Mercer Law Review

Volume 74
Number 5 *MLR Online Companion*

Article 3

6-2023

Waiving Goodbye to Oil Spill Claims Against the United States: The Eleventh Circuit Creates a Narrow Exception to the Sovereign Immunity Waiver in the Suits in Admiralty Act of 1920

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I. INTRODUCTION

Costs related to oil spills can be extraordinary. Excluding the damage to the environment and to the vessel alone, a responsible party may incur containment costs, clean-up costs, cost of repairing public infrastructures, and fines and fees for causing the spill.[1] Additionally, the owner of the spilling vessel also risks liability for lost profits to other businesses in the surrounding areas, including those that can no longer fish in the affected area.[2]

*I would like to thank Professor David Hricik for taking the time to provide thoughtful feedback while serving as my faculty advisor on this Casenote. I am eternally grateful for his wisdom and his guidance throughout this process. I would also like to thank Professor Steve Johnson for his insight and advice. Finally, I would like to thank my parents, Shahnaz Begum and MoAkbar Khan for their unwavering love and support; my brother Mbill Khan for always being in my corner; and my friends for always reminding me to take a moment to breathe when life gets difficult.

1. *See generally* Mark A. Cohen, A Taxonomy of Oil Spill Costs—What are the Likely Costs of the Deepwater Horizon Spill?, https://media.rff.org/archive/files/sharepoint/WorkImages/Download/RFF-BCK-Cohen-DHCosts_update.pdf [https://perma.cc/3RM2-AZGV].

2. 33 U.S.C. § 2702(b)(2) (establishing the economic and environmental damages a responsible party is required to pay).

A responsible party[3] must incur all of those costs and reimburse the United States for any costs it incurs for the spill, but then the responsible party may bring a claim for contribution against another party for their negligence.[4] The responsible party may also be protected from liability to the federal government for costs it incurs if it can prove the sole cause of the spill had been due to an act of God, an act of war, or an act or omission of a third party.[5] However, no contribution is available from the United States under any circumstances—even if it had been the sole cause of a spill.

The United States Court of Appeals for the Eleventh Circuit explored a question of first impression on whether the Suits in Admiralty Acts of 1920[6] (SAA) created a waiver of sovereign immunity to allow a vessel owner to recover on oil spill clean-up costs.[7] In holding that the Oil Pollution Act of 1990[8] (OPA) is exclusive to oil spills and interpreting that there was no waiver of sovereign immunity, the court established a narrow exception to the SAA and may have created some disincentives that Congress hoped to avoid.

II. FACTUAL BACKGROUND

On September 8, 2019, the *M/V Savage Voyager* (the Vessel) was pushing two tank barges laden with oil along the Tennessee-Tombigbee Waterway (the Waterway) when it approached the James Whitten Lock, which was operated by the United States Army Corps of Engineers (Army Corps).[9] Due to the alleged negligence of the Army Corps, one of the Vessel's oil-containing tanks was punctured, causing an oil spill.[10]

The Vessel's owners, Savage Services Corp. and Savage Inland Marine LLC (collectively Savage), incurred $4 million in damages and costs associated with cleaning up oil from the Waterway.[11] Savage sued the

3. The "responsible party" is named to be the party that is liable for any spill, regardless of fault. 33 U.S.C. § 2701(32)(A). When a spill occurs, the first priority is to contain and clean the spill to ensure minimal damage. *Id.* The owner or operator of a spilling vessel is typically in the best position to do so in these situations. *Id.* (defining responsible party to include an owner or operator of a vessel).

4. 33 U.S.C. § 2709 ("A person may bring a civil action for contribution against any other person who is liable or potentially liable under this Act or another law.")

5. 33 U.S.C. § 2703(a) (establishing defenses to liability).

6. 46 U.S.C. § 30901 (waiving sovereign immunity for civil actions against the United States in all admiralty claims).

7. Savage Servs. Corp. v. United States, 25 F.4th 925, 927 (11th Cir. 2022).

8. 33 U.S.C. § 2703.

9. *Savage*, 25 F.4th at 928.

10. *Id.* at 928–29.

11. *Id.* at 929.

United States to recover those costs, alleging that the Army Corps was "solely responsible" for the spill. The Government filed a motion to dismiss, contending that the United States did not waive sovereign immunity for spill removal costs. Savage moved for a partial summary judgment, where it sought an affirmative ruling that sovereign immunity had been waived under the Suits in Admiralty Act of 1920 (SAA).[12]

The United States District Court for the Southern District of Alabama granted the Government's motion to dismiss and denied Savage's motion for partial summary judgment.[13] The district court held that the remedial scheme of the Oil Pollution Act of 1990[14] (OPA) was exclusive to oil spills and created a narrow exception to the SAA where the federal government had not waived sovereign immunity for oil spill clean-up costs.[15]

Savage appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court's judgment.[16] In doing so, the court prevents a party from recovering contribution for clean-up costs in claims against the United States government, whose negligence is the sole cause of an oil spill.[17]

III. LEGAL BACKGROUND

A. Early Federal Control Over Water Pollution

In the mid-1800s, many health professionals advocated for a national board after state and local boards had already been established.[18] Bills to establish a national health board failed to gain approval for concerns over states' rights.[19] When yellow fever swept through the south, Congress responded by creating the National Board of Health (the Board) in 1879.[20] The Board found thousands of overflowing privies and

12. *Id.* at 929.

13. *Id.* at 932.

14. 33 U.S.C. § 2703.

15. *Savage*, 25 F.4th at 948.

16. *Id.*

17. *Id.*

18. William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789–1972: Part II*, 22 STAN. ENVTL. L.J. 215, 217 (2003).

19. *Id.*

20. *See* Act of Mar. 3, 1879, ch. 202, 20 Stat. 484.The National Health Board only had limited powers and duties. *Id.* It may gather information on public health issues. *Id.* It may also advise state and local health departments on questions submitted to it. *Id.*

cesspools near areas where residents drew water and recommended a sewer system.[21]

The first piece of federal water pollution control legislation was introduced in 1899 in the Rivers and Harbors Act of 1899[22] (the Refuse Act), but was interpreted to only apply to objects in the navigable waterways rather than spills.[23] In the 1920s, bills were introduced to Congress to prohibit the discharge of oil, but critics argued there was not data to warrant their enactment.[24] Finally in 1924, Congress was able to pass a bill to prohibit the discharge of oil from vessels, but this ban was not applicable to on-shore facilities and the Army Corps failed to enforce the act.[25]

By the 1930s, the water was seriously polluted so federal assistance programs through the New Deal increased publicly owned waste treatment facilities.[26] There were also attempts to enact federal water pollution control legislation in the 1930s, but the Federal Water Pollution Control Act (FWPCA) was not signed into law until 1948.[27] However, it left the responsibility of addressing water pollution to the states.[28]

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21. Joel A. Tarr, *The Search for the Ultimate Sink*, *Urban Air, Land, and Water Pollution in Historical Perspective* 1, 5–6 (1996).

22. 33 U.S.C. § 407. This transformed Memphis to one of the cleanest cities in the nation. *Id.* However, the Board disbanded four years after its creation when the epidemics of 1878 and 1879 settled and the public no longer felt a need for a national board. *Id.*

23. *Id.* The Refuse Act prohibited the discharge of any material into any navigable waterway of the United States without a permit from the U.S. Army Corps of Engineers. *Id.* However, the Army Corps interpreted the statute to only apply to discharge of materials that impede navigation until the 1960s. *Id.*

24. *Pollution of Navigable Waters: Hearings Before the H. Comm. On Rivers and Harbors, Part 2*, 67th Cong. 102 (1921). Some critics also felt that the oil industry would bear too much of a burden. *Id.*

25. Oil Pollution Act of 1924, Pub. L. No. 68-288, 43 Stat. 604 (1924); ANDREEN, *supra* note 18, at 225.

26. *Stream Pollution: Hearings on S. 3958, S. 3959, S. 4342, and S. 4627 Before the Subcomm. of the S. Comm. on Commerce*, 74th Cong. 476 (1936).

27. Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948), *superseded by statute*, Water Pollution Control Act, Pub. L. No. 92-241, 35 Stat. 379 (1972). Congress halted discussions on federal water pollution control legislation to focus on World War II. After the war, Congress began discussing water pollution control. ANDREEN, *supra* note 18, at 234–35.

28. ANDREEN, *supra* note 18, at 238. The federal government did not play much of a role beyond providing additional funding. *Id.* Under the Act, polluters were immune from federal action as long as local residents were endangered or their activity did not actually threaten public health. *Id.*

The FWPCA was amended in 1956.[29] One remedy for the 1948 act was allowing for federal action against a polluter after convening a conference to allow local agencies an opportunity to address the issues.[30] This caused a serious delay and most of the conferences focused on rural rivers and not the most industrialized streams in the country.[31]

The FWPCA was again amended in 1961 to expand federal authority,[32] but the United States could not convene a conference without the consent of the governor of the state where the pollution occurred.[33] Several bills were also introduced and enacted to regulate water pollution control[34] throughout the 1960s but were largely ineffective.[35]

Once again, the FWPCA was amended in 1972 to strengthen the powers of the federal government to control water pollution in a number of ways, including establishing liability in the event of spill, allowing the federal government to arrange for an oil spill clean-up, and the power to recover for the clean-up costs it incurs.[36] In 1989, the Exxon Valdez spill showed the federal government placed too great of a burden on itself.[37]

B. The 1972 Amendments to the FWPCA

The FWPCA was significantly amended in 1972 to strengthen the powers of the federal government over water pollution by establishing liability in the event of a spill and gave the federal government more authority to arrange for an oil spill clean-up and, in that event, to recover costs from those who had caused the spill.[38] The "norm" in 1972 was to

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29. Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, 70 Stat. 498 (1956), *superseded by statute*, Water Pollution Control Act, Pub. L. No. 92 241, 35 Stat. 379 (1972).

30. *Id.*

31. ANDREEN, *supra* note 18, at 240. Only fourteen conferences were convened between 1956 and 1961, and mostly focused on rural rivers. *Id.*

32. H.R. REP. NO. 87-306, at 10 (1961). The federal government now had authority over all navigable water, rather than just interstate waters.

33. Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204 (1961), *superseded by statute*, Water Pollution Control Act, Pub. L. No. 92-241, 35 Stat. 379 (1972).

34. Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965), *superseded by statute*, Water Pollution Control Act, Pub. L. No. 92-241, 35 Stat. 379 (1972); Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 101, 80 Stat. 1246 (1966).

35. United States v. Standard Oil Co., 384 U.S. 224, 225 (1966).

36. Walter B. Jones, *Oil Spill Compensation and Liability Legislation: When Good Things Don't Happen to Good Bills*, 19 ENV'T L. REP. 10333 (1989).

37. *Id.* at 10337.

38. 33 U.S.C. § 1321(d); 33 U.S.C. § 1321(k). This version of the FWPCA required that the President create a National Contingency Plan (NCP) in the event of an oil spill and authorized a revolving fund to maintain $35 million for clean-up costs. 33 U.S.C. § 1321(d);

allow the owner or operator to clean up the spill because the operator of the vessel was always closest to the spills.[39] Further, it took time to "federalize" a spill, so it was more efficient to allow the financially capable spiller to take action.[40]

If instead the United States incurred clean-up costs, the FWPCA allowed the United States to recover for the costs associated with the spill through federal civil action or federal maritime lien proceedings.[41] In these proceedings, strict liability was imposed on the owner or operator of the discharging vessel.[42] The FWPCA provided a defense to the owner or operator to avoid paying those clean-up costs by proving that the sole cause of the spill had been an act of God, an act of war, negligence of the United States, or an act or omission of a third party.[43] The federal government would be able to recover the full amount of costs associated with clean-up for spills that were caused with willful negligence or willful misconduct.[44] In cases where such willful negligence or willful misconduct cannot be shown, the amount the federal government would have been able to recover was capped depending on the type of vessel.[45]

Significantly, the fact that the sole cause of a spill had been the fault of the United States was not a claim; it was a defense. However, the FWPCA also created an expressed waiver of sovereign immunity to allow a vessel owner recovery against the United States.[46] When vessel owners or operators incurred the oil spill clean-up costs, the FWPCA allowed for reimbursement to the owner or operator in a suit against the United States government by proving that an act of God, an act of war, negligence of the United States government, or an act or omission of a third party was the sole cause of the spill.[47]

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33 U.S.C. § 1321(k). Under procedures outlined in the National Contingency Plan (NCP), the owner or operator of a leaking facility or vessel was required to report the spill to the United States Coast Guard. 33 U.S.C. § 1321(b)(5). After a spill is reported, the President has two options: (1) arrange the clean-up efforts, or (2) authorize the owner or operator of the vessel to facilitate the clean-up if they were capable of performing the clean-up.33 U.S.C. § 1321(c). However, a spiller would oftentimes be able to recover on a spill. *Id.*

39. Cynthia M. Wilkinson et al., *Slick Work: An Analysis of the Oil Pollution Act of 1990*, 12 J. ENERGY NAT. RES. & ENV'T L. 181, 186 (1992).

40. *Id.*

41. 33 U.S.C. § 1321(c) (1972).

42. *Id.*

43. 33 U.S.C. § 1321(f)(1).

44. 33 U.S.C. § 1321(g).

45. 33 U.S.C. § 1321(f)(1)–(3).

46. Platte Pipe Line Co. v. United States, 846 F.2d 610, 612 n.3 (10th Cir. 1988).

47. 33 U.S.C. § 1321(f)(1). Put simply, in a circumstance where the negligence of the United States is the sole cause of a spill, the federal government would be unable to recover any of the costs it incurred when it arranged clean-up efforts. *Id.* When the vessel owner is

A spiller must prove it had not been a contributing cause of the spill to recover. For example, in *City of Pawtucket v. United States*,[48] the City of Pawtucket had acquired two storage tanks that were filled with oil when it purchased the surrounding land.[49] A vandal caused oil to spill from the tanks. The City sought reimbursement for the spill, alleging the spill was caused solely by a third party.[50] However, the court held that the city had been a contributing cause of the spill because it had "created a situation conducive to vandalism."[51] Among other security failures, surrounding fences had gaping holes, the floodlights had burnt out, and the tank's spigots had been unlocked. Over the eight-month period prior to the spill, the city had taken no action to secure the area. The city's omissions allowed the unknown vandal easy access, making the city a contributing cause and barring reimbursement.[52]

C. Problems with the 1972 Amendments to the FWPCA

By 1982, the government had obligated $124 million in the revolving fund while only recovering $49 million.[53] The $75 million expenditure for oil-spill removal costs severely undercut Congress's budget plans.[54] An assortment of other federal regulations as well as states' liability schemes complicated matters even further.[55]

When the federal government began implementing additional standards, these standards would supersede the FWPCA and even prevent reimbursement in some cases.[56] In *Alyeska Pipeline Service Co. v. United States*,[57] the plaintiff sued the United States for reimbursement of clean-up costs under the FWPCA when an "unknown saboteur" detonated an explosive and caused the discharge of oil into the navigable waterways of the United States.[58] The court denied reimbursement to the

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the party that incurred the oil-spill clean-up costs, then it may bring suit against the United States to recover on the costs. *Id.*

48. 546 F.2d 430 (1976).

49. *Id.* at 430.

50. *Id.*

51. *Id.* at 430.

52. *Id.*

53. S. REP. NO. 101-94, at 3 (1989).

54. *Id.*

55. *Id.* at 14.

56. J.B. Ruhl & Michael J. Jewell, *Oil Pollution Act of 1990: Opening a New Era in Federal and Texas Regulation of Oil Spill Prevention, Containment and Cleanup, and Liability*, 32 S. TEX. L. REV. 475, 480 (1991).

57. 649 F.2d 831 (1981).

58. *Id.* at 832.

plaintiff because the Trans-Alaska Pipeline Authorization Act[59] (the Pipeline Act) prevailed over the FWPCA since the Pipeline Act was the later and more specific statute.[60] This superseded the FWPCA's consent to bring suit against the United States government for an act or omission by a third party.[61]

Congress began discussing changes to the FWPCA for a more comprehensive liability scheme a few years after the FWPCA amendments of 1972 came into effect.[62] Disagreements over whether federal oil spill liability law preempted state liability laws delayed passage of a new plan until 1989 when the *Exxon Valdez* spill created a turning point for environmental legislation by highlighting the inadequacies of the current plan.[63]

D. The Exxon Valdez Spill Leads to Legislation Focusing on Prevention, not Restoration

Over the fourteen-year period before *Exxon Valdez*, Congress's primary consideration had been establishing liability for clean-up costs.[64] Efforts to create a comprehensive liability scheme were met with opposition from those advocating for the state schemes. House Resolution 1465[65] was introduced one week before the *Exxon Valdez* spill to address the issues regarding liability and compensation under the FWPCA.[66] The goal with this bill before the *Exxon Valdez* spill was to create a comprehensive liability scheme that irons out the issues with the state liability schemes.[67] However, the bill was continuously delayed as

59. 43 U.S.C. § 1651.

60. *Alyeska Pipeline*, 649 F.2d at 833. While the FWPCA created exceptions for situations where discharge was caused by a third party, Section 204(b) of the Pipeline Act provided that the "'control and total removal of the pollutant shall be at the expense of' the pipeline owners and operators, without an exception for situations where the discharge was caused solely by a third person." *Id.*

61. *Id.*

62. See Ruhl & Jewell, *supra* note 56, at 478.

63. Jones, *supra* note 36, at 10335, 10337.

64. *Id.* at 10333. The FWPCA required that the liable party pay the government back for clean-up costs unless the party can show that they were not at fault for the spill. *Id.* Courts would bar recovery if the actions of the spiller contributed to the spill. *Id.* In cases where a spill was caused by the negligence of the United States, the federal government would reimburse the spiller for removal costs. *Id.*

65. Oil Pollution Act of 1990, H.R. 1465, 101st Cong. (1990).

66. *Id.*

67. Wilkinson et al., *supra* note 39, at 190.

representatives debated over whether the federal law would preempt a state's ability to impose liability for oil spills.[68]

In 1989, the oil tanker the *Exxon Valdez* was en route to California from Valdez, Alaska when it struck the Bligh Reef in the Prince William Sound, causing the largest oil spill in history at eleven-million gallons.[69] *Exxon Valdez* showed the technology to contain spills over one-million gallons was either not being used or had not been developed.[70] The spill forced members of Congress supporting the preemption of state liability laws to change their decision to allow the bill to advance.[71] The new bill that protected state liability laws focused on preventing spills rather than containing them, but seemingly shifted liability for oil spills entirely onto the oil industry.[72]

E. The Oil Pollution Act of 1990 and its New Preventative Measures

The Oil Pollution Act (OPA)[73] was enacted in 1990 and amended the oil spill liability scheme in place under the FWPCA.[74] The nine titles of the OPA established liability;[75] compensation;[76] oil tanker personnel requirements;[77] created a fund for clean-up costs;[78] and initiated an oil pollution research institute,[79] among other things.[80]

1. The Deletion of the Sole Cause of the United States as a Defense to Liability

Section 2701 of the OPA defines the term "responsible party"[81] and requires the President to name the responsible party in an oil spill who will be held strictly liable for any removal costs or damages.[82]

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68. S. REP. No. 101-94, at 17 (1989).
69. S. REP. No. 101-94, at 2 (1989).
70. *Id.*
71. Wilkinson et al., *supra* note 39, at 190.
72. S. REP. No. 101-94, at 3 (1989).
73. 33 U.S.C. § 2701.
74. *Id.*
75. 33 U.S.C. § 2702.
76. 33 U.S.C. § 2708.
77. 33 U.S.C. § 2735.
78. 33 U.S.C. § 2712.
79. 33 U.S.C. § 2731.
80. See Ruhl & Jewell, *supra* note 56, at 492–93.
81. 33 U.S.C. § 2701(32)(A). "In the case of a vessel, any person owning, operating, or demise chartering the vessel. In the case of a vessel, the term 'responsible party' also includes the owner of oil being transported in a tank vessel with a single hull after December 31, 2010." *Id.*
82. 33 U.S.C. § 2714(a).

As a mechanism to avoid having clean-up costs fall on the federal government, Congress removed the "negligence on the part of the United States Government" defense to a claim brought by the United States against a responsible party for reimbursement of clean-up costs.[83] Instead, the OPA created a complete defense to liability in a claim for reimbursement costs only if the responsible party proves the sole cause of a spill was an act of God, an act of war, or an act or omission of a third party.[84] When a spiller cannot prove these defenses, then the federal government is entitled to reimbursement on any spill removal costs they incur throughout the process.[85] A spiller is then able to recover on spill removal costs from a third party in their own suit under comparative fault[86] or by enforcing an indemnity agreement.[87] While "person"[88] is expressly defined in the OPA, "third party" is not.[89]

"Third party" does not include the United States according to *In Re Glacier Bay*.[90] In this case, the plaintiff intended to anchor when it ran aground a rock that was not accounted for on the government's nautical charts. An oil spill resulted, and the United States sued the plaintiff for clean-up costs while the plaintiff sued the United States for its negligence in preparing the nautical charts.[91] The United States Court of Appeals for the Ninth Circuit held that the OPA sets out rights and responsibilities of discharging vessel owners and the United States in relation to one another.[92] The court further held that "third party" refers to "parties other than [the discharging vessel owner and the United States]."[93] Therefore, the United States does not waive sovereign immunity for oil spills under the "third party" defense in the OPA.[94]

The OPA defines "person" as any "individual, corporation, partnership, association, *State*, municipality, commission, or political subdivision of a State, or any interstate body."[95] "State" and the "United

83. 33 U.S.C. § 1321(f)(1); 33 U.S.C. § 2703(a).

84. 33 U.S.C. § 2703(a).

85. 33 U.S.C. § 2702.

86. 33 U.S.C. § 2709.

87. 33 U.S.C. § 2710; *In re* Complaint of Settoon Towing, L.L.C., 859 F.3d 340, 351 (5th Cir. 2017).

88. 33 U.S.C. § 2701(27).

89. 33 U.S.C. § 2701.

90. United Cook Inlet Drift Assoc. v. Trinidad Corp. (*In re* Glacier Bay), 71 F.3d 1447, 1455 (9th Cir. 1995).

91. *Id.* at 1449–50.

92. *Id.* at 1455.

93. *Id.*

94. *Id.*

95. 33 U.S.C. § 2701(27) (emphasis added).

States" are defined together as "the several States of the United States . . . and any other territory or possession of the United States."[96]

The OPA's liability scheme is modeled similarly to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).[97] CERCLA governs hazardous spills and imposes strict liability on a party spilling hazardous materials unless it can prove the spill was caused solely by an act of war, an act of God, or an act or omission of a third party.[98] Like the OPA, CERCLA also defines "State" and the "United States" the same.[99] CERCLA also allows the spiller to sue for contribution against another "person."[100] However, "person" in CERCLA is specifically defined to include "the United States government,"[101] whereas the OPA's definition of "person" is not.[102]

The OPA also created an Oil Spill Liability Trust Fund (the Fund) which is financed by environmental taxes, fines, and penalties.[103] When a responsible party is entitled to a complete defense to liability, the Fund will reimburse the responsible party.[104] Alternatively, a third party that pays the oil spill clean-up costs may present a claim to the Fund if the responsible party fails to pay a claim for removal costs.[105] While the federal government would sometimes have to front some costs associated with a spill, it would be able to recover those costs from the spillers or liable third parties.[106]

As another mechanism to avoid having the federal government bear the costs of cleaning up oil spills, the OPA sought to encourage private contractors to be prepared to clean up spills by establishing limited immunity for those providing repair services to vessels or are involved

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96. 33 U.S.C. § 2701(36).

97. 42 U.S.C. § 9601.

98. 42 U.S.C. § 9607(b).

99. 42 U.S.C. § 9601(27).

100. 42 U.S.C. § 9613(f)(1).

101. 42 U.S.C. § 9601(21) (2023) ("The term 'person' means . . . United States Government."). *Id.*

102. 33 U.S.C. § 2701(27).

103. 26 U.S.C. § 9509.

104. 33 U.S.C. § 2713(b)(1)(B); 33 U.S.C.A. § 2708(a).

105. 33 U.S.C. § 2713(a). When the United States must sue on behalf of the Fund to recover removal costs paid for by the Fund, the United States is also entitled to attorney's fees because "[t]hat purpose would be frustrated if recovery of fees was defeated by the happenstance that, as a matter of accounting, the Fund paid for the removal costs after, rather than before, the claim against the responsible party was litigated." United States v. Hyundai Merchant Marine Co., 172 F.3d at 1187, 1192–93 (9th Cir. 1999).

106. 33 U.S.C. § 2702(b)(1)(A).

with oil spill clean-up.[107] Legislators were concerned the absence of such a provision would deter responsible parties and contractors from performing a "prompt, aggressive response."[108]

Base costs—which included personnel salaries—of the United States Coast Guard constituted removal costs incurred by the United States, even if the United States did not incur any extra expenses for the removal.[109] For example, in *United States v. Hyundai Merchant Marine Co.*,[110] the bulk carrier *M/V Hyundai* was carrying an approximated 200,000 gallons of bunker oil when the crew discovered fractures in each of the tanks that caused oil to spill in waters around the Shumagin Islands of Alaska.[111] Even though the United States Coast Guard did not provide support beyond monitoring, the Ninth Circuit held these costs were within the definition of "removal costs" in the OPA, because it was a cost "to prevent, minimize, or mitigate oil pollution from such an incident."[112] The court further held that the Coast Guard's base costs did "result from" the spill even though the Coast Guard would have been paid to perform another task had the spill not occurred.[113]

2. More Work, Less Claims for Contribution

The OPA added additional requirements on a vessel before it may be allowed to travel through the waterways of the United States. One of the most notable requirements under the OPA was the double hull requirement on tank vessels.[114]

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107. 33 U.S.C. § 2732(b)(4) (barring suits against private persons or entities involved with oil spill contingency plans).

108. H.R. REP. 101-653. Prior to this provision in the OPA, private contractors had already been available. When questioned about this concern despite the availability of contractors, legislatures justified that "the Exxon Valdez had changed everything." Cynthia M. Wilkinson, L. Pittman & Rebecca F. Dye, *Slick Work: An Analysis of the Oil Pollution Act of 1990*, 12 J. ENERGY NAT. RES. & ENV'T L. 181, 191.

109. *See generally Hyundai Merchant Marine Co.*, 172 F.3d 1187.

110. *Id.*

111. *Id.* at 1188–89. The United States Coast Guard responded to the initial emergency and provided consultation for mitigation plans. *Id.* However, Hyundai performed all the work and incurred all the costs associated with cleaning the spill. *Id.* The United States sued Hyundai under the OPA to recover for the monitoring expenses incurred by the Coast Guard's response to the spill. *Id.* Hyundai argued that the United States was not entitled to those costs and that they were duplicative and unnecessary because the Coast Guard would still be monitoring regardless of the spill and Hyundai already spent millions of their own money in a successful clean-up operation. *Id.*

112. *Id.* at 1190.

113. *Id.* at 1192.

114. Wilkinson et al., *supra* note 39, at 196. Double hulls add an extra layer of protection in case a vessel is punctured, and this helps to prevent spills. *Id.* Opponents of the double

Additionally, the OPA requires oil carrying vessels to also carry removal equipment.[115] Owners and operators of certain vessels are required to submit response plans in the event of an oil spill,[116] however acting in accordance of an approved plan will not absolve an owner or operator of liability.[117] An owner or operator may deviate from this plan or the National Contingency Plan when the President or the Federal On-Scene Coordinator determines a deviation would allow "for a more expeditious or effective response to the spill or mitigation of its environmental effects."[118]

The OPA also imposes penalties which are enforced by the Environmental Protection Agency (EPA) on owners and operators who do not have a control or contingency plan in place.[119] For example, in *Pepperell Assocs. v. United States EPA*,[120] Pepperell operated a business out of an old textile mill building when the EPA issued an administrative penalty against Pepperell for its failure to have a Spill Prevention Control and Countermeasures (SPCC) Plan in place.[121] On appeal to the court, Pepperell argued that the SPCC did not apply to its operations and that the discharge of the oil into the river was not foreseeable, but the court disagreed and held that the Pepperell was required to have a plan in place.[122]

All is not lost for vessel owners though: in cases where the federal government brings suit against the responsible party to recover on clean-up costs it incurred, the responsible party will not be liable for the

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hull requirement argued that a breach in the outer hull can cause severe stability problems when water enters the space between the hulls and potentially lose the entire oil shipment. *Id.* In the 1989 amendment to this bill, new vessels were required to be equipped with double hulls. *Id.* As of January 1, 2015, single-hull oil tankers have been banned from traveling in the waters of the United States. *Id.*

115. 33 U.S.C. § 1321(j)(6)(A).

116. 33 U.S.C. § 1321(j)(5)(A).

117. 33 U.S.C. § 1321(j)(5)(H). A vessel traveling in the navigable waters of the United States cannot travel with oil unless a response plan is submitted to the President for approval. *Id.* Response plans and removal equipment are subject to periodic inspections. 33 U.S.C.A. § 1321(j)(5)(F); 33 U.S.C.A. § 1321(j)(5)(D)(v)–(vi).

118. 33 U.S.C. § 1321(c)(3)(B).

119. 33 U.S.C. § 1321(b)(6).

120. 246 F.3d 15 (1st Cir. 2001).

121. *Id.* at 19–20. Pepperell was in the process of removing the three oil tanks underground into a single above-ground tank. A spill occurred when a gasket ruptured on the facility's boiler and oil flowed into the city sewer and into a nearby river. When the EPA imposed its penalty, Pepperell appealed to the Environment Appeals Board (EAB) and then to the United States Court of Appeals for the First Circuit when the EAB upheld the EPA's order. *Id.*

122. *Id.* at 22–24.

costs if they can show an act of God, an act of war, or an act or omission of a third party was the sole cause of the spill.[123] Alternatively, a responsible party that is unable to prove these defenses may bring a contributions claim against any "person" that is also liable.[124]

Congress's goal with the OPA was to incentivize the oil industry to develop new technology and more safety measures to prevent spills.[125] This goal was carried out by imposing more liability onto the oil industry so it becomes cheaper to implement measures that prevent spills entirely.[126] The OPA allows the United States to recover on any costs incurred to clean-up an oil spill.[127] The OPA also allows a responsible party to seek contribution claims from others that are liable for a spill.[128] However, the Eleventh Circuit's holding indicates the responsible party may be unable to seek contribution claims when the United States is the sole cause of an oil spill.

IV. COURT'S RATIONALE

Judge Roy Kalman Altman from the United States District Court for the Southern District of Florida wrote the opinion for the United States Court of Appeals for the Eleventh Circuit in *Savage Servs. Corp. v. United States*.[129] The opinion addressed a question of first impression involving the interplay between the OPA and SAA.[130] In reaching its conclusion, the court interpreted the OPA to be exclusive to oil spill clean-up and that the United States did not waive sovereign immunity under the terms in the OPA.[131]

A. The Statutory Language

The court addressed the statutory language of the OPA.[132] The OPA allows a "person [to] bring a civil action for contribution against any other person who is liable or potentially liable."[133] The court explained that the OPA definition of "person" does not include the United States, only an

123. 33 U.S.C. § 2703(a)(1)–(3).

124. 33 U.S.C. § 2709.

125. S. REP. NO. 101-94 at 10 (1989).

126. Wilkinson et al., *supra* note 39, at 190.

127. 33 U.S.C. § 2702.

128. 33 U.S.C. § 2709 ("A person may bring a civil action for contribution against any other person who is liable or potentially liable under this Act or another law.").

129. 25 F.4th 925 (11th Cir. 2022).

130. *Id.* at 933.

131. *Id.* at 938.

132. *Id.* at 933.

133. *Id.*

"individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body."[134] The court also noted that the United States is not a "State" under Section 2701's definition of "person."[135]

Next, the court considered the application of the United States under the defenses to liability portion of the OPA,[136] particularly whether the defense "an act or omission of a third party" included the United States.[137] Previously, the FWPCA included the defenses to liability when a spill resulted from an act of God, act of war, negligence of the United States, and/or act or omission of a third party.[138] When the OPA amended the FWPCA in 1990, Congress removed the "negligence of the United States" defense.[139] Savage alleged that Congress transformed the United States into a "third party" by doing so.[140] The court holds that Congress intends any change to a statute to have "real and substantial effect,"[141] and it knows how to waive sovereign immunity when it wants to, which it did not in the OPA.[142]

B. OPA versus SAA: Total Knock Out!

Savage also argued that it may obtain contribution for oil spill removal costs in admiralty rather than the OPA.[143] The Suits in Admiralty Act of 1920 (SAA) contains an expressed waiver of sovereign immunity, allowing any civil claim against the federal government in admiralty.[144] However, this court held that the OPA created a limited exception to the SAA regarding oil spill liability claims.[145]

The court recognized the traditional rule of interpretation is that a statute with a more detailed remedial plan will preempt a statute with a

134. *Id.*

135. *Id.* at 934.

136. 33 U.S.C. § 2703(a).

137. *Savage*, 25 F.4th at 936–37.

138. 33 U.S.C. § 1321(f)(1).

139. 33 U.S.C. § 1321(f)(1); 33 U.S.C. § 2703(a).

140. *Savage*, 25 F.4th at 937.

141. *Id.* at 937–38 (quoting Husky Int'l Elecs., Inc. v. Ritz, 578 U.S. 355, 356, 359–60 (2016); United States v. Quality Stores, Inc., 572 U.S. 141 (2014)).

142. *Savage*, 25 F.4th at 935. The court compared the definition "person" in CERCLA to the OPA's definition. *Id.* While "person" in CERCLA included "the United States," the OPA's definition did not. This indicated that Congress knew how to waive sovereign immunity but chose not to do so. *Id.*

143. *Id.* at 938.

144. 46 U.S.C. § 30903.

145. *Savage*, 25 F.4th at 947.

general one.[146] The court reasoned that the OPA created a more detailed remedial plan because it was written to govern every aspect of an oil spill,[147] including the type of vessel that may carry oil in the navigable waterways of the United States,[148] required periodic testing and certification of equipment,[149] and placed limitations on travel for vessels carrying more than one-million gallons of oil after 1989.[150] The SAA, as the more general statute, does not create a cause of action but waives sovereign immunity for claims arising out of admiralty.[151]

The court also looked to the "savings" clause in the OPA.[152] Savage argued that this clause in the OPA allowed a responsible party to raise claims that are not found in the OPA.[153] The court here holds that the language of the OPA is clear, and that congress chose not to "afford vessel owners any cause of action against the United States."[154]

Savage finally asserted that protecting the federal government from the consequences of its decisions when acting as a tortfeasor would be unfair.[155] However, the court held that Congress intended to force the oil industry to internalize these costs to incentivize prevention of spills entirely.[156]

V. IMPLICATIONS

While the United States Court of Appeals for the Eleventh Circuit is not the first to determine that the OPA is exclusive to oil-removal

146. *Id.* at 939. A statute creates a detailed remedial scheme when it "'set out a carefully circumscribed, time-limited, plaintiff-specific cause of action,' 'precisely define the appropriate forum,' prescribe 'a specified limitations period,' and vest 'jurisdiction' in certain courts." *Id.* (quoting United States v. Bormes, 568 U.S. 6 (2012)).

147. *Savage*, 25 F.4th at 939.

148. 46 U.S.C. § 3703(a).

149. 33 U.S.C. § 2735.

150. 33 U.S.C. § 2737.

151. *Savage*, 25 F.4th at 938.

152. *Id.* at 941. It has been previously understood that a notwithstanding clause is "Congress's indication that the statute containing that language is intended to take precedence over any preexisting or subsequently enacted legislation on the same subject." *Id.*

153. *Id.* at 943.

154. *Id.* at 942.

155. *Id.* at 945.

156. *Id.* By placing greater liability and carefully curating the rights, duties, and obligations of a responsible party as well as creating a Fund financed by environmental fines and penalties rather than taxpayers, Congress intended to assign the right incentives onto the oil industry. *Id.*

claims,[157] *Savage* was the first to discuss whether the Suits in Admiralty Act created a waiver of sovereign immunity to allow a vessel owner recovery for oil spill clean-up costs when the United States was the sole cause of the spill.[158] The holding by the Eleventh Circuit may disincentivize vessel owners from taking responsibility for a spill in cases where the negligence of the United States seems evident.

Prior to the OPA, the FWPCA of 1972 included an expressed waiver of sovereign immunity against the United States to allow for recovery of removal costs.[159] The OPA was written in such a way to shift the burden away from the federal government and incentivize those transporting oil to take measures ensuring oil is not spilled, and that any spill is promptly cleaned-up with minimal environmental impact.[160] T0 do so, Congress created more requirements to ensure that implementing spill prevention measures was the less expensive alternative.[161]

This decision reinforces the burden placed onto a responsible party for any spill that occurs from its vessel. However, a vessel owner cannot control the actions of those employed by the federal government and cannot prevent spills when these employees are acting negligently. A responsible party may be disincentivized from creating additional spill prevention measures and implementing new technology if the negligence of the United States derails the entire purpose of these measures.[162]

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157. *See generally* United States v. American Commercial Lines, L.L.C., 759 F.3d 420 (5th Cir. 2014); S. Port Marine, LLC v. Gulf Oil Ltd. P'ship, 234 F.3d 58 (1st Cir. 2000); Ironshore Specialty Ins. Co. v. United States, 871 F.3d 131, 139 (1st Cir. 2017).

158. *Savage*, 25 F.4th at 943.

159. 33 U.S.C. § 1321(i)(1).

> In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil or a hazardous substance is discharged . . . such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Claims Court, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing causes.

Id. (*See also* Platte Pipe Line Co. v. United States, 846 F.2d 610 (10th Cir. 1988)).

160. Eileen M. Voegele, *United States v. Hyundai Merchant Marine Co.: Big Brother Is Watching—But Who Should Pay For His Monitoring Costs?*, 11 VILL. ENVTL. L.J. 495, 527 (2000).

161. Wilkinson et al., *supra* note 39, at 190.

162. "If responsible parties begin to weigh the cost of involving the Coast Guard against the cost of penalties, . . . a definite step in the wrong direction will have precipitated." Sergio J. Alarcon & Flynn M. Jennings, *Monitoring Costs Under The Oil Pollution Act Of 1990: A Blank Check For The Coast Guard?*, 21 TUL. MAR. L. J. 419, 440 (1997).

While there may be historical reasons to prevent a vessel owner from recovering some reimbursement from the United States for its contributory negligence,[163] requiring a vessel owner to incur clean-up costs and damages for a spill caused entirely by the United States government will increase insurance coverage costs and transportation costs for the vessel owners. Even though an oil carrier is typically in a better position to incur these costs, these costs will inevitably be incurred by the consumers.[164]

Fortunately, a vessel owner that sustains damages to its vessel due to the sole negligence of the United States has recourse under the Federal Torts Claims Act[165] for damages to the vessel, but not for any oil spill costs. Oil spill costs includes costs for the clean-up, damages to business owners in the surrounding areas, and damages to natural resources. The decision in *Savage* significantly limits the damages available to a vessel owner for the negligent actions of the federal government and may create some disincentives in the future.

163. S. REP. No. 101-94, at 3 (1989).

164. Alarcon & Jennings, *supra* note 162, at 440. "The consuming public ultimately bears the burden of increased production, transportation, and insurance coverage costs resulting from unreasonable demands for monitoring costs." *Id.*

165. 28 U.S.C.S. § 2674 (waiving sovereign immunity in claims against the United States for torts committed by persons acting behalf of the United States government).