



Federal Appeals Court Demolishes Defenses Against MARPOL Prosecutions

On January 20, 2009, the U.S. Court of Appeals for the Second Circuit upheld the jury conviction of Ionia Management S.A. for failing to “maintain” an oil record book (“ORB”) while in U.S. waters. In its decision, the Second Circuit has joined the Fifth Circuit in construing the Act for the Prevention of Pollution from Ships (the “APPS”) broadly and extending vicarious criminal liability to ship owners and operators. Indeed, the court applied what is essentially a strict liability standard that would make a ship owner criminally liable whenever one of its vessels is found to have brought an ORB with false entries into U.S. waters.

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Background

In late March 2007, a crewmember on the Ionia-managed vessel M/V Kriton called U.S. Coast Guard officials to report that the vessel had been making illegal discharges from bilge water holding tanks through a “magic pipe,” bypassing the oily water separator and pumping oily wastes directly overboard. In the subsequent investigation, the Coast Guard found that the discharges were not recorded in the oil record book, and several crewmembers initially lied about the events in the engine room. Nevertheless, the Coast Guard obtained significant evidence that the discharges had occurred, including infrared pictures of the vessel making illegal discharges in European waters, provided by officials from the Netherlands.

The U.S. ultimately indicted Ionia in four jurisdictions: Connecticut, New York, Florida, and the Virgin Islands. The cases were consolidated for trial in Connecticut, and the company was subsequently tried by a jury on eighteen counts, including conspiracy, violation of the APPS, falsifying records, and obstruction of justice. The jury found Ionia guilty on all counts.

Ionia appealed, arguing that it could not be held criminally liable under the APPS for the mere possession of a falsified ORB, when the false entries were made outside of U.S. waters. The company also argued that it could not be held criminally liable for wrongful acts unless the government proved that: (1) the acts were made by “managerial” employees, (2) the company lacked effective compliance policies and procedures, and (3) the false entries were “material.”

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The Decision

Following the Fifth Circuit’s reasoning in *U.S. v. Jho* (involving Overseas Shipholding Group), the court held that “the APPS’s requirement that subject ships ‘maintain’ an ORB [pursuant to APPS regulations] mandates that these ships ensure that their ORBs are accurate (or at least not knowingly inaccurate) upon entering the ports or navigable waters of the United States.” The court concluded that such a broad reading was necessary to carry out the purpose of MARPOL

and the APPS, and was therefore fully consistent with international law. Further, the court found that its reading was supported by the text of the regulation itself, quoting from a dictionary to note that the word “maintain” is defined to mean “to keep in a state of repair, efficiency, or validity” Therefore, the court concluded, “in the context of a regulation imposing record-keeping requirements, the duty to “maintain” plainly means a duty to maintain a reasonably complete and accurate record.” Thus, the court viewed the question of where the false entries were made to be irrelevant.

The court also rejected *Ionia*’s challenges to the extension of corporate vicarious criminal liability. The court held that it was enough to prove that the wrongful acts were committed by employees acting within the scope of their employment for the purpose of benefiting the company. Further, the court held that the vessel’s chief engineer was a “manager” in any case.

More significantly, the court rejected *Ionia*’s argument that the prosecutors needed to prove that the company lacked effective compliance policies and procedures. The court noted that “a compliance program, however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law.”

Finally, the court summarily rejected the argument that a falsification in an ORB must be “material” to be criminal. Instead, the court looked at whether the defendant was on notice of the “core criminality” of the actions taken.

Meaning and Potential Impact of the Decision

With both the Second Circuit and the Fifth Circuit now in agreement that the APPS extends criminal liability for the mere possession of a falsified ORB in U.S. waters, the central defenses of ship owners and operators against criminal liability for false ORBs has been blown out of the water. While other circuits could apply a more restrictive reading of the APPS in future cases, such a split in the circuits seems unlikely. Faced with clear agreement between the two leading “maritime” circuits, other courts are likely to follow suit.

The resulting rule is essentially this: a ship owner or operator can be held vicariously and strictly liable for the actions of any employee who falsifies an ORB, anywhere in the world, if that ORB is carried on a ship into U.S. waters.

The effectiveness of a company’s environmental compliance program will therefore be measured against only one standard: whether it works. If an employee commits the offense of making a false ORB entry, the company’s compliance program will be found wanting. Of course, prosecutors may look at the company’s compliance program, along with its cooperation and remedial efforts, in deciding whether to bring charges at all, or in reaching a plea agreement. However, if charges are brought, the existence of a compliance program, no matter how good it looks on paper, will be no defense.

The European Union and international Port State Control organizations are likely to take notice of the *Ionia* decision. Certainly the EU will read the Second Circuit’s view of MARPOL as consistent with its own increasingly aggressive approach towards the use of criminal sanctions for environmental compliance enforcement. Rather than object to the assertion by U.S. courts of jurisdiction to punish ship owners for false entries made overseas, other nations may well decide to pursue similar enforcement strategies.

From an industry perspective, the timing of the *Ionia* decision is disheartening, considering the current tough economic times. Many shipping companies are already stretched tight, with depressed ship values and downward rate pressures. However, those conditions do not change the fact that environmental compliance enforcement will continue to become more and more strict.

Companies that have already undergone the nightmare of a criminal MARPOL prosecution have learned through experience that a culture of environmental compliance cannot be instituted overnight — it takes years of commitment from the top-most levels of a company. All ship owners and operators should take a fresh look at their compliance programs, and ask themselves this question — can they be *sure* that no one on their vessels will make a false ORB entry?

If the answer to that question is “no,” the company will need to work quickly and effectively to change the corporate culture so that making any false record entry is not only unlikely, but unthinkable. Doing so is no longer a luxury, it is a requirement for trading to the U.S.

We are continuing to follow this matter and will keep you informed concerning additional issues as they arise. If you have any questions, please contact the following attorneys:

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