The Polluter Pays – *Sometimes*

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OPA 90 PRECLUDES USA'S LIABILITY FOR CONTRIBUTION TO THE RESPONSIBLE PARTY FOR REMOVAL COSTS AND DAMAGES

Savage Services Corp v. USA, 25 F. 4th 925 (11th Cir. 2022)

In the first case to examine the issues, the Federal Court of Appeals held that the even where it is negligent OPA 90 as the exclusive vehicle for a remedy shields the federal government for liability to the spiller for contribution covering the OPA 90 removal costs and damages the spiller had incurred.

The essential facts are quickly recited: The Army Corps of Engineers' negligence holed Savage's loaded barge, spilling its oil cargo. Savage paid the removal costs and then sought contribution from the government under the provision in OPA 90 whereby "Any person may bring a civil action for contribution against any other person who is liable or may be potentially liable under this Act or another law." 33 USC §2709.

The Court analyzed first whether OPA 90 provides any remedy, and then whether OPA 90 provided the injured party's exclusive remedy precluding Savage from resorting to "another law."

OPA 90 90 Fails to Provide a Remedy by Way of Litigation. The court began its reasoning noting that OPA 90 in amending the earlier Federal Water Pollution had stripped the spiller of the defense of government negligence. The Court then held that the government was not a "person" under the above section as that term is defined in OPA 90 itself. Finally, the court held that Savage could not take advantage of the defense to liability where the spill is the sole fault of a "third party." 33 USC §2703, because the United States as the entity to which the spiller is liable is not a "third party," i. e. a stranger to the event, but rather is the "second" party.

OPA 90 Provides the Spiller's Exclusive Litigation Remedy. The Court rejected Savage's contention, based on its recognition that the government must waive its immunity for a claim to proceed, that it could bring its claims under common law because the government had waived its sovereign immunity under the Suits in Admiralty Act. But the Court held first that The SAA was only a general waiver, whereas OPA 90, the specific statute, was silent, thus indicating there was no waiver. Savage relied on the Savings Clause stating that "Except as otherwise provided in this Act, this Act does not affect…admiralty and maritime law." 33 USC §2751. Reasoning this clause related only to matters OPA 90 did not address, the court found that OPA 90 had addressed the matter of the government's liability as already discussed above and so the Savings Clause was inapplicable.

But the result runs afoul of the public policy principle undergirding OPA 90 - "the polluter pays." The Court failed to discuss this issue. Instead, it treated policy in terms of whether the taxpayer funded the costs, as was the case with the Oil Spill liability Trust Fund as constituted under the FWPCA, or the oil industry, as is the case under the Fund as modified by OPA 90. The Court reasoned that if it allowed Savage to recover, the funding would come from the general treasury and not the oil industry, thus contravening OPA 90's purpose.

Also, by insulating the government from liability, the Court has deprived the government of any incentive to act carefully - another policy at OPA 90's foundation.

However, OPA 90 through the vehicle of the Oil Spill Liability Trust Fund may afford a spiller an alternate means of recovery. If the spiller either has a defense under OPA 90 or is entitled to limit its liability to the gross registered ton cap, the spiller may look to the Fund for compensation. 33 USC §2708. Savage could not claim the benefit of the defenses, Act of God, Act of War, or Act of a Third Party. The above litigation concerned only removal costs and damages as defined in OPA 90, but explicitly allowed claims for non OPA 90 losses such as repair costs to go forward. On these claims the court found that Savage alone caused the casualty. 666 F. Supp 1177. As to Savage's prospects of sustaining limitation, the facts as reported do not disclose whether the OPA 90 losses Savage claimed exceeded the tonnage cap.

Note that because a tax on imported oil provides the money for the Fund to pay claims, the policy concerns the Savage court raised are avoided.

While a future case will need to resolve the conflicting policies Savage has implicated, the Fund may provide an alternative road to a spiller's recovery.