

Uncle Sam Can Escape Liability for Maritime Torts at His Discretion

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We are fortunate to live in a country where the government, by and large, plays by the same rules as everyone else when it comes to liability for maritime no-nos. When Uncle Sam, through his administrative agencies, botches something up, the Public Vessels Act, 46 U.S.C. §782 (PVA), and the Suits in Admiralty Act, 46 U.S.C. §741 *et al* (SAA), enable injured parties to sue the federal government to recover their losses, just like they could anyone else (*see* April 1999 Legal Lookout article).

Well, almost. The federal court sitting in Massachusetts recently took a look at these principles in two different contexts, and drew lines distinguishing the unique functions government entities play in the maritime industry from those of other players. If you suffer a loss at the hands of feds who were undertaking a “discretionary function” as part of their public function, the government may not be liable under the PVA and SAA.

The PVA and SAA were modeled after another statute, the Federal Torts Claim Act, 28 USC § 2680(a) (FTCA), which also imposes liability on the government in certain (non-maritime) circumstances. The FTCA contains an exception to liability when a federal employee causes a loss through an act or omission committed within the employee’s explicit or implicit discretion. In other words, if a government agency has the right to do something as part of its responsibilities, you can’t hold Uncle Sam’s lieutenants liable even if one makes the wrong call in exercising that right.

When a fishing vessel sprang a leak off the coast of the Bay State, the vessel’s master summoned both the Coast Guard and a commercial salvor. The former arrived first and concluded the flooded vessel, listing heavily to starboard, was too dangerous to allow crewmembers or Coasties to remain on board. The vessel’s master pleaded, futilely, that the salvor could save the vessel if personnel remained on board just a little while longer to keep the boat’s condition from deteriorating. The vessel was evacuated shortly before its meeting with Davy Jones’ Locker.

The vessel’s owner blamed the Coasties for everything from trespass, breach of fiduciary duties and interference in contractual relations, to the lint in his bellybutton. The U.S. District Court for Massachusetts was not sympathetic. It extrapolated from the FTCA’s discretionary function exception (not found in the PVA or SAA), and ruled the Coast Guard has especially wide leeway in making spur-of-the-moment decisions involving safety. Even if the call was wrong and an arriving salvor would have averted the loss, the government isn’t liable for ordering everyone off a flooded vessel. Indeed, even if the government agency actually “abused” its discretion in this regard, it walks Scot-free.

A much closer call involved some bad surveying of Bay State waterways by the U.S. Army Corps of Engineers. Apparently, the Army Corps cut some corners in doing the

survey (the result of decreased funding), and deviated from surveying standards promulgated by the National Oceanic and Atmospheric Administration (NOAA). Consequently, inaccurate navigation charts were published, and a pilot reading them ran a vessel aground in the Boston Harbor. Damages were to the tune of some 800 grand.

But here again, the Army Corps was not *required* by statute or regulation to apply NOAA's standards. Rather, its doing so was discretionary in the context of an agency determining how best to execute its safety functions. The court bought Uncle Sam's argument that the very publication of navigational charts was a discretionary function not subject to scrutiny as part of a liability claim.

Citing a U.S. Supreme Court case which addressed the FTCA, the Massachusetts federal court concluded that application of the discretionary function exception to the PVA and SAA was necessary "to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of [a private party's action]." There are going to be times when someone loses out because of agency actions, but the overall policy of agencies serving the public good should not be impacted by fear of liability.

Courts have gone in different directions when analyzing the discretionary function issue. The Ninth Circuit Court of Appeals reached the opposite conclusion when addressing government liability for inaccurate navigational charts (holding a government agency liable), a precedent the Massachusetts court distinguished unpersuasively.

Notwithstanding the PVA and SAA, maritime players shouldn't view government agencies as garden-variety participants in the industry, subject to the same obligations, responsibilities and commitments as everyone else. If a Coast Guard cutter runs into your vessel while you're minding your own business, you might have recourse. But if the feds are just making a discretionary call regarding public safety when they cause or contribute to your loss, you may be out of luck.

Ref: Northern Voyager, L.P. v. Thames Shipyard and Repair Co., and the United States of America, 214 F.Supp. 2d 47 (D. Mass 2002); and Limar Shipping, Ltd. v. the United States of America, 206 F.Supp.2d 61 (D.Mass 2002).