

CRIMINAL LIABILITY IN THE MARITIME INDUSTRY: THE COVER-UP IS WORSE THAN THE CRIME

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There can be no debating the fact that criminal liability, or at least the potential for criminal liability, has become a part of the reality which owners/operators must contend with in the present day maritime industry. This fact has been illustrated by any number of maritime casualty cases dating back to the *EXXON VALDEZ* up to the more recent *COSCO BUSAN* case.

The potential ramifications for owners/operators, not to mention crewmembers, arising from criminal liability under U.S. law have been widely publicized as a result of the steady drumbeat of media coverage relating to the myriad "Magic Pipe" prosecutions brought by the U.S. Department of Justice ("DOJ") in virtually every coastal state from California to Maine.

As such, it is essential that both shoreside management and vessel officers/crews have a clear understanding as to their potential exposure under U.S. criminal law, and equally important, what steps to take in the event they are confronted with a criminal investigation so as to not further compound the situation for themselves and the company.

At the risk of stating the obvious, the most effective way to avoid criminal liability is to avoid committing the crime in the first instance. Certainly, there are ample resources available to owners and operators regarding training for both shoreside and vessel personnel as to proper compliance with MARPOL and other environmental regulations.

While such measures are highly commendable and recommended to avoid, or at least minimize, criminal liability in the first instance, that is not the focus of this article. Rather, this article is premised on the proposition that no matter how extensive a company's safety and environmental training may be, the owner/operator is ultimately at the mercy of the weakest link in its personnel chain.

Thus, the most prudent and environmentally conscious owner/operator can find itself in the cross-hairs of a multi-million dollar criminal prosecution because of the actions of a single rogue chief engineer who decides, perhaps as a matter of short-sighted economy or his own convenience, that he will by-pass an oily water separator and fabricate entries in the vessel's logs. The purpose of this article is to provide the owner/operator with some

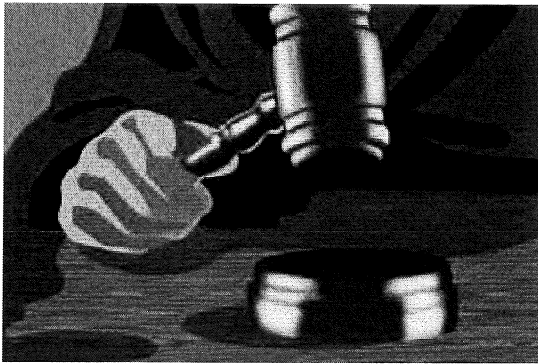
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practical guidance as to what steps should be taken when the owner/operator, without any intent on its part, finds itself the target of a criminal investigation, or worse, an actual prosecution by U.S. law enforcement.

In order to provide some context to these recommendations, it is important to have an understanding of two concepts which have played a recurring role in almost all criminal prosecutions of owners/operators under U.S. law. The first of these is the principle of vicarious liability. This is a fundamental principle under U.S. criminal law and is often not fully appreciated by foreign vessel owners/operators conducting business in the United States.

In sum, this legal principle provides that a corporation may be held criminally liable for the acts and omissions of its employees, provided they were acting within the scope of their employment and for the benefit of the corporation. See *United States v. Richmond*, 700 F.2d 1183, 1195, n.7 (8th Cir. 1983). The corporation need not know, or have reason to know, of the conduct giving rise to the criminal liability. Moreover, the company may even be held liable if the actions of the employees were in violation of company policies or directives.

The second core concept can best be summarized by the old axiom that "the cover-up is worse than the crime." This has proven to be particularly true in the context of "magic pipe" cases, where the government has routinely brought obstruction charges against crewmembers and their employers, based on conduct ranging from destruction of evidence, (i.e., log books, pipes, hoses, etc.) to making false statements to Federal investigators.



In fact, more often than not, it is these obstruction related charges that have driven the multi-million dollar fines which have been so widely publicized throughout the industry. In order to support these charges and obtain such exorbitant fines, the Government has a wide array of statutes which it can, and does, rely upon where there is evidence of obstruction on the part of crewmembers or other employees:

- (i) The False Statement Act, 18 U.S.C. §1001:**
As its name implies, the statute is premised upon the making of a false statement to a Federal investigator during the course of his/her investigation. The False Statement Act carries a potential fine as high as \$500,000.00 per charge, or twice the amount of the gain obtained (or loss caused) by the offender, whichever amount is greater. See, 18 U.S.C. §3571(c)(3). The Act further provides for potential incarceration of up to five (5) years.
- (ii) Obstruction of Justice, 18 U.S.C. §1512:**
These charges will often be pursued by the government where there is evidence that crewmembers have engaged in destruction of evidence, i.e., such as by-pass pipes, and hoses. The potential fine for obstruction of justice is the same as under the False Statement Act, i.e., up to \$500,000.00. However, potential incarceration period is greater, i.e., up to 10 years.

The government may also pursue similar charges for witness tampering, 18 U.S.C. §1505, and or destruction of evidence, 18 U.S.C. §1519.

- (iii) Conspiracy, 18 U.S.C. §1001:**
This charge may arise where there is evidence two or more parties may have conspired in furtherance of the underlying criminal violation.
- (iv) Sarbanes-Oxley, 18 U.S.C. §1519:**
Violations of the Sarbanes-Oxley Act are generally premised upon tampering with corporate records, and can carry fines up to \$500,000.00 per charge, with jail terms of up to 20 years.

Notwithstanding the formidable arsenal of possible statutes available to the government, there are certain practical steps which an owner/operator can take in an effort to minimize liability in the event it finds itself facing a criminal investigation in the United States:

OWNERS/OPERATORS MUST BE MADE AWARE OF ANY CRIMINAL INVESTIGATION WITHOUT DELAY

While this may seem rather self-evident, it is often the case that vessel officers or shoreside personnel, such as Port Captains, fail to provide upper level management with a full and complete understanding of what is transpiring at the commencement of a criminal investigation. In many cases this may be due to the assumption on the part of those on the scene that the matter can be addressed in the same manner as any other issue involving Port State Control Authorities.

The problem is further compounded by the fact that the line between a routine Port State Control Inspection and the commencement of a criminal investigation is often difficult to discern. The vessel officers and shoreside personnel should be clearly instructed that when Port State Control Authorities are inquiring as to matters that could have potential criminal ramifications, company management should be made aware of the situation immediately.

In many cases the investigating authorities may be privy to information/evidence that the vessel's officers

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are not, often by way of “whistle blowers,” and the authorities are attempting to obtain additional information/statements which will ultimately come back to haunt the company in a subsequent criminal prosecution. Thus, it is essential that upper level management be fully apprised of the situation as quickly as possible.

EARLY REFERRAL AND INTERVENTION BY COUNSEL

It is essential in any criminal matter to have counsel appointed and available to assist as early in the investigation as possible. In those instances where counsel are appointed to advise owners/operators, and their employees, of their respective rights and obligations at the commencement of a criminal investigation, the potential for damaging and costly obstruction charges can be greatly diminished. In most cases, it will be necessary to appoint counsel both for the owners/operator as well as independent counsel for the crew.

In fact, in many cases, depending upon the specific facts and allegations being made, it may be necessary to appoint separate counsel for individual crewmembers. A crewmember who is being provided with effective advice and representation by counsel will be much less likely to make the regrettable (and costly) decision to tamper with evidence, lie to investigators, etc. For this reason alone, the early involvement of counsel both for owners/operators and individual employees may potentially eliminate millions of dollars in criminal fines for the owner/operator.

EDUCATING CREWMEMBERS AND SHORESIDE PERSONNEL OF THEIR LEGAL RIGHTS AND OBLIGATIONS IN THE EVENT OF A CRIMINAL INVESTIGATION

The prospect of being interviewed, and perhaps even restrained, by law enforcement personnel as part of a criminal investigation is obviously a stressful experience for anyone. The experience may be all the more traumatic for a foreign crewmember who is far from home, possibly with limited English language skills and education, and who may originate from a country where law enforcement personnel are perhaps viewed with

a certain degree of suspicion - if not outright trepidation. These factors combine to create a situation ripe for obstructionist conduct, false statements, etc., all of which may ultimately expose the owner/operator to significant criminal liability.

The most effective manner in which to minimize the likelihood of crewmembers exposing themselves to obstruction or false statement charges is for owner/operators to provide crewmembers (and shoreside personnel) with an understanding of their rights and obligations should they find themselves involved in a criminal investigation. These rights and obligations include the following:

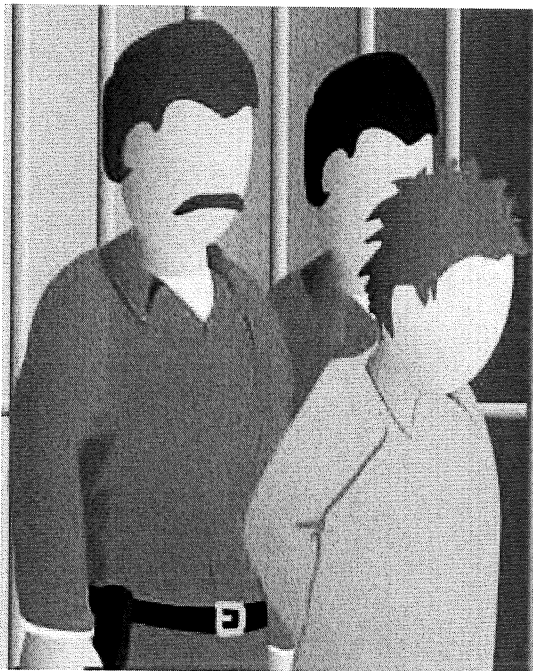
- (i) Crewmembers should understand that law enforcement powers may be exercised by a wide array of local, state and federal agencies. The most common interaction with law enforcement personnel for crewmembers will be in the form of the United States Coast Guard (“USCG”). Crewmembers should take note that the surest sign that the USCG is viewing the matter as a potential criminal investigation is the presence of Coast Guard Investigative Services (“CGIS”) personnel aboard the vessel. These are personnel within the USCG that are expressly tasked with conducting criminal investigations. However, depending upon the circumstances of the case, crewmembers may also have dealings with local and state police officers, agents of the Environmental Protection Agency (“EPA”), Department of Environmental Conservation (“DEC”) agents, Immigration and Customs Enforcement (“ICE”) agents, and attorneys with both the U.S. Attorney’s Office and local district attorney’s office. Given the wide array of agencies which may be involved in any given criminal investigation, crewmembers should be instructed to request and take careful note of the identification of any law enforcement personnel who comes aboard the ship and seeks to interview crewmembers.

(ii) Crewmembers should be advised that they do have the right to remain silent if interviewed by law enforcement personnel in the United States. Moreover, crewmembers should understand that they have the right to consult with an attorney before they decide whether or not to provide any written or oral statements to law enforcement personnel and to have their counsel present during any questioning.

(iii) The crewmembers must understand that it is a serious crime to lie to law enforcement personnel in the United States. However, while they are not compelled to answer questions, if they do elect to speak with law enforcement personnel, **THEY MUST TELL THE TRUTH.** Crewmembers should be clearly advised, in writing, by the company that if they agree to speak with law enforcement officers and fail to tell the truth, they will be deemed to have acted of their own accord, not for the benefit of the company, and not within the scope of their employment. Crewmembers must understand that such conduct will result in immediate termination of employment.

(iv) If English is not the first language of the crew member, the crewmember may and should insist that a translator be provided before answering any questions.

(v) Crewmembers should be advised not to rely on any promises made by law enforcement officers that their statements will not be used against them in a criminal proceeding. Law enforcement officers do not have the authority to make such promises. Moreover, crewmembers should also understand that law enforcement officers are not permitted to threaten or intimidate witnesses into making statements. Any such conduct should be reported to counsel immediately. Any promise of immunity by law enforcement personnel to a crewmember must be in writing, reviewed by counsel, and will ultimately have to be approved by the Court.



(vi) Under no circumstances should senior officers or shoreside management “coach” or otherwise influence a crewmember in responding to questions by law enforcement personnel.

(vii) The USCG may have the right to remove certain documents from the vessel during the course of their investigation. In the event documents are removed from the vessel, the crew should be instructed to request copies and should keep a detailed inventory of all documents and/or other evidence removed from the vessel.

(viii) With the exception of certain documentation, the USCG and other law enforcement personnel will likely require a search warrant signed by a Judge to remove evidence from the vessel or search crewmembers’ personal belongings. In the event crewmembers are asked to consent to the removal of such items or to having their personal

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belongings searched, they should immediately request an opportunity to confer with counsel.

- (ix) While crewmembers are not required to give their consent to the removal of evidence or to a search of their belongings, they should under no circumstances use force or attempt to physically prevent law enforcement personnel from removing items from the vessel. The validity of any such removal will ultimately be contested before the Court – provided the crewmember did not give consent.
- (x) The crewmembers must understand that under no circumstances should they tamper with, hide or destroy a document or evidence aboard the vessel as such conduct will rise to very serious criminal charges against them.

While the above recommendations will not immunize a company from criminal liability, they will go a long way towards minimizing the various obstruction of justice and similar charges which often make up a significant part of the government's case in any criminal prosecution.

COMPANY POLICIES AND PROCEDURES

In the course of evaluating a criminal case against a corporate entity, one of the first areas counsel will focus on is whether the company had policies and rules prohibiting the underlying criminal conduct allegedly committed by its employees. In this day and age, the vast majority of owners and operators will and should have extensive rules and requirements regarding compliance with MARPOL and other environmental regulations. In fact, many companies require crewmembers to sign affidavits attesting to their understanding of such requirements and agreement to comply with same as a condition of employment.

Nevertheless, the existence of company policies and procedures is only half the battle. In order for counsel to make an effective argument that the employees' conduct is contrary to company policy, and thus arguably outside the scope of employment so as to defeat vicarious liability

on the part of the corporation, the company should be able to establish that its policies and procedures are effectively enforced. Thus, the company's position will be strengthened if it can document that the policies are in fact enforced, i.e., such as by producing evidence of employees having been reprimanded or terminated for previous incidents of non-compliance.

Finally, as noted above, it is recommended that the company provide crewmembers with written notice of their obligation to TELL THE TRUTH should they elect to speak with law enforcement personnel during the course of a criminal investigation. Such notice must make it clear that should crewmembers fail to tell the truth to law enforcement personnel, such conduct will be deemed to be for their own benefit, beyond the scope of their employment, and will result in immediate termination from the company. This notice should also cover the additional obligations addressed above, i.e. such as not tampering with or destroying evidence, coaching witnesses, etc. Crewmembers should be required to acknowledge their understanding of these obligations in writing, preferably by way of affidavit, as a condition of employment. By requiring such a written acknowledgement from the crewmembers, the company will be in a stronger position to argue that any future conduct involving obstruction of justice or false statements on the part of the crewmembers arose outside the scope of their employment and thus should not result in vicarious criminal liability.

CONCLUSION

As stated at the beginning of this article, the only fool proof way to avoid criminal liability is obviously to avoid the crime in the first instance. Nevertheless, the most environmental and safety-conscious company may still face the prospect of a criminal investigation or prosecution due to the wrongful conduct of a single employee or a small group of employees. It is hoped that the above recommendations and suggestions may provide an owner/operator with some guidance as to how best to proceed in that instance, and may serve to at least minimize a company's collateral damage in terms of obstruction of justice and similar charges.