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CASENOTE

RECOVERY OF MONITORING COSTS UNDER THE OPA:
MONEY FOR NOTHING*United States v. Hyundai Merchant Marine Co., Ltd.*¹

I. INTRODUCTION

Since the introduction of legislation concerning oil pollution in middle 1800s, there have been fragmented statutory schemes. In an effort to make oil pollution legislation more uniform, Congress passed several statutes and acts during the 1970s and 1980s; however, legislators never attained their goal of uniformity. With the legislative evolution came changes as to the liability of persons or entities responsible for oil pollution. In Congress's most recent effort, the Oil Pollution Act of 1990,² lawmakers again had intentions of making oil pollution laws uniform, but also set out to extend the liability of a responsible party.³ In doing so, Congress made responsible parties liable for costs incurred during the removal of an oil spill.⁴

The focus of this Note is on the scope of a responsible party's liability. More specifically, are the costs incurred by the government recoverable from the party responsible for an oil spill when the government merely monitored but did not participate in the oil removal effort? While the Ninth Circuit recently answered the question in the affirmative, this Note will offer a viable alternative to that court's holding. As mentioned below, the Ninth Circuit's approach to the question is correct when only the applicable federal statutes are considered; however, the court does not adequately consider the policy it created nor the legislative intent behind the statutes.

II. FACTS AND HOLDING

Hyundai Merchant Marine Co. ("Hyundai") operated the bulk carrier M/V Hyundai No. 12 in the area around the Shumagin Islands of Alaska.⁵ On October 2, 1991, the vessel, carrying 200,000 gallons of bunker oil, ran aground and fractured the ship's holding tanks, exposing the bunker oil to the sea.⁶ During the fifth and sixth days after the vessel ran aground, storm winds blew the vessel more than 100 degrees around causing oil to leak from the vessel into the sea covering an area 2000 feet in length and creating the potential for more leakage.⁷ The oil leakage threatened several species of wildlife.⁸ The Coast Guard responded to the emergency and for eleven days stood by with personnel and equipment capable of containing the existing oil spill and any oil that may further seep from the vessel.⁹ Hyundai performed the actual labor of containing the oil spill by preventing further leakage, freeing the ship from the rock on which it was perched, and towing the ship to harbor where the vessel could be properly mended.¹⁰ The United States sued for recovery of costs incurred by the Coast Guard in monitoring the aforementioned oil spill under section 2702 of the Oil Pollution Act of 1990 ("OPA").¹¹ The OPA permits recovery from the responsible party of those costs and damages suffered by the

¹ *United States v. Hyundai Merchant Marine Co., Ltd.*, 172 F.3d 1187 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 397 (1999).

² Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761 (1994).

³ Michael P. Donaldson, *The Oil Pollution Act of 1990: Reaction and Response*, 3 VILL. ENVTL. L.J. 283, 288-89 (1990).

⁴ Daniel Kopec & Philip Peterson, *Crude Legislation: Liability and Compensation Under the Oil Pollution Act of 1990*, 23 RUTGERS L.J. 597, 618 (1992).

⁵ *Hyundai*, 172 F.3d at 1188. The Shumagin Islands are roughly 260 miles west of Kodiak. *Id.*

⁶ *Id.* at 1188-89. Bunker oil has a thick consistency and must be heated before being pumped. *Id.* at 1188. If evaporation occurs it is slow, and dispersion is poor when released into the environment. *Id.*

⁷ *Id.* at 1189.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* Hyundai consulted the Coast Guard regarding its plan for dealing with the emergency. *Id.* The Coast Guard approved the proposed plan, and Hyundai proceeded at its own sizeable expense. *Id.*

¹¹ *Id.* Oil Pollution Act of 1990, 33 U.S.C. § 2702(a) (1994).

United States, or another private party, in removal and containment of oil spills into navigable waters.¹² The United States further sued for penalties under the Debt Collection Act,¹³ which provides for penalties in the form of interest for unpaid claims made by the United States.¹⁴ The district court held that the OPA and Debt Collection Act were both applicable and awarded the United States \$1,702,553.51.¹⁵ Hyundai brought an appeal before the Court of Appeals for the Ninth Circuit, contending under the OPA, that the United States is not entitled to recover costs for monitoring Hyundai's clean-up efforts, that costs must be necessary to be recovered, and that base costs are not recoverable.¹⁶ Hyundai further argued that the Debt Collection Act did not apply, that the United States could not recover attorney's fees under the OPA, and that the wrong rate schedule was used in calculating the Coast Guard's costs in monitoring the emergency.¹⁷ The appellate court affirmed the district court's ruling in all but one respect.¹⁸ It held that when the United States sues for damages resulting from the Coast Guard monitoring an oil spill clean up of which the actual clean up was performed by and at the expense of the responsible party, the OPA is applicable.¹⁹ Thus, the United States can recover damages, regardless of necessity, including attorney's fees and base costs.²⁰ The court also concluded that because the OPA provides for interest on damages, the Debt Collection Act is inapplicable.²¹ Hyundai was therefore responsible for the damages sustained by the United States with the exception of penalties that would have been owed had the Debt Collection Act been applicable.²²

III. LEGAL BACKGROUND

There are two main issues presented in *United States v. Hyundai Merchant Marine Co., Ltd.*²³ First, whether monitoring costs, attorney's fees, and base costs that result from monitoring an oil spill prevention and clean up effort are recoverable under the OPA from a responsible party.²⁴ Second, if such costs are recoverable, whether penalties can be assessed against the responsible party under the Debt Collection Act.²⁵ The Ninth Circuit considered these two issues as a case of first impression in all circuits.²⁶ There are, however, one case from the Eastern District of Louisiana dealing with the recovery of monitoring costs under the OPA²⁷ and one case from the District of Columbia Circuit that touches on a closely related issue.²⁸ While these cases do not dispose of the issues, they offer holdings consistent with that of the Ninth Circuit.

¹² *Hyundai*, 172 F.3d at 1189. The statute reads, "[e]ach responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages." 33 U.S.C. § 2702(a) (1994). Removal costs include, "all removal costs incurred by the United States." *Id.* § 2702(b)(1)(A).

¹³ Debt Collection Act, 31 U.S.C. § 3717(a)(1) (1994). The statute reads, "[t]he head of an executive, judicial, or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person that is equal to the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole percentage point." *Id.* The statute does not apply, "if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest of charges." *Id.* § 3717(g)(1).

¹⁴ *Hyundai*, 172 F.3d at 1189.

¹⁵ *Id.*

¹⁶ *Id.* Base costs are costs "such as the salaries of personnel, that the Coast Guard would have incurred even were it not responding to the Hyundai No. 12's distress." *Id.* at 1192.

¹⁷ *Id.* at 1189.

¹⁸ *Id.*

¹⁹ *Id.* at 1192.

²⁰ *Id.*

²¹ *Id.* The appellate court further held the rate schedule used was in effect at all times relevant and was the proper rate schedule to be used in calculating the cost of the Coast Guard activity. *Id.* at 1193.

²² *Id.*

²³ *Id.* at 1188-89.

²⁴ *Id.* at 1188.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See *infra* notes 47-83 and accompanying text.

²⁸ See *infra* notes 84-99 and accompanying text.

A. The Oil Pollution Act – Relevant Provisions

The Oil Pollution Act (“OPA”) was passed by Congress in 1990 after 15 years of drafting.²⁹ Though Congress began work on the OPA several years prior to the Exxon Valdez oil spill, it played a major roll in the Congressional effort to enact the OPA.³⁰ The OPA was passed as an effort to make uniform several fragmented laws regarding oil spills.³¹ Congress further wanted to provide adequate compensation to those injured by oil spills and to ensure that damage to natural resources would be kept to a minimum.³² Following is a discussion of the OPA provisions relevant to the *Hyundai* case.

Before determining the scope of the OPA regarding recovery of costs, the person liable for the oil spill must first be identified. The OPA refers to the liable person as the “responsible party.”³³ The responsible party with regard to a vessel is defined in section 2701 of the OPA as, “any person owning, operating, or demise chartering the vessel.”³⁴ As a result, anyone falling within one of the three categories can be a responsible party and can be held liable for those costs recoverable under the OPA.

After determining who the responsible party is, the costs that are recoverable under the OPA must be evaluated. Stated another way, it must be determined for what amount the responsible party will be liable. Section 2702(a) of the OPA imposes on a responsible party liability for removal costs and damages resulting from an oil spill.³⁵ While the OPA defines removal costs in section 2701(31) as “the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident,”³⁶ section 2702(b)(1) further expounds on what things are included as removal costs.³⁷ Removal costs as defined by section 2702(b)(1)(A) include “all removal costs incurred by the United States ... under subsection (c), (d), (e), or (f) of section 1321 of this title.”³⁸ Although it appears that section 2702(b)(1)(A) of the OPA does not shed much light on what additional removal costs are covered by the Act, a look at the referenced section adds clarity to this portion of the OPA. As stated above, the OPA references section 1321 of the Federal Water Pollution Control Act (“FWPCA”).³⁹ Section 1321 of the FWPCA states that “[t]he President shall ... ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or hazardous substance” into the navigable waters of the United States.⁴⁰ Sections 1321(c)(1)(B)(i) and (ii) further provide that in carrying out this task, the President may “remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of discharge, at any time” and “direct or monitor all Federal, State and private actions to remove a discharge.”⁴¹ Section 1321(c)(2)(A) further authorizes the President to “direct all Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge” if the “discharge, or a substantial threat of a discharge, of oil or a hazardous substance from a vessel ... is of such a size or character as to be a substantial threat to the public health or welfare of the United States.”⁴² Therefore, any costs resulting from the President’s action authorized through these sections of the FWPCA are included as removal costs under the OPA.⁴³

²⁹ Donaldson, *supra* note 3, at 288.

³⁰ Jeffrey D. Morgan, *The Oil Pollution Act of 1990: A Look At Its Impact on the Oil Industry*, 6 FORDHAM ENVTL. L.J. 1, 1 (1994). The Exxon Valdez spilled 10.9 million gallons of oil in Prince William Sound of the coast of Alaska. *Id.*

³¹ Kopec & Peterson, *supra* note 4, at 618.

³² *Id.*

³³ Oil Pollution Act of 1990, 33 U.S.C. § 2702(a) (1994).

³⁴ *Id.* § 2701(32)(A).

³⁵ *Id.* § 2702(a). This section reads “each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.” *Id.*

³⁶ *Id.* § 2701(31).

³⁷ *Id.* § 2702(b)(1).

³⁸ *Id.* § 2702(b)(1)(A).

³⁹ *Id.* § 2702(b)(1)(A).

⁴⁰ Federal Water Pollution Control Act, 33 U.S.C. § 1321(c)(1)(A) (1994).

⁴¹ *Id.* § 1321(c)(1)(B)(i), (ii).

⁴² *Id.* § 1321(c)(2).

⁴³ Oil Pollution Act of 1990, 33 U.S.C. § 2702(b)(1)(A) (1994).

Finally, the OPA charges interest on amounts recoverable.⁴⁴ The interest is calculated “at the average of the highest rate for commercial and finance company paper of maturities of 180 days or less obtaining on each of the days included within the period for which interest must be paid to the claimant, as published in the Federal Reserve Bulletin.”⁴⁵

B. Cases Permitting the Recovery of Monitoring Costs Under the OPA.

While the Ninth Circuit is the first circuit court to decide the issue of whether monitoring costs should be included in removal costs under the OPA,⁴⁶ the Eastern District of Louisiana has dealt with precisely this issue.⁴⁷ In *United States v. Conoco, Inc.*⁴⁸ the court held that monitoring costs are recoverable as removal costs under the OPA.⁴⁹ The facts of the *Conoco* case are relatively straightforward. Conoco, Inc. (“Conoco”) was the responsible party for two oil pipelines located in or near the Gulf of Mexico.⁵⁰ On February 21, 1991, crude oil leaked from one of the pipelines and on April 30, 1992, crude oil leaked from the second of the two pipelines.⁵¹ On both occasions, Conoco repaired the leaks and successfully initiated clean-up efforts to rid the Gulf of Mexico of the crude oil leaked from the two pipelines.⁵² During Conoco’s efforts to remove the oil from the Gulf of Mexico and to repair the leaking pipelines, Coast Guard monitored Conoco’s activities.⁵³ The Coast Guard incurred costs of \$7,841 in monitoring the first oil leak and \$12,988.16 in monitoring the leak from the second pipeline.⁵⁴ The Coast Guard then submitted bills, each of which went unpaid, to Conoco for each amount.⁵⁵ As a result of Conoco’s non-payment of the bills, the United States initiated a suit against Conoco to recover the billed amounts.⁵⁶

Conoco offered four arguments to support its contention that monitoring costs are not recoverable as removal costs under the OPA.⁵⁷ First, Conoco argued that monitoring does not fall within the definition of “remove” or “removal” as defined by section 2701(30)⁵⁸ of the OPA.⁵⁹ The statute refers to “other actions as may be necessary to minimize or mitigate damage.”⁶⁰ Conoco argued that had Congress wanted to include monitoring in this definition, it would have worded the provision to the following effect: “the taking of any other actions as may be necessary to ensure minimization or mitigation of damages.”⁶¹ In the view of Conoco, because monitoring is not included in the definition of remove or removal, monitoring costs can not be included as removal costs.⁶² Thus, Conoco argued monitoring costs are not recoverable as removal costs under the OPA.⁶³ The court rejected Conoco’s argument and concluded that while the statute “is not a model of clarity, the language is broad enough” to include monitoring costs.⁶⁴

⁴⁴ *Id.* § 2705(a).

⁴⁵ *Id.* § 2705(b)(4). The period for which interest will be charged is calculated according to sections 2705(b)(1)-(3) of the Debt Collection Act. *Id.* § 2705(b)(1)-(3).

⁴⁶ *United States v. Hyundai Merchant Marine Co.*, 172 F.3d 1187, 1188 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 397 (1999).

⁴⁷ *Cf. United States v. Conoco, Inc.*, 916 F. Supp. 581 (E.D. La. 1996).

⁴⁸ *Id.*

⁴⁹ *Id.* at 585.

⁵⁰ *Id.* at 582.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 583-85.

⁵⁸ Oil Pollution Act of 1990, 33 U.S.C. § 2701(30) (1994). The statute reads, “‘remove’ or ‘removal’ means containment and removal of oil or hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage.” *Id.*

⁵⁹ *United States v. Conoco*, 916 F. Supp. 581, 583 (E.D. La. 1996).

⁶⁰ 33 U.S.C. § 2701(30) (1994).

⁶¹ *Conoco*, 916 F. Supp. at 583 (emphasis added).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

Conoco's second argument concerns the reference of OPA section 2702⁶⁵ to section 1321 of the FWPCA.⁶⁶ To this effect, Conoco argued that permitting the government to monitor clean-up efforts is not to say that the costs of monitoring are recoverable as removal costs against the responsible party.⁶⁷ The court quickly disposed of this argument by stating that this interpretation does not "withstand scrutiny of the OPA provisions as a whole."⁶⁸

Third, Conoco based an argument on a provision of the OPA that deals with the Oil Spill Liability Trust Fund ("Fund").⁶⁹ The statute reads in pertinent part, "[t]he fund shall be available ... for the payment of removal costs, including the costs of monitoring removal actions."⁷⁰ Conoco argued that if removal costs include monitoring costs, it is surplusage to include in the provision the phrase "including the costs of monitoring removal actions."⁷¹ Conoco further suggested that because monitoring costs are recoverable by the government from the Fund, Congress did not intend the government to recover these costs from the responsible party.⁷² Finally, Conoco argued that because it pays taxes into the fund based on its petroleum enterprise, it would be double jeopardy to include monitoring costs as recoverable removal costs under the OPA.⁷³ The court was not willing to accept Conoco's interpretation of the language used in section 2712 of the OPA and further disagreed with Conoco that the Fund was the only source from which the federal government could recover monitoring costs.⁷⁴ Moreover, the court did not find Conoco's double recovery argument persuasive because the Fund is a revolving fund that expends and derives its money to and from many sources.⁷⁵

The fourth and final argument made by Conoco was based on the National Contingency Plan ("NCP").⁷⁶ The NCP is used to guide both regulated agencies and regulated parties in the "enforcement, administration and interpretation of environmental law."⁷⁷ Once there is an oil spill, the oil spill must be reported to a person referred to as the On-Scene Coordinator ("OSC").⁷⁸ In responding to the report, the OSC may (1) "[r]emove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge"⁷⁹ or (2) "[d]irect or monitor all federal, state, and private actions to remove a discharge."⁸⁰ Conoco argued that for a responsible party to be liable for monitoring costs under these provisions, the effort put forth in removing the discharge must be inadequate.⁸¹ The court did not find Conoco's argument compelling and stated that Conoco's argument places a restriction upon the provisions that is not intended.⁸² Because the court did not find Conoco's arguments compelling, the court held that "monitoring costs are included in removal costs which the government may seek to recover from a responsible party."⁸³

A second case that permitted the recovery of monitoring costs under the OPA is *General Electric Co. v. United States Dep't of Commerce*.⁸⁴ *General Electric Co.* concerned the National Oceanic and Atmospheric Administration's ("NOAA") final rulings on several provisions of the OPA.⁸⁵ "To facilitate damage recovery,

⁶⁵ 33 U.S.C. § 2702(b)(1)(A) (1994).

⁶⁶ Federal Water Pollution Control Act, 33 U.S.C. § 1321(c)-(e) and (l) (1994). See notes 38-43 for a discussion of the relationship between section 2702 of the OPA and section 1321 of the FWPCA.

⁶⁷ *Conoco*, 916 F. Supp. at 583.

⁶⁸ *Id.*

⁶⁹ *Id.* "The Oil Spill Liability Trust Fund ... is available to pay for oil-spill related costs when the spiller cannot be identified, when the spiller can successfully defend against a charge of liability, when the spiller can invoke liability limits and claims exceed those limits, when the spiller is not subject to United States jurisdiction ... or when a spiller is insolvent or otherwise cannot make good on its obligations under the OPA." Cynthia M. Wilkinson et al., *Slick Work: An Analysis of the Oil Pollution Act of 1990*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 181, 207 (1992).

⁷⁰ 33 U.S.C. § 2712(a)(1) (1994).

⁷¹ *Conoco*, 916 F. Supp. at 584.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*; The National Contingency Plan, 40 C.F.R. § 300.300 (1999).

⁷⁷ 40 C.F.R. § 300.300 (1999); *Conoco*, 916 F. Supp. at 585.

⁷⁸ 40 C.F.R. § 300.300(d) (1999).

⁷⁹ *Id.* § 300.305(d)(1)(i).

⁸⁰ *Id.* § 300.305(d)(1)(ii).

⁸¹ *Conoco*, 916 F. Supp. at 585.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 128 F.3d 767 (D.C. Cir. 1997).

⁸⁵ *Id.* at 769.

[the] OPA directs the President, acting through NOAA, to ‘promulgate regulations for the assessment of natural resource damages ... resulting from a discharge of oil.’⁸⁶ In an NOAA final rule, the NOAA declared that monitoring costs are recoverable as assessment costs in restoration actions under the OPA.⁸⁷ Thus, one issue concerning the court in *General Electric Co.* was whether the OPA permits recovery of monitoring costs in a restoration action.⁸⁸

In an effort to persuade the court that monitoring costs should not be included as assessment costs, General Electric Co. (“GE”) made two arguments.⁸⁹ Its first argument relied on OPA provisions that concern the Oil Spill Liability Trust Fund (“Fund”).⁹⁰ GE made issue of the fact that in one provision the Fund was available for payment of removal costs including monitoring costs and in another provision, the Fund was available for payment of restoration actions with no mention of monitoring costs.⁹¹ GE concluded from this observation that monitoring costs are not included as assessment costs and therefore can not be recoverable in restoration actions.⁹² Given this interpretation, GE believed the NOAA acted arbitrarily in its final ruling that monitoring costs are recoverable as assessment costs in restoration actions.⁹³

GE’s argument was not persuasive to the court.⁹⁴ The court found that the two provisions concerned only the use of the Fund and not what costs are recoverable from the responsible party under the OPA.⁹⁵ The court further held that the provisions are not parallel in that “[t]he former refers only to ‘removal costs,’ while the latter refers to a significantly broader activity – ‘developing and implementing plans.’”⁹⁶ This was relevant because the court found monitoring to be “necessarily include[d]” in the implementation of plans.⁹⁷ Moreover, the court held that monitoring costs are included in assessment costs in a restoration action because “[m]onitoring is essential to ensure that restoration actions accomplish their intended goals and objectives and do not cause unanticipated harm to the environment or public health.”⁹⁸ The court further stated, “monitoring is essential to determine whether the terms of restoration agreements have been met, upon which a release from liability is premised.”⁹⁹

To date there is yet to be a published case that rejected recovery of monitoring costs under the OPA. With the exception of the instant case and the two cases referenced above, there are no other cases concerning the issue of whether monitoring costs are recoverable under the OPA. This is not to say that responsible parties have not been charged with monitoring costs in the past. The fact is that since the enactment of the OPA in 1990 it has been common practice for the government to include monitoring costs in its recoverable costs under the OPA.¹⁰⁰ One can only assume that responsible parties have not objected to the inclusion of monitoring costs as those costs recoverable under the OPA.

C. The Debt Collection Act – Relevant Provisions

Section 3717 of the Debt Collection Act imposes penalties and interest upon outstanding debts owed to the United States.¹⁰¹ The amount of interest charged is “equal to the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole

⁸⁶ *Id.* at 770 (citing Oil Pollution Act of 1990, 33 U.S.C. § 2706(e)(1) (1994)).

⁸⁷ *General Electric Co.*, 128 F.3d at 775.

⁸⁸ *Id.* Note the issue in *General Electric Co.* differs from *Hyundai*, in that the government attempted to include monitoring costs as assessment costs in a restoration action, and in *Hyundai* the government attempted to include monitoring costs as removal costs. *Id. Cf. United States v. Hyundai Merchant Marine Co.*, 172 F.3d 1187, 1188 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 397 (1999).

⁸⁹ *General Electric Co.*, 128 F.3d at 775-7.

⁹⁰ *Id.* at 775.

⁹¹ *General Electric Co.*, 128 F.3d at 775.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 776 (quoting National Oceanic and Atmospheric Administration, 61 Fed. Reg. 440, 491 (1996)).

⁹⁵ *General Electric Co.*, 128 F.3d at 776.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *United States v. Conoco*, 916 F. Supp. 581, 585 (E.D. La. 1996).

¹⁰¹ Debt Collection Act, 31 U.S.C. § 3717(a)(1) (Supp. III 1997).

percentage point.”¹⁰² Additional penalties shall be assessed against the debtor including “a charge to cover the cost of processing and handling a delinquent claim” and “a penalty charge of not more than 6 percent a year for failure to pay a part of a debt more than 90 days past due.”¹⁰³ However, the aforementioned interest will not accrue on the penalty amount.¹⁰⁴ The penalties and interest assessed under the Debt Collection Act do not apply if a “statute ... explicitly fixes the interest of charges.”¹⁰⁵

IV. INSTANT DECISION

In the instant decision, the court began by closely looking at several provisions of the OPA and of the FWPCA.¹⁰⁶ In doing so, the court rejected Hyundai’s argument that the OPA does not permit the recovery of monitoring costs.¹⁰⁷ The first provision the court analyzed was section 2702(a) of the OPA.¹⁰⁸ The court noted the reference therein to section 1321 of the FWPCA.¹⁰⁹ After referencing the aforementioned statutory provisions, the court concluded that the removal costs incurred by the government in monitoring Hyundai’s removal action were recoverable under the OPA.¹¹⁰ The court reasoned that “the Coast Guard’s actions were an attempt to ‘mitigate or prevent a substantial threat of a discharge,’ § 1321(c)(1)(B), it was ‘monitoring . . . private action to remove a discharge,’ § 1321(c)(1)(B)(ii), and its monitoring was a means of ‘direct [ing] private actions to remove the discharge or to mitigate or prevent the threat of discharge’ of oil, § 1321(c)(2)(A).”¹¹¹ To support its conclusion, the court examined the OPA’s definition of removal costs¹¹² and determined that monitoring a removal action is part of the Coast Guard’s “effort to prevent or minimize a threatened oil discharge.”¹¹³ Thus, the court flatly rejected Hyundai’s position that the OPA definition of removal costs does not include monitoring costs.¹¹⁴ In doing so, the court reasoned that Hyundai’s position “unduly minimizes the importance of the Coast Guard’s emergency stand-by operation” and that such an operation is an act of prevention, “the cost of which is . . . recoverable” under the OPA.¹¹⁵

In the next portion of the court’s decision, the court addressed Hyundai’s argument that for costs to be recoverable under the OPA, the costs must be “necessary” to mitigate or prevent an oil discharge.¹¹⁶ Hyundai contended, to no avail, that monitoring costs are not necessary to mitigate or prevent the discharge of oil based on the OPA’s definitions of “remove” and “removal.”¹¹⁷ In rejecting this argument, the court concluded that the words “as may be necessary” do not purport to be a limitation on reimbursement.¹¹⁸ The court then stated that the relevant term in section 2702(a)¹¹⁹ is not “removal” but rather “removal costs” and that the word “necessary” is not found in the section 2701(31)¹²⁰ definition of removal costs.¹²¹ According to the court, to determine what costs are recoverable, one should look to the liability provisions of a statute and not the

¹⁰² *Id.*

¹⁰³ 31 U.S.C. § 3717(e)(1), (2) (Supp. III 1997).

¹⁰⁴ 31 U.S.C. § 3717(f) (Supp. III 1997).

¹⁰⁵ 31 U.S.C. § 3717(g)(1) (Supp. III 1997).

¹⁰⁶ *United States v. Hyundai Merchant Marine Co.*, 172 F.3d 1187, 1189 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 397 (1999).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*; Oil Pollution Act of 1990, 33 U.S.C. § 2702(a) (1994).

¹⁰⁹ *Hyundai*, 172 F.3d at 1189; Federal Water Pollution Control Act, 33 U.S.C. § 1321(c)(1)(A) (1994).

¹¹⁰ *Hyundai*, 172 F.3d at 1190.

¹¹¹ *Id.*

¹¹² *See* Oil Pollution Act of 1990, 33 U.S.C. § 2701(31) (1994); *see* text accompanying note 36.

¹¹³ *Hyundai*, 172 F.3d at 1190.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1191.

¹¹⁷ *Id.* *See* Oil Pollution Act of 1990, 33 U.S.C. § 2701(30) (1994) (stating that “‘remove’ or ‘removal’ means containment and removal of oil or hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage.”).

¹¹⁸ *Hyundai*, 172 F.3d at 1191.

¹¹⁹ Oil Pollution Act of 1990, 33 U.S.C. § 2702(a) (1994).

¹²⁰ *Id.* § 2701(31).

¹²¹ *Hyundai*, 172 F.3d at 1191.

definition provisions.¹²² The liability provisions of the OPA do not limit recoverable costs to those costs that are necessary.¹²³

Hyundai next argued that if monitoring costs are recoverable under the OPA, the government is given a "blank check permitting it to undertake all kinds of unnecessary and unreasonable actions" at the responsible party's expense.¹²⁴ Again the court rejected Hyundai's argument based on its belief that the government action is only unnecessary in hindsight.¹²⁵ The court reasoned that under the circumstances, the Coast Guard reacted prudently, and even though the Coast Guard's assistance was not needed to remove the oil spill, the OPA does not limit recoverable costs to those that are necessary.¹²⁶

Hyundai next argued that even if it was liable for monitoring costs, base costs are not recoverable by the government.¹²⁷ Hyundai based this argument on the wording of section 2702(a)¹²⁸ and argued that costs must "result from" the incident before the costs are recoverable under the OPA.¹²⁹ Hyundai argued that costs such as wages paid to Coast Guard personnel did not result from the oil spill and therefore are not recoverable.¹³⁰ The court rejected this argument and determined that base costs such as personnel wages were a result of the oil spill.¹³¹ The court concluded that the government should not be precluded from recovering personnel wages simply because Coast Guard personnel would be paid to perform different tasks had the oil spill not occurred.¹³² "Base costs," according to the court, "represent real costs to the United States and are recoverable to the extent they are allocable to a response to an oil spill."¹³³

In a further attempt to reduce the amount of its liability, Hyundai successfully argued that penalties prescribed by the Debt Collection Act¹³⁴ were not applicable.¹³⁵ In finding for Hyundai on this argument, the court closely examined the penalty provisions of the Debt Collection Act and more specifically section 3717(a)(1)(e).¹³⁶ The court applied the provision of the Debt Collection Act as written and concluded that when a statute explicitly provides for interest on monies owed pursuant to said statute, the penalties imposed by the Debt Collection Act are inapplicable.¹³⁷

V. COMMENT

A. Relevant Policy Considerations

Until August 18, 1990, the United States had a fragmented and confusing legal framework regarding petroleum-type spills in the navigable water ways, shorelines, and certain exclusive economic zones in and around the United States.¹³⁸ In its effort to clarify and extend the U.S. laws regarding oil pollution, Congress enacted the Oil Pollution Act of 1990.¹³⁹ Aside from streamlining the existing oil-spill legislation, Congress addressed several other policy considerations.¹⁴⁰ One of the dominant policy considerations was to extend a responsible party's liability to ensure proper compensation to those government and private parties injured by an oil spill and to ensure that damaged natural resources could be sufficiently restored.¹⁴¹ In doing so, Congress

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 1192. See text accompanying note 13.

¹²⁸ Oil Pollution Act of 1990, 33 U.S.C. § 2702(a) (1994).

¹²⁹ *Hyundai*, 172 F.3d at 1192.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Debt Collection Act, 31 U.S.C. § 3717(a)(1) (1994).

¹³⁵ *Hyundai*, 172 F.3d at 1192.

¹³⁶ *Id.* See Debt Collection Act, 31 U.S.C. § 3717(a)(1)(e) (1994).

¹³⁷ *Hyundai*, 172 F.2d at 1192.

¹³⁸ Antonio J. Rodriguez & Paul A.C. Jaffe, *The Oil Pollution Act of 1990*, 15 TUL. MAR. L.J. 1, 1 (1990).

¹³⁹ *Id.*

¹⁴⁰ Kopec & Peterson, *supra* note 4, at 618-19.

¹⁴¹ Michael J. Uda, *The Oil Pollution Act of 1990: Is There a Bright Future Beyond Valdez*, 10 VA. ENVTL. L.J. 403, 428 (1991).

extended recovery to include oil removal costs by federal or state governments as well as private parties.¹⁴² The OPA also provides recovery for damage to “natural resources, damage to real or personal property, loss of subsistence use, revenues lost by the United States or state governments, lost profits and lost earning capacity, and the increased cost of providing public services during or after cleanup activities.”¹⁴³

In *United States v. Hyundai Merchant Marine Co., Ltd.* the court did not consider the above policy considerations per se and instead focused solely on the statutory language.¹⁴⁴ The court meticulously dissected each relevant provision of the OPA and those statutes referenced by the OPA and found that a responsible party is liable for the costs the Coast Guard sustains while monitoring a clean up effort.¹⁴⁵

It is difficult to disagree with the court that monitoring costs can be recovered under the OPA when the OPA and the other statutory provisions referenced therein are closely read and interpreted in accordance with the court’s logic. Many would commend the court on its devotion to interpret the OPA as written. However, the problem that the court created is that it arguably extended the scope of the OPA beyond Congress’s intentions. Viewing the policy considerations collectively it is clear that Congress intended the responsible party to be liable for the damages resulting from oil that was spilled, regardless of who suffered the damages.¹⁴⁶ Included in these damages are removal costs and natural resource protection costs.¹⁴⁷ It is clear that Congress intended to extend the liability of the responsible party to cover damages that were not recoverable under pre-existing legislation. However, it is not clear that Congress wanted to extend liability or to create another category for recovery. Stated differently, monitoring costs are manufactured by the Coast Guard and are not directly caused by spilled oil. Monitoring costs are avoidable in that they are not necessary to remove oil from the water into which the oil was spilled, nor are they necessary in preserving or restoring natural resources threatened or damaged by an oil spill. If the Congressional concerns were recovering damages and preserving natural resources, those policy considerations are amply met without requiring the responsible party to pay for monitoring costs. While the court read the OPA to include monitoring costs, the Congressional policy considerations underlying the OPA are grossly unclear as to whether those costs were intended to be within the scope of the OPA. By including monitoring costs as costs recoverable under the OPA, the court blindly interpreted the OPA without first considering its purpose and the policy considerations Congress addressed in enacting the OPA.

B. Negative Ramifications

In *United States v. Hyundai Merchant Marine Co., Ltd.* the court held that monitoring costs, including attorney’s fees and base costs, are recoverable under the OPA.¹⁴⁸ As a result of the court’s holding, Hyundai was liable for not only the costs associated with cleaning up oil spilled from its tanker but also for the costs associated with the Coast Guard monitoring the clean-up effort.¹⁴⁹ In short, Hyundai would have been economically better off had it not taken responsibility for its oil tanker’s misfortune.

In effectively cleaning up the oil spilled from its tanker and preventing additional oil from spilling from the tanker, Hyundai spent millions of dollars.¹⁵⁰ As a result of Hyundai’s efforts, the oil was properly removed and contained.¹⁵¹ The Coast Guard approved Hyundai’s plan to clean up the oil and did not see the need to assist Hyundai in its efforts.¹⁵² One can only assume that Hyundai’s clean up and prevention effort was not substandard in the view of the Coast Guard. It can further be assumed that the Coast Guard would have taken the same or similar action and would have had the same or similar success. Based on these assumptions, it can be said that Hyundai sufficiently reacted to the situation and took responsibility for its actions. Nonetheless,

¹⁴² Oil Pollution Act of 1990, 33 U.S.C. § 2701(32) (1994).

¹⁴³ Kopec, *supra* note 4, at 621-22; see 33 U.S.C. § 2702(b) (1994).

¹⁴⁴ *United States v. Hyundai Merchant Marine Co., Ltd.*, 172 F.3d 1187, 1189-92 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 397 (1999).

¹⁴⁵ *Id.* at 1192.

¹⁴⁶ See *supra* note 104 and accompanying text; see also Debt Collection Act, 31 U.S.C. § 3717(f) (1994).

¹⁴⁷ Oil Pollution Act of 1990, 33 U.S.C. § 2702(b) (1994).

¹⁴⁸ 172 F.3d at 1192.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1189.

¹⁵¹ *Id.*

¹⁵² *Id.*

Hyundai was found liable for the costs the Coast Guard sustained in monitoring the clean up and prevention effort.

Finding defendants such as Hyundai liable for such costs greatly reduces its incentive to act appropriately and responsibly to such oil spills. In future oil-spill situations the responsible parties may elect to stand idle and allow the Coast Guard to man the effort needed to protect the natural resources. Their logic is easily understandable. In not cleaning up the oil spill responsible parties will not bear the costs of both cleaning up the oil spill and monitoring. Rather, the responsible parties will be liable only for the clean up effort put forth by the Coast Guard. At the end of the day, responsible parties will be economically better off because they will have spent their funds on only the clean up or prevention effort and not on monitoring the effort. It is good policy to have responsible parties clean up oil spills. Having them act accordingly prevents the Coast Guard from having to clean up the oil spill. As a result, the Coast Guard can focus on other situations in which its assistance is needed rather than spending time cleaning up oil spills.

Another consequence of the court's holding is that the price of petroleum-based products will increase. It is a well-settled practice of corporate business to distribute the risks and costs of manufacturing products across its consumers. Anytime the costs of manufacturing or producing a product increase, the price a consumer must pay for the product will increase. When the OPA was enacted, many scholars had precisely this concern.¹⁵³ These critics argued that because the costs of transporting oil would be greatly increased under the OPA regime, oil prices would increase and the consumer would bear the brunt of the Congressional activity.¹⁵⁴ With there already being a concern of rising oil prices resulting from the OPA, requiring responsible parties to reimburse the government for monitoring costs can only increase concerns that the price of petroleum-based products will increase. That is not to say that the OPA was not needed to ensure proper compensation to those injured and to preserve our natural resources; however, the amount of liability a responsible party faces should be kept in check not only for the benefit of the party transporting oil but also for the consumer.

VI. CONCLUSION

It appears the *Hyundai* court interpreted the OPA correctly under the plain language doctrine. However, the court should have focused more on legislative intent and policy rather than solely on the statutory language. As a result of the court's strict statutory interpretation, those individuals or corporations closely connected with oil transportation and storage should be prepared to spend extra money in the event an oil spill should occur and the government monitors the removal effort.

SHANNON A VAHLE



¹⁵³ Donaldson, *supra* note 3, at 318.

¹⁵⁴ *Id.*