So.2d at 1061-62 (citing Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931); James, supra note 10, at 56). The dissenting opinion by Justice Calogero, foreseeing the effect that so heavily weighting the policy prong of a duty/risk analysis would have, suggested that it might have been better after all to explicitly affirm the Robins / Forcum-James rule. PPG Industries, 447 So.2d at 1062 (Calogero, J., dissenting) (disagreeing on the basis that the ease of association includes the customer’s increased costs).
precedential value.\textsuperscript{72} These factors constituting the reach of a defendant’s scope of duty ultimately comprise a policy decision that must be made by the court.\textsuperscript{73} If the court decides that a prudent policy analysis limits the defendant’s scope of duty in a certain case, than the plaintiff’s action in that case will fail.\textsuperscript{74} Thus it appears that the bright-line rule simply moved, intact, to alight on the policy branch of the duty/risk analysis.

D. Post-PPG: The Reign of Confusion in Louisiana

The *Phillips III* decision, largely a result of the unfortunately phrased attempt by the *PPG Industries* court in toeing the line of equitable results and pragmatic decision-making, entered a Louisiana legal scene immersed in a state of widespread confusion as to the proper approach for intangible economic loss in Louisiana following *PPG Industries*.\textsuperscript{75} The claim that the *PPG Industries* decision set a new course in Louisiana jurisprudence by doing away with the bright-line rule resembles more wishful thinking than legal reality.\textsuperscript{76} The decisions coming after the

\textsuperscript{72} Harges, *supra* note 19, at 776.

\textsuperscript{73} *Hill*, 256 So. 2d at 622-23; *Roberts*, 605 So. 2d at 1044.

\textsuperscript{74} *Roberts v. Benoit*, 605 So. 2d 1032, 1044 (La. 1991).

\textsuperscript{75} *Wiltz v. Bayer CropScience*, Ltd., 645 F.3d 690, 695 (5th Cir. 2011) *cert. denied*, 132 S. Ct. 1145, 181 L. Ed. 2d 1019 (U.S. 2012) (referring to this area of law in Louisiana as “unsettled”); *Phillips v. G & H Seed Co.*, 2010-1405 (*Phillips III*), (La. App. 3d Cir. 3/7/12); 86 So. 3d 773, *cert. granted*, 2012-0775 (La. 6/22/12); 90 So. 3d 447 (mem).
PPG Industries 1984 opinion largely fall into three different categories in handling intangible economic-loss cases in Louisiana.

One group holds that a duty/risk analysis, at least in some form, should now be applied to cases of intangible economic loss. Another group finds that the Forcum-James rule has continued intact, and even that the PPG Industries case simply represents another iteration of the same rule.

As untenable as even this simple division would be, a third group, attempting to literally apply the language of the PPG Industries decision, creates an even more convoluted
interpretation, similar to that suggested in the subsection “D” above where a given court will declare a duty/risk analysis should apply but then promptly decide in favor of the defendant on policy grounds when the plaintiff fails to show a proprietary connection. For example, in In re Katrina Canal Breaches Consolidated Litigation, a federal district court applying Louisiana law after the decisions in Phillips III and in Wiltz v. Bayer CropScience, Ltd., noted that PPG Industries stands for the utilization of a duty/risk analysis, then cited cases construing that decision as pure policy consideration, and finally concluded by noting that the lack of a property connection ruins the action. This of course parallels the bright-line rule, with the difference now being that the rule simply comes under the guise of a policy consideration in the duty/risk analysis rather than an immediate bar at the outset. Several other cases attempting faithful interpretations have come to similar conclusions as to the effect of the policy consideration.

As many have commented, the Louisiana Supreme Court needs to review cases like these to resolve the courts’ contradictory interpretations of how to handle intangible economic-loss

80 Id. at 3-4 (citing PPG Industries, 447 So.2d 1058; Wiltz, 645 F.3d 695; Phillips III, 86 So.3d 773).
81 Prof'l Answering Serv., 521 So.2d at 550-51 (using PPG Industries, 447 So.2d 1058, and Forcum-James, 93 So. 2d 228, interchangeably, as the policy considerations eliminate any real distinction); Babin v. Texaco, Inc., 449 So.2d 718, 720 (La. App. 3d Cir. 1984) (characterizing PPG Industries, 447 So.2d 1058, as focusing “purely on the policy consideration under the duty/risk analysis”); J. Ray McDermott Eng’g, 2007 WL 490162, at * 4-5 (referring to the prohibitory rule and looking at PPG Industries, 447 So.2d 1058, as based on the policy consideration).
cases.Fortunately, they have agreed to do so in Phillips III, granting writs to hear oral arguments this fall and likely coming to a decision around the beginning of 2013. This granting of writs comes none too soon, as in addition to not knowing the approach in intangible economic-loss cases, the courts have started to experiment with applications of the PPG Industries decision even in tangible-loss cases.

For example, in Cleco Corp. v. Johnson, a case confusingly cited by the court in Phillips III as support for the application of a duty/risk analysis in intangible economic loss, the majority distinguished the PPG Industries decision as inapplicable since the facts before it encompassed actual property damage of the party bringing the action. However, a two-judge dissent argued

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82 Robertson, supra note 1, at 755, 760 (marveling at the fact that no justice even dissented from the denial of writs in the Illinois Central R.R., 467 So.2d 1141, case, which in part applied Forcum-James, 93 So.2d 228); Wiltz, 645 F.3d at 703.

83 Phillips v. G & H Seed Co., 2010-1405 (Phillips III), (La. App. 3d Cir. 3/7/12); 86 So. 3d 773, cert. granted, 2012-0775 (La. 6/22/12); 90 So. 3d 447 (mem). While no formal date has yet been set, an email conversation with the Louisiana Supreme Court, Clerk of Court’s Office, revealed that oral argument will likely take place in October of 2012 with the earliest possible date for issuance of the opinion arising in December of 2012.

84 See Robertson, supra note 1, at 760.

85 Cleco Corp. v. Johnson, 2001-0175, pp. 5-6 (La. 9/18/01); 795 So.2d 302, 306. The court cites two different occasions of property damage. First, the initial injury occurs to Cleco’s actual physical property (an electrical pole that feeds electricity to its customers). Id. Second, addressing whether its customers might have a cause of action, the court notes the property damage they suffered in terms of their electrical appliances. Id. at 305.
that *PPG Industries* should be applied to bar recovery. The *Phillips III* decision evidences this continuing confusion.

IV. THE COURT’S DECISION

A. The Court Chooses Between a Bright-Line Rule or Duty/Risk Analysis for Intangible Economic-Loss Cases

The appellate court’s *Phillips III* decision to remand this intangible economic-loss case for a duty/risk analysis, by an *en banc* vote of 7 – 4, succinctly captures the state of confusion in the courts as to how cases of intangible economic loss should be approached. The appellate court started its substantive analysis by drilling down on what it viewed as the main issue:

whether a Louisiana court should apply a bright-line rule necessitating a proprietary interest as a

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86 *Id.* at 307-08 (Victory & Johnson, JJ., dissenting); *see also* Cmty. Coffee Co., Inc. v. Tri-Parish Const. & Materials Inc., 490 So. 2d 1109, 1113 (La. App. 1 Cir. 1986).

Similarly, the *Phillips III* court looks to support from its own opinion in Istre v. Fid. Fire & Cas. Ins. Co., 628 So.2d 1229 (La. App. 3d Cir. 1993), cited favorably in *Cleco Corp*, 795 So.2d at 306-07. *Phillips III*, 86 So.3d at 780-81. Again though, *Cleco Corp*, does this only to help reinforce the inapplicability of *PPG Industries*, 447 So.2d 1058, as physical damage to the plaintiff is involved. *Cleco Corp*, 795 So.2d at 306.

Additionally, the *Phillips III* decision also quotes a comment in a 1990 Louisiana Supreme Court saying that “the *PPG* case abrogated the rule that flatly prohibited recovery for intangible economic loss produced by negligent conduct.” *Phillips III*, 86 So.3d at 781 (quoting 9 to 5 Fashions, Inc. v. Spurney, 538 So.2d 228, 234 (La. 1989).

Two brief points on the quote immediately above: 1.) The source case addressed intentional interference with contracts, and thus this comment stood only as *dicta*. 2.) More importantly, an opinion later that same year by Justice Dennis, the author of that statement, included language supporting the bar on actions for negligent interference with contractual relations, and even for pure economic-loss more generally, thereby at least in part undermining this statement. *Great Sw. Fire Ins. Co. v. CNA Ins. Companies*, 557 So.2d 966, 969-71 (La. 1990).

87 *See generally* *Phillips III*, 86 So. 3d 773 (finding a duty/risk analysis should apply over the dissents of four other judges arguing for a bright-line rule as issued in *Phillips v. G & H Seed Co.* (*Phillips I*), 2008-934 (La. App. 3d Cir. 4/8/09); 10 So. 3d 339, *cert. denied*, 2009-1504 (La. 10/30/09), 21 So. 3d 284 (mem.).)
precondition to tort recovery, or whether a court should instead consider the question of liability
within the parameters of a duty/risk analysis.\textsuperscript{88} The court found the latter, with the inclusion of
the possibly limiting factor of “particularly foreseeable” damages after its examination of
relevant policy concerns and the related body of Louisiana jurisprudence.\textsuperscript{89}

B. The Court’s Choice: \textit{PPG Industries}, and Policy Considerations, Demand a

Duty/Risk Analysis

The court primarily came to its conclusion by conducting an analysis of the \textit{PPG Industries} decision, holding that that case straightforwardly stated a departure from the prior

\textit{Robins Dry Dock} and adopted in Louisiana via the \textit{Forcum-James Co.} decision.\textsuperscript{90} Therefore, the court found that \textit{Phillips I} directly contradicted the

\textsuperscript{88} “The issue in this case boils down to whether Louisiana will apply a bright-line litmus test mandating proprietary interest in damaged property as a prerequisite to recovery, or do Louisiana courts apply a . . . duty-risk analysis when determining the scope and extent of a defendant’s duties.” \textit{Phillips III}, 86 So. 3d at 779.

Three points merit brief mention: 1.) \textit{Phillips III} presents a wholesale adoption of the Phillips v. G & H Seed Co. (\textit{Phillips II}), 2010-1405 (La. App. 3d Cir. 5/11/11); 66 So. 3d 507, \textit{reh’g denied} (July 27, 2011), \textit{cert. granted, cause remanded}, 2011-1861 (La. 11/18/11), 75 So. 3d 460 (mem.), \textit{aff’d en banc}, \textit{Phillips}, 86 So. 3d 773, \textit{Phillips III}, 86 So. 3d at 775 (adopting \textit{Phillips II}, 66 So. 3d 507). 2.) The court technically begins by disposing of the argument that the “law of the case” doctrine prevents this issue from being revisited following \textit{Phillips I}. \textit{Phillips III}, 86 So. 3d at 779 (citing \textit{Phillips I}, 10 So. 3d 339). 3.) Although these actions came under the Louisiana Products Liability Act, this seems to present no particular complication in the form of special tort rules in the court’s reasoning, especially as the \textit{PPG Industries} decision formed a core part of the court’s decision but did not involve products liability. \textit{Phillips III}, 86 So. 3d at 779 (citing \textit{PPG Industries, Inc.}, 447 So. 2d 1058); \textit{see also} Wiltz v. Bayer CropScience, Ltd., 645 F.3d 690, 696-97, 699 (5th Cir. 2011) \textit{cert. denied}, 132 S. Ct. 1145, 181 L. Ed. 2d 1019 (U.S. 2012) (holding that \textit{PPG Industries}, 447 So.2d 1058, applies equally to LPLA claims).

\textsuperscript{89} \textit{Phillips III}, 86 So. 3d at 780-82. The possible intended interpretations of the phrase “particularly foreseeable” are discussed in the section “Facts and Holding.”
mandate of *PPG Industries* calling for a duty/risk analysis.\(^9\) In addition to looking at the

language of the *PPG Industries* decision, including Justice Calogero’s statement in his dissent

“applaud[ing] the majority’s applying a duty/risk analysis . . . and abandoning the *per se*

exclusion of such damages which our courts have heretofore adopted,” the court looked to five

cases that employed the *PPG Industries* decision or a duty/risk analysis in general.\(^9\) One of

these cases, *9 to 5 Fashions, Inc. v. Spurney*, examining Louisiana’s allowance for an intentional

interference with contractual relations action, also figured heavily in Judge Saunder’s 2009

dissent due to its characterization of *PPG Industries* as “abrogat[ing] the rule that flatly

prohibited recovery for intangible economic loss produced by negligent conduct.”\(^9\)

In addition to interpreting *PPG Industries* as a mandate for a duty/risk analysis, the court

noted policy concerns that it found to support the use of a duty/risk analysis.\(^9\) This concern

stemmed from a sentiment that adherence to a bright-line rule could result in “depriv[ing] an

\(^9\) *Id.* at 782 (citing *PPG Industries, Inc.*, 447 So. 2d at 1061; Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303
(1927); Forcum-James Co. v. Duke Transp. Co., 93 So. 2d 228 (1957)).

\(^9\) *Id.* at 779-80

\(^9\) *Id.* at 780-82 (quoting *PPG Industries, Inc.*, 447 So. 2d at 1062 (Calogero, J., dissenting)) (citing five cases, discussed below)

\(^9\) *Id.* at 781 (citing *Phillips I*, 10 So. 3d at 345 (Saunders, J., dissenting) (quoting 9 to 5 Fashions, Inc. v. Spurney,
538 So. 2d 228, 234 (La. 1989))).

\(^9\) *Id.* at 780.
innocent person of any remedy for damage suffered in direct contrast to our fundamental civil law principal that obliges a person to fully repair damage caused by his fault.”

Finding a duty/risk analysis with a possible limiting factor of “particularly foreseeable” damages to be appropriate, rather than a bright-line rule, the court went no further. As the matter came before it solely on defendants’ motion for summary judgment, the court remanded the case to the trial court for further proceedings. Four judges dissented from this decision, with two assigning reasons, and the other three joining in both written reasons.

C. The Dissents: PPG Industries, and Policy Considerations, Demand a Bright-Line Rule

Dissenting Judge Decuir quoted extensively from the Third Circuit, Louisiana Court of Appeal’s penultimate opinion in PPG Industries finding that the Robins Dry Dock bright-line rule had acquired the status of jurisprudence constante in Louisiana. His dissent pointed out

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95 Id. at 780 (citing LA. CIV. CODE ANN. art. 2315 (2012)). The court also cited text from a treatise in support of this policy argument. Phillips III, 86 So. 3d at 782 (citing Frank L. Maraist & Thomas C. Galligan, Louisiana Tort Law, § 5.09 (1996)).

96 Phillips III, 86 So. 3d at 782.

97 Id.

98 Id. at 783-85 (Decuir, Pickett, Ezell, & Gremillion, JJ., dissenting)

99 Id. at 784 (citing Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927)).
that regardless of Justice Calogero’s dissent in the *PPG Industries* decision, or the statement in *9 to 5 Fashions*, the bright-line rule as adopted in *Forcum-James* has never been overruled.  

Instead, Judge Decuir’s dissent claimed that the *PPG Industries* court avoided overruling the bright-line rule while also taking the extra step of pointing out that policy concerns would bar recovery under a duty/risk analysis. Thus, his dissent concludes that the court should be limited to following this interpretation of the Louisiana Supreme Court.

**V. ANALYSIS**

The *Phillips III* court reached a fair conclusion in its decision, albeit with scant and even inapplicable support given the dearth of guidance from Louisiana jurisprudence. The problem discussed in this paper lies not with the court’s individual analysis, but with Louisiana’s overall confusion with this area of law. After a more detailed investigation of the *Phillips III* reasoning,

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100 Id. (citing *PPG Industries, Inc.*, 447 So. 2d at 1062 (Calogero, J., dissenting); *9 to 5 Fashions, Inc.*, 538 So. 2d 228; *Forcum-James Co.*, 93 So. 2d 228).

101 *Phillips III*, 86 So. 3d at 784 (Decuir, J., dissenting) (citing PPG Industries, Inc. v. Bean Dredging, 447 So. 2d 1058 (La. 1984)).

102 Id.; Judge Decuir notes *Phillips I* and the parallel action in federal court as ones that have properly applied that holding. *Id.* (citing Phillips v. G & H Seed Co. (*Phillips I*), 2008-934 (La. App. 3d Cir. 4/8/09); 10 So. 3d 339, *cert. denied*, 2009-1504 (La. 10/30/09), 21 So. 3d 284 (mem.); Wiltz v. Bayer CropScience, Ltd., 645 F.3d 690 (5th Cir. 2011) *cert. denied*, 132 S. Ct. 1145, 181 L. Ed. 2d 1019 (U.S. 2012)).

Judge Pickett’s dissent simply emphasized the dissenting judges’ belief that *Phillips I* correctly stated the law, and as plaintiffs failed to show a proprietary interest, should be maintained. *Phillips III*, 86 So. 3d at 785 (Pickett, J., dissenting) (citing *Phillips I*, 10 So. 3d 339).

103 *Phillips III*, 86 So.3d at 780-82 (majority opinion).
this paper will suggest a delineated four-step process which the Louisiana Supreme Court could adopt and use in this and other intangible economic-loss cases.\textsuperscript{104}

\textbf{A. Phillips as a Microcosm of the Confusion}

Relying primarily on a close reading of \textit{PPG Industries}, the \textit{Phillips III} court discerned that the proper jurisprudential approach for intangible economic loss cases demanded a duty/risk analysis with an eye towards limiting the group of plaintiffs via “particularly foreseeable” damages.\textsuperscript{105} This reasoning, though, becomes strained when the court asserts that “cases since \textit{PPG Industries} have consistently followed the duty/risk analysis set forth in \textit{PPG}.”\textsuperscript{106} In support, the court cites five cases, but those cases provide very little aid for this assertion.

Two of the cases address fact patterns containing physical damage to the plaintiffs’ property, and the only one that cites \textit{PPG Industries} does so to distinguish it on a factual basis for why the defendant has a duty in that case.\textsuperscript{107} Another case only cites the \textit{PPG Industries}

\textsuperscript{104} See \textit{Id.} at 779-82.

\textsuperscript{105} \textit{Id.} at 782. Again, the court does not actually define whether this phrase requires an additional step to the normal duty/risk analysis. \textit{Id.}

\textsuperscript{106} \textit{Id.} at 780.

\textsuperscript{107} \textit{Id.} at 780-81; \textit{Cleco Corp. v. Johnson}, 2001-0175 (La. 9/18/01); 795 So.2d 302, 306-07 (citing \textit{Istre v. Fid. Fire & Cas. Ins. Co.}, 628 So.2d 1229 (La. App. 3d Cir. 1993)) (asking the limited question whether customers have a cause of action against a party striking a utility company’s electrical pole thus sending a power surge that causes physical property damage to these customers).
decision to note the interplay between policy considerations and duty, and moreover, is cited by the *Phillips III* court merely for the legal argument that a duty/risk analysis helps especially in determining a duty.\(^{108}\) A fourth case likely even undermines the *Phillips III* court’s decision, reiterating the principles of a duty/risk analysis, and actually describing *PPG Industries* as standing for the broad rule that a duty to not damage someone’s property does not include the risk of affecting another party’s business arrangement under a duty/risk analysis.\(^{109}\) While at best broadly supportive of a duty/risk analysis for negligence cases in general, these cases remain mostly inapplicable as guideposts for intangible economic loss actions, and should not be seen as the *PPG Industries* decision’s progeny.\(^{110}\)

Finally, the fifth and last case pointed to by the *Phillips III* court noted that *PPG Industries* had done away with the bright-line rule barring recovery for intangible economic loss.\(^{111}\) However, this quote is merely *dicta*, as the facts of the case focused on intentional

\(^{108}\) Pitre v. Opelousas Gen. Hosp., 530 So.2d 1151, 1155 (La. 1988); *Phillips III*, 86 So.3d at 781-82 (citing *Pitre*, 530 So.2d 1151).


\(^{111}\) *Phillips III*, 86 So.3d at 781 (quoting *9 to 5 Fashions, Inc. v. Spurney*, 538 So.2d 228, 234 (La. 1989)).
interference with a contract.\textsuperscript{112} Also, Justice Dennis, the author of this statement, would later go on to undermine it in an opinion that same year in which he showed signs of support for a bar on actions for negligent interference with contractual relations and, moreover, for a bar on actions relating to intangible economic loss in general.\textsuperscript{113}

Thus, as this review shows, the \textit{Phillips III} decision settles on a reasonable interpretation of the \textit{PPG Industries} decision but provides no further clarification in Louisiana’s legal landscape as to whether that case set the way forward for similarly situated cases. The court fell into the trap of understanding the \textit{PPG Industries} decision to stand for a certain proposition only to realize that the caselaw offers no consistent support. This condition then led the court to rely on suspect buttressing for its assertion of a consistent application.

Parties to a suit face a difficult enough proposition walking into a courtroom with an adverse outcome looming as a possibility. This uncertainty of result, however, is immanent in the courts’ function. What is not in their nature, and what undermines the system, is when the parties do not even know by what process their case will be decided.

\textsuperscript{112} See generally \textit{9 to 5 Fashions}, 538 So.2d 228.

Fortunately, the Supreme Court of Louisiana has granted writs for the Phillips III case.114

Our state’s highest court needs to take the opportunity to set out definitive language conclusively stating the proper approach in Louisiana for intangible economic loss cases.

B. A Possible Way Forward

The real problem, however, is not solved merely with the clarification on the approach to intangible economic-loss cases. As proposed above, the reason this confusion has continued stems just as much, if not more, from the courts’ dissatisfaction with either a complete prohibitory rule or with a duty/risk analysis lacking clear guidelines. The Louisiana Supreme Court does not need to simply mark the channel – it needs to chart a new course.

Following is a suggested four step process that the Louisiana Supreme Court should adopt when reviewing the Phillips III case.115 Each step is borrowed from scholars in the field, that enables the court to draw a definite line while expanding liability past a property interest to more accurately reflect individuals’ interests worthy of protection.116 These four steps can be

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114 Phillips v. G & H Seed Co., 2010-1405 (Phillips III), (La. App. 3d Cir. 3/7/12); 86 So. 3d 773, cert. granted, 2012-0775 (La. 6/22/12); 90 So. 3d 447 (mem.).

115 Id.

116 The concepts behind three of these steps overlap to some degree. This overlap can be seen, for instance, in some of the reasoning in the Production Theory article or in Judge Wisdom’s Testbank dissent. See Rhee, supra note 2, at
summarized by their base criteria as follows: 1) particular, or special, damages;\textsuperscript{117} 2) factor of production versus factor of outcome;\textsuperscript{118} 3) availability of alternative sources;\textsuperscript{119} and, 4) a duty/risk analysis.\textsuperscript{120}

To better illustrate these steps, they will be applied to a fact pattern built from the \textit{Phillips III} case.\textsuperscript{121} The only difference here is that the plaintiffs will consist of the six following groups:

Group A consists of small crawfish processing operations serving only a few rice/crawfish farmers; Group B consists of crawfish processing operations serving the entire state; Group C consists of the employees of the processing operations; Group D consists of a regional seafood supplier who experiences increased prices and sparse supplies; Group E consists of some seafood restaurants that do a significant business in crawfish but now do not serve crawfish at all due to lack of availability or price increases; and, Group F consists of consumers who experience

\textsuperscript{74} State of La. ex rel. Guste v. M/V Testbank (“Testbank”), 752 F.2d 1019, 1051-52 (5th Cir. 1985) (Wisdom, Rubin, Politz, Tate, and Johnson, JJ., dissenting). However, these steps help to delineate and categorize the amalgamation of the processes, thereby hopefully saving a court from intensive academic deliberation every time it encounters an intangible economic loss case.

\textsuperscript{117} e.g. \textit{Testbank}, 752 F.2d at 1049.

\textsuperscript{118} Rhee, \textit{supra} note 2.

\textsuperscript{119} E.g. Phillips v. G & H Seed Co. (\textit{Phillips I}), 2008-934 (La. App. 3d Cir. 4/8/09); 10 So. 3d 339, \textit{cert. denied}, 2009-1504 (La. 10/30/09), 21 So. 3d 284 (mem.) (Decuir, Pickett, Ezell, & Gremillion, JJ., dissenting).

\textsuperscript{120} E.g. Roberts v. Benoit, 605 So. 2d 1032, 1056 (La. 1991).

\textsuperscript{121} See generally \textit{Phillips III}, 86 So.3d at 774.
greatly increased crawfish prices. A court examining a fact pattern of intangible economic loss could move progressively through these steps, continuing to narrow down the field of prospective plaintiffs with some bright-line criteria before proceeding with a duty/risk analysis.

1. “Particular Damage,” i.e. “Special Damage”

First, as has been most frequently cited by those arguing to allow recovery in intangible economic-loss cases, a court should do a quick application of the familiar “particular [or special] damage” concept borrowed from public nuisance law. “Particular [or special] damages” comprise “damages . . . different in kind and degree from those suffered by the general public.”

122 While the case relied on here for this concept utilizes the phrase “particular damage,” the use of “special damage” offers a preferable alternative for two reasons. First, the two terms seem to be used interchangeably to describe the same concept. See e.g. William B. Johnson, What Constitutes Special Injury that Entitles Private Party to Maintain Action Based on Public Nuisance-Modern Cases, 71 A.L.R. 4th 13, §§ 2a, 2b (1989). Second, as Louisiana courts frequently employ the term “particular” in a normal duty/risk analysis, a distinction is desirable to avoid further confusion, one such example of which might be the Phillips III court’s use of “particularly foreseeable.” E.g. Roberts, 605 So. 2d 1032; Faucheaux v. Terrebonne Consol. Gov’t, 615 So. 2d 289, 293 (La. 1993); Phillips III, 86 So.3d at 782.

123 Robertson, supra note 1, at 742-48 (citing People Express Airlines, Inc. v. Consol. Rail Corp., 495 A.2d 107, 116 (N.J. 1985); State of La. ex rel. Guste v. M/V Testbank (“Testbank”), 752 F.2d 1019, 1047 (5th Cir. 1985) (Wisdom, Rubin, Politz, Tate, and Johnson, JJ., dissenting)).

124 Testbank, 752 F.2d at 1047; see Restatement (Second) of Torts § 821 (c) (1979). As a brief reminder, in that case a group of plaintiffs including shipping interests, seafood restaurants and processors, and bait shops, among others, brought suit for losses incurred when defendants caused a chemical spill in the Mississippi River Gulf Outlet. Testbank, 752 F.2d at 1020-21 (majority opinion).
Instituting this step in our group of plaintiffs, Group F, the public consumers, falls first to this bright-line criterion. As the public, the general definition immediately excludes them from recovery. Determinations beyond this point quickly get trickier. For instance, in regards to the restaurants, Group E, should their increased cost at getting crawfish be considered a damage different than that suffered by the consuming public, who also experience increased costs for crawfish as the sparse supply drives up prices?

Judge Wisdom struggled with the same determination in his dissenting opinion in *State of La. ex rel. Guste v. M/V Testbank.* In explaining why restaurants could not recover, his dissenting opinion offers the two following reasons: their damage is not distinguishable from general economic harm, and the restaurants do not provide “vital services” to the area. His first measure, while reasonable, does not always present a dependable and discernible basis for judging between the merits of different groups, for example local seafood processors versus local seafood restaurants. As if in response to this concern, the dissenting opinion introduced the extra measure of determining who provides a “vital service” to the affected area. This second

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125 *Testbank*, 752 F.2d at 1050 (Wisdom, Rubin, Politz, Tate, and Johnson, JJ., dissenting).

126 *Id.* at 1050-51.
measure, though, strikes one as inapposite to a consideration of recovery in tort. Put another way, to determine the ability of a party to recover for its injury, the consideration of whether they provide a “vital service” to the affected area, or in this case, the group of farmers, should not serve as the deciding line between those owed a duty and those not. Instead, the distinction needs to arise from society’s desire to protect certain groups from certain harms. Undoubtedly the good provided to society, or an area of society that a certain group serves, will be taken into account to some degree, but that should not be the basis of tort liability.

These reasons have undoubtedly contributed to the lack of interest in establishing such a system as the new course. The measures strike one as too vague in one step of the Testbank dissent’s suggestion, and too insufficient or inapposite in the other.\textsuperscript{128} The two concurrences in the Testbank opinion seem to have come to the same conclusion.\textsuperscript{129} Although both suggest that the court should be able to be flexible beyond the proprietary interest limitation, neither was willing to accept the proposed “particular [or special] damages” approach as the substitute.\textsuperscript{130}

\textsuperscript{127} \textit{Id.} at 1050.

\textsuperscript{128} \textit{See generally Id.}

\textsuperscript{129} Testbank, 752 So.2d at 1034-35 (Williams, J. concurring) (Garwood, J. concurring).

\textsuperscript{130} \textit{Id.}
Thus, at this point, the application of the “special damages” criterion has allowed us to quickly dispose of what would be the largest group of plaintiffs – the consuming public, Group F. However, practical difficulty in more nuanced use of this measure demands further criteria to help separate out meritorious claims.

2. Factor of Production vs. Factor of Outcome

The second step attempts to separate out a mere loss of profit expectation from actual damage incurred. Such a separation more accurately reflects the desired distinction between the unfortunate occurrence of loss due to business risk, an economic reality referred to as a “factor of outcome,” and the encroachment of a negligent act by another into one’s actual production process, or a “factor of production.” More directly, a “factor of production” exists in the case of the “integration of a particular property or asset into the production function such that the particular asset is indispensable to production.”

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131 These terms, in addition to the idea overall, are borrowed directly from the work of Professor Rhee in his article “A Production Theory of Pure Economic Loss.” Rhee, supra note 2. While his article delves into a thorough explanation of economic theory and differentiation, this paper presents a simplified version of the same concept. Therefore, any errors in explanation can be entirely attributed to this student’s attempt to understand Prof. Rhee’s theory, and not to any problem inherent in the original work.

132 Id. at 53. This likely parallels the intention of Judge Wisdom in looking to “vital services.” Testbank, 752 So.2d at 1049 (Wisdom, Rubin, Politz, Tate, and Johnson, JJ., dissenting).

133 Rhee, supra note 2, at 76. A common example of this occurs in what has come to be known as “the fisherman exception” in a case where some pollutant closes off the fishing grounds. Id. 57-60 (citing several cases exhibiting
the theory that society seeks to protect through tort liability those mechanisms adding to the
overall benefit of society, factors of production, but avoids civil litigation as a means to
redistribute wealth due to an adverse outcome of market risk.\footnote{Id. at 90-92, 103-04.}

When now asking the question “Is this a factor of production for the plaintiff?” the
answer as to recovery for Group D, the regional seafood supplier with sparse supplies and
increased prices, and Group E, the seafood restaurants who have stopped serving their popular
crawfish dishes, becomes more apparent. For neither business can it be said that a certain supply
of crawfish represents an “indispensable” factor in their production function. Certainly their
business will be less profitable due to decreased supply and increased purchase price, but that
constitutes a risk of doing business, or a “factor of outcome.”\footnote{It is also important to note that our facts do not address a total failure of the crawfish crop. While the combined rice/crawfish farming does provide more than 50% of crawfish in Louisiana, that still leaves the a significant percentage derived from other sources. W. Ray McClain, Robert P. Romaine, C. Greg Lutz, Mark G. Shirley, \textit{Louisiana Crawfish Production Manual}, LSU Agricultural Center (2012), \textit{available} at http://www.lsuagcenter.com/NR/rdonlyres/3AD14F0D-567D-4334-B572-D55D1C55A1F1/34429/pub2637CrawfishProductionManualLOWRES.pdf at 3.}

This cut also necessarily includes Group C, the employees of the Group A small crawfish
processing operations and the Group B state-wide crawfish processing operations. As salaried

As a further explanation of the indispensable aspect, although not retained here, Prof. Rhee sets forth three elements to evidence indispensability, consisting of “a joint economic enterprise, ownership of the enterprise, and incapacity of a factor of production.”\footnote{Id. at 94-96.}
employees, they have elected to not sustain the risk the business itself does, and as such, a loss of
salary from the bankruptcy of their employer presents a factor of outcome.  Furthermore, allowing both the company as a whole and the employees individually to recover would essentially constitute a double recovery for the single harm.

    Such a finding might initially seem harsh. However, this finding is consistent with economic theory and the idea that society should not turn to the courts to redistribute wealth when something goes wrong. Instead, the source of distribution will rely on the employees’ employers doing the right thing. If the employers can recover, the processing operations’ damages will include a comprehensive accounting of costs, revenue, etc., which will undoubtedly reflect their employees’ salaries. The processing companies should seek to aid their employees in that case, but that aid should remain a separate issue between employer and employee.  

136 Rhee, supra note 2, at 95-96.

137 Id. at 91.

138 This casenote does not attempt to address the situations of truly catastrophic man-made disasters covering entire geographic regions, such as the flooding following Hurricane Katrina, or the BP / Deepwater Horizon oil spill. However, where the disaster is devastating to a wide geographic area, the production theory would likely apply to extend liability. See generally Rhee, supra note 2. Regardless, the best approach likely lies with Congress legislating specific terms of liability, recovery, etc., in advance, where possible, such as it did with the Oil Pollution Act. Oil Pollution Act of 1990, 28 U.S.C. § 2701 et seq.
The distinction between factors of production and factors of outcome allows for an easily discernible separation that more accurately reflects both economic realities and the intrinsic fairness protected by tort recovery. Only two groups remain – Group A, smaller crawfish processing operations serving a few rice/crawfish farmers, and Group B, a state-wide crawfish processor. Both groups clearly have suffered a harm different from that suffered by the general public, and both groups also rely on crawfish as indispensable parts of their production function.

3. Alternative Sources

The third step addresses a bar on recovery where a party could take an alternate route, use an alternate supplier, or have some other way of circumventing the harm. This of course overlaps with the concept of special damages, as well as the indispensability element to show a factor of production. While in this case the negligent act might decrease profit expectations, again, it does not impede ultimate production as the plaintiff can choose another route available.

An application of this implicates Group B, the state-wide crawfish processing operation, but admittedly, in this limited factual context, it still does not provide an easy answer. Proper

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139 *Testbank*, 752 So.2d at 1050-51 (Wisdom, Rubin, Politz, Tate, and Johnson, JJ., dissenting); Phillips v. G & H Seed Co. (Phillips I), 2008-934 (La. App. 3d Cir. 4/8/09); 10 So. 3d 339, 346, *cert. denied*, 2009-1504 (La. 10/30/09), 21 So. 3d 284 (mem.) (Saunders, J. dissenting) (saying that even if *PPG Industries*, 447 So.2d 1058, does stand for a bright-line rule, it should be distinguished as the plaintiff had available an alternate source of gas).

140 See Restatement (Second) of Torts § 821 cmt. i (1979); Rhee, *supra* note 2, at 74.
consideration requires more facts about just how severely Group B’s processing operations – or, their production -- was affected. The simple existence of a possible alternative would not equitably distinguish between a processor able to recover and one not able to recover. Instead, the measure should be whether there is a viable alternative. While admittedly a frustratingly vague term, the specificity of the situations of various industries and businesses within those industries demands a more case-specific analysis. Nor does this case-specific analysis negate the advantages of avoiding a duty/risk analysis. In addition to the two preceding bright-line criteria that will weed out some claims, the required analysis of viable alternatives still offers a much quicker route than only using a general duty/risk analysis from the outset.

Group A, the smaller processing operations dependent on a few rice/crawfish rice farmers, meanwhile passes through this test easily. Its operations are constrained to a few affected rice/crawfish farmers upon whom it routinely and entirely depends.

4. Duty/Risk Analysis

Finally, the court will allow any party surviving this gauntlet to proceed to litigate their action under a normal duty/risk analysis as provided for by Louisiana law. For example, now

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that the claims have been narrowed down to those of actually recoverable loss, plaintiff will still need to prove *prima facie* elements such as the actual negligent breach of the duty, and even the duty/scope of duty elements.\(^{142}\)

Applying this to the case at hand, the *Phillips III* court likely made the correct, ultimate determination that this case should be remanded to proceed under a duty/risk analysis, especially for those processors displaying an “interwoven, symbiotic relationship” with the crawfish farmers.\(^{143}\)

**Conclusion**

While the *Phillips III* court likely arrived at the correct conclusion, the circumspect way at which it arrived there, as evidenced by the cases it cited, provides little help to future cases of intangible economic loss. The fault for this cannot be placed solely on the shoulders of the Third Circuit, Louisiana Court of Appeals. The leading Louisiana Supreme Court case on the issue to date, in an apparent attempt to balance among statutory deference, fairness, and fears of endless liability, left the waters of the Louisiana legal landscape more muddied than ever.

\(^{142}\) See generally *Id.*; The difference now comes from the elimination of a “proprietary interest” as being the linchpin of the scope determination, with concrete criteria taking the place of that evaluation, as explicated above.

\(^{143}\) *Phillips v. G & H Seed Co.*, 2010-1405 (*Phillips III*), (La. App. 3d Cir. 3/7/12); 86 So. 3d 773, 777, 782, *cert. granted*, 2012-0775 (La. 6/22/12); 90 So. 3d 447 (mem).
In an attempt to rectify this situation, the Louisiana Supreme Court has granted writs to review the *Phillips III* decision. At the very least, the court must indicate precisely where the law currently stands for intangible economic loss in Louisiana. A truly satisfactory opinion, however, would address both the concerns of fairness and of indeterminate liability that have engendered dissatisfaction with the methods posed thus far. The four step process proposed above represents just one such possible way to address these competing concerns.