



Maritime & Admiralty Practice

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Coming Into U.S. Port With False Oil Record Book is a Crime, Even if False Entries Made Offshore, According to Court of Appeals

The Ruling

On June 30, 2008, the U.S. Court of Appeals for the Fifth Circuit in New Orleans ruled that bringing an oil record book known to have false entries into a U.S. port constitutes a criminal offense under U.S. law without regard to where the false entries are made or where the associated oil discharges occur, and even if such false entries or discharges occur outside U.S. territorial waters. However, the Court declined to resolve the question of whether multiple port visits with the same false oil record book entries would be treated as separate violations for purposes of U.S. sentencing law, remanding the case to the district court for consideration of that issue. The ruling was issued in the case of *U.S. v. Jho and Overseas Shipholding Group, Inc.*

The Fifth Circuit rejected the holding of the U.S. District Court for the Eastern District of Texas that the prosecution of a foreign-flag vessel for false entries made outside U.S. waters would violate international law by subjecting foreign-flag vessels to criminal penalties for conduct committed outside of U.S. waters, and by imposing criminal sanctions prohibited by the U.N. Law of the Sea Convention.

The Court went even further than earlier pro-government decisions to hold that the mere entry of a vessel into a U.S. port with an oil record book “known to be inaccurate” constitutes a criminal violation of the U.S. Act for the Prevention of Pollution from Ships. The holding therefore increases the potential exposure of foreign vessel operators — and their crews — to the risk of criminal prosecutions in the United States.

Background

Jho was the chief engineer on the tanker *Pacific Ruby*, owned and operated by OSG. The oily water separator onboard not only met MARPOL requirements by being designed to stop discharges of oily bilge wastes with oil content greater than 15 parts per million, it exceeded those requirements by having various “anti-tricking” devices, including a monitoring system. Nevertheless, Jho and other engineers came up with a way to defeat the “anti-tricking” devices by allowing the oil content monitor to sample fresh water instead of a sample from the actual effluent. After making illegal discharges by “tricking” the oil content sensor, the discharges were falsely recorded in the oil record book as having been properly made through the 15 ppm oil content meter.

Another engineer on the ship reported the unlawful discharges to the Coast Guard, which ultimately confirmed the unlawful discharges and identified the false oil record book entries. Although the alleged wrongful discharges and false oil record book entries were made outside of

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U.S. waters, both Jho, as the alleged perpetrator of the unlawful discharges and false entries, and OSG, as the vessel operator, were indicted for multiple counts, including eight counts of violation of the APPS, 33 U.S.C. § 1908(a) for “failure to maintain an oil record book.”

In the district court, the judge threw out the APPS charges, holding that such charges would be contrary to U.S. obligations under the signed, but not yet ratified, U.N. Convention on the Law of the Sea (“UNCLOS”). The judge found that the APPS charges sought to impose criminal penalties on conduct that occurred outside U.S. waters, and concluded that the charges ran “afoul of well-established law of the flag principles which seek to ensure uniformity, comity and reciprocity among sea-faring nations.”

Nevertheless, OSG settled the other charges on December 19, 2006, paying a fine of \$37 million for an overall settlement of alleged violations involving 12 OSG vessels, brought in multiple U.S. federal jurisdictions. The plea agreement included alternative arrangements to keep the settlement intact regardless of the ruling issued by the Court of Appeals. The prosecution of Jho, however, will be impacted by the Fifth Circuit's ruling.

The Circuit Court's Reasoning

Recent similar cases have held that the *presentation* to Coast Guard officials of an oil record book containing false statements constitutes a criminal offense punishable by U.S. law, regardless of where the actual discharges occur. The Fifth Circuit noted several of those cases, including *U.S. v. Abrogar* (decided in August 2006 by the Third Circuit), *U.S. v. Ionia Management* (decided by the District of Connecticut in July 2007), *U.S. v. Petraia* (decided by the District of Maine in February 2007), and *U.S. v. Royal Caribbean Cruises* (decided by the Southern District of Florida in May 1998).

However, the Fifth Circuit extended the reach of the APPS beyond those cases, by holding that the crime of “failure to maintain an oil record book” is not limited to the making of a false entry or to the presentment of the oil record book. Rather, the Fifth Circuit held that the crime is committed whenever a vessel enters a U.S. port with a false oil record book by the mere *maintenance* of the false oil record book.

After setting out its broad view on the extension of U.S. criminal jurisdiction over the carriage of a false oil record book into a U.S. port, the Fifth Circuit summarily rejected the central basis of the district court's decision. The district court had noted that Section 230 of the United Nations Law of the

Sea Convention prohibited criminal penalties for violations of pollution laws committed by foreign vessels in the territorial sea of a coastal nation, except in cases of willful and serious pollution of the territorial sea. However, the Fifth Circuit pointed out that Section 230 would not apply to a vessel that had passed through the territorial sea and entered the internal waters of the coastal nation. Curiously, the Court never addressed the most recent Supreme Court decision addressing the intersection of U.S. domestic law with international law affecting foreign flag vessels — *Spector v. Norwegian Cruise Line Ltd.*, decided in 2005.

The Fifth Circuit declined to rule on the Defendants' argument that charging them with a distinct criminal act for each time the vessel entered port would be multiplicitous by charging the same conduct in multiple counts. Although the government argued that each entry into port with a false oil record book would be a separate criminal act, and the broad language of the Fifth Circuit's opinion would appear to support that view, the Court nevertheless noted that the district court had not considered that issue and therefore the record was not sufficiently developed. Accordingly, the Court remanded the case to the district court to determine whether the multiple counts in the indictment alleging failure to maintain the same oil record book must be consolidated.

Implications of the Case

The implications of the Fifth Circuit's holding will be significant for vessel operators and their crews. The decision opens up the critical question of what a ship manager must do if it discovers false entries in an oil record book onboard one of its vessels. By going beyond a “presentation” requirement and allowing criminal liability to extend to even the mere carriage of an oil record book with false entries, the ruling may put vessel managers into a “no win” situation. Whether foreign ship registries or vessel owners will attempt to limit this broad extension of U.S. criminal jurisdiction remains to be seen.

Also yet to be determined is the effect the decision will have on charging — and sentencing — of persons and ship managers in cases involving multiple visits to U.S. ports with an oil record book containing false entries. However, the impact of the district court's resolution of the “multiplicity” issue on remand may well be constrained by Sentencing Guidelines' treatment of multiple related counts for sentencing purposes.

In any event, the case certainly underscores the importance of an aggressive environmental compliance program for any

company that manages vessels calling in the United States. Because the United States extends vicarious criminal liability to vessels owners and managers for the wrongful acts of crew members, managers will need to be even more zealous to discourage, discover, and act upon unlawful discharges and false oil record book entries.

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