ANAVE – Circular de Régimen Interior

Madrid, 23 de julio de 2012
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Asunto: Empresas con tráficos con EEUU – Depuradores de aguas de sentinas – Recomendaciones a las empresas navieras.

Muy Sres. nuestros:

Según las leyes norteamericanas, en caso de incidente de contaminación medioambiental, una empresa naviera puede ser declarada penal y subsidiariamente responsable por las acciones de sus empleados, cuando éstos últimos hayan actuado en el ámbito de sus funciones y en beneficio de su empleador, aun cuando no existan pruebas de que han recibido instrucciones desde tierra o incluso aunque se demuestre que los hechos van en contra de la política de la empresa.

Por si fuera de su interés, les adjuntamos un artículo de un bufete jurídico norteamericano, relativo principalmente a las depuradoras de aguas de sentinas, y que incluye un listado de posibles medidas a tomar por las empresas navieras para tratar de evitar posibles responsabilidades penales.

Muy cordialmente,

Manuel Carlier
Director General

Sometimes, The Best Defense is a Good Offense

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The increasingly aggressive criminal prosecution by the United States of oily water separator violations should lead defense attorneys and their owner/operator clients to a reassessment of viable tactics to defend such cases. Illustrative of the United States' aggressive prosecution of these cases, Corporate owners and operators are becoming increasingly victimized by rogue employees acting against corporate environmental policy and crewmember whistleblowers who choose to notify the U.S. Coast Guard of illegal discharges as opposed to company officials. Frequently, huge fines are paid by owners and operators as a result of the actions of employees who are committing illegal acts which are against corporate policy and not known or condoned by owners and operators. Lately, more often than not employees are being given large rewards as whistleblowers for reporting violations to the Coast Guard and not to the Company.

This state of affairs is a result of U.S. law imposing vicarious criminal liability on employers for the actions of employees. Under U.S. law a corporate owner/operator can be held vicariously criminally liable for the actions of employees when they are acting within the scope of their employment and for the benefit of the employer even when there is no evidence of on-shore higher corporate level involvement and when the acts are against company policy. This is the predominant theory upon which otherwise innocent owner/operators are criminally prosecuted in the United States for oily water separator violations. As a result of this legal concept, after OWS violations are discovered it becomes very difficult for an owner/operator to mount a viable defense. Frequently the only viable option is to try and negotiate a plea with the U.S. Attorney. However, it should be noted that there may be a viable way to protect the Corporate owner/operator from vicarious criminal liability in advance, if the owner/operator can demonstrate that it exercised due diligence to prevent such illegal conduct from happening on its vessels.

While a corporation under U.S. law can still be liable for an act committed by an employee, which is against company policy, **U.S. Courts do allow juries to consider company policy restrictions in determining whether an employee is acting within the scope of employment and for the benefit of the corporation**. For instance, a pattern jury instruction approved by the U.S. Court of Appeals for the Third Circuit outlines this possible defense:

> **"An employee was not acting within the scope of his employment if that person performed an act which his corporate employer, in good faith, had forbidden the employee to perform. A corporate defendant is not responsible for acts it tries to prevent. However, a corporate**

defendant, like an individual defendant, may not avoid criminal responsibility by meaningless or purely self-serving pronouncements."[1]

It should be stressed that such due diligence cannot be just written corporate policies or fleet memos. In the past we have found that most owners and operators involved in OWS violations cannot meet the necessary due diligence requirement to mount such a defense. Indeed many may not be aware that such a possible defense exists. Accordingly, we would like to outline some of the measures that we as defense attorneys feel would be very useful in helping defend OWS cases in the future.

1. Documentation of crew training re MARPOL and company pollution policy *prior* to crewmembers joining the ship.

2. MARPOL related DVD's aboard ship relating to pollution policies shown to crewmembers during meetings.

3. Affidavits signed by crewmembers prior to joining the ship acknowledging responsibility under MARPOL and their commitment to company policy, including reporting any violations to a designated shore based person.

4. Specific posters in engine room and crew spaces noting company anti-pollution policy and confidential telephone numbers of someone in the company to call to report illegal dumping. In conjunction with this the crew must have access to make such calls on satellite phones or cell phones when in port.

5. Documentation of disciplinary actions taken against employees that do not comply with company policy, including termination.

6. Documentation of superintendent inspections of oil record books and OWS equipment when visiting ships.

7. Establishment of a culture of environmental compliance including prioritizing upkeep of pollution prevention equipment.

Such a pre-emptive effort demonstrating due diligence in conjunction with the above quoted pattern jury instructions could very well result in a successful defense or at least be a strong negotiating point in coming to a favorable settlement of a case.

[1] This is to be distinguished from an argument presented to the Second Circuit Court of Appeals in U.S. v. Ionia, 555 F.3d 303 (2009) contending that the prosecution must prove as a separate element in its case-in-chief that the Corporation lacked effective policies and procedures to deter and detect criminal actions by its employees. The U.S. Court of Appeals rejected this as an element to be proved by the prosecution but affirmed the fact that a corporate compliance program is relevant to whether an employee was acting within the scope of his employment.