**INTENTIONAL POLLUTION CASES, PROSECUTED IN THE UNITED STATES AND**

**THE FINANCIAL DAMAGE CAUSED TO VESSEL INTERESTS**

 In the Industry press, and in the local news media in many port cities in the United States, the story is all too familiar:

***“Shipping Company Sentenced in Pollution Case”***

 This was local news headline in New Orleans as recently as June 29, 2012. The sub-headline was “ . . . shipping company . . placed on probation for three years and ordered to pay a $500,000 fine for obstruction and violating a federal pollution control act”. The story then explained, “The company pleaded guilty March 29th to charges in a two-count bill of information for violating the Act to Prevent Pollution from Ships . . . [the vessel, a modern bulk carrier] arrived at the Port of New Orleans in January. [The company] admitted that on two occasions in December 2011, crews pumped oily bilge water into the sea without using required pollution prevention equipment. The crew later hid the illegal discharges by falsifying the vessel’s Oil Record Book”.

 This is simply one example, and actually one of the smaller fines imposed. More typically the penalties can be several million dollars, and the shipowner and management company, typically as part of a guilty plea and sentencing agreement, are required to hire an outside monitoring agency to oversee their environmental compliance throughout their fleet for several years, and to donate several hundred thousand dollars to an environmental restoration project or fund, in order to complete the “probation” placed upon the company. An even more recent case in New Orleans yielded a sentence requiring the company to pay a $1.2 million fine, and a “community service” payment of $100,000 to the National Fisheries and Wildlife Service, along with three years’ probation and a required independent monitor to ensure compliance during that period. It is also not uncommon for criminal charges to be brought against individual ship’s officers, typically engineers, and prison terms have resulted (especially for destroying evidence or lying to investigators), as also have requirements that a crewmember agree not to be employed on any vessel trading in the United States for a period of time in the future, which can be a most debilitating hindrance to employment in the modern maritime world. Some cases, as a condition of probation, require the company to cease trading to the United States for a certain time period.

**A Brief History: What Happened?**

 These cases began to enter the public eye approximately ten years ago, when the Coast Guard placed more emphasis on seeking criminal penalties for MARPOL violations, whereas previously it was more typical for administrative penalties to have been sought. The addition of criminal prosecution to the existing penalties brought immediacy to the situation, since it typically involved arrest of a suspect ship and possibly the arrest of key crewmembers onboard.

 Very few of these cases have gone to trial, as it is much more typical for them to be resolved, after much investigation and negotiation, by way of a guilty plea arranged with U.S. Department of Justice through the local federal prosecutors, whose assistance had been sought by the Coast Guard. Since 2002, over 100 cases have been brought by federal prosecutors, and several hundred million dollars in criminal penalties, and the jailing of some ship’s crew (typically officers) have taken place.

**Why Doesn’t it Stop?**

 One would expect, with all of the publicity throughout the shipping industry newspapers and newsletters, and even in the general media regarding such incidents, that there would be a decrease, since the penalties resulting from apprehension are so severe, as well as publicly embarrassing for the ship management entities. However, it does not appear that these cases are declining – rather this intentional pollution is still occurring unabated. In 2010 alone, the Coast Guard brought 21 cases to the Department of Justice (DOJ), and almost $25,000,000 in criminal penalties was paid by shipowners during that year.

 The typical incident, and hence the typical prosecution, do not involve a discharge of oil in the waters of the United States, nor does it involve a large quantity of oil when one compares these incidents to accidental spills as a result of external factors. Most of these incidents consist of the intentional pumping of waste oil, typically from the engine room bilge, into the ocean by way of a jury-rigged bypass (the so-called “magic pipe”) to avoid the ship’s oily-water separator (“OWS”). Yet these occurrences, even in international waters, can and do result in prosecution. This amount of oil, it would seem, should be easily transferrable to the ship’s slop tank, retained onboard, and pumped off in the next competent port. Most ships follow this practice. But based on the number of prosecutions, a significant number of ships do not follow this procedure – and at an outsized risk to themselves and their companies when compared to the likely damage to the environment itself, or the money supposedly “saved”.

**“It’s the Cover-up that Will Get You.”**

 One has to wonder why these cases persist, and it is difficult to explain. Evidently there must be a “disconnect” between shoreside management and shipboard personnel, assuming the shipowners and managers are serious about complying with the law in the first place. While the Coast Guard does not have jurisdiction over foreign vessels sailing in international waters (where the discharge of bilge slops usually occurs), yet under MARPOL and the laws implementing it in the United States, the presentation of a falsified oil record book (“ORB”) regarding that occurrence is a “false official statement” under federal law, and subjects the presenter to criminal penalties even if the discharge of oil itself took place outside U.S. waters. Further, one need not actually physically “present” an oil record book to authorities – it is sufficient that the book is kept onboard and is required to be made available for inspection and review in any port whose country are signatory to the MARPOL convention, such as the United States seaports. Once the Coast Guard suspects a violation (whether they are tipped off by a crewmember, which frequently happens, or discover such evidence during other types of inspections), ship’s crewmembers only compound matters and make their situation worse by attempting to “cover up” such intentional discharges, and by instructing subordinate crewmembers to either lie about it or keep quiet. Such a “cover-up” will typically add a charge of “obstruction of justice” for those who instructed crewmembers to report falsely, and possibly charges of “false official statement” by those who reported falsely to the investigators. Further, such statements need not be made under oath, nor even be in writing, to constitute a “false official statement” under the federal criminal law.

**The Financial Impact Can Be Devastating to the Company**

 Coverage for criminal behavior is not provided by P and I Clubs, so ship managers will have to engage lawyers to represent the vessel in proceedings before the USCG and DOJ. Because potential criminal defendants may include several crewmembers, they will need separate criminal lawyers to represent them, which expense will in all likelihood be borne by the ship managers. There may also be substantial delay to the vessel, as she waits for the DOJ and federal prosecutors to initiate and follow through with proceedings, which could drag on for some time. And of course, the independent environmental monitoring typically required during lengthy probation, is itself expensive.

**The Lesson**

 So, there is much to lose, and really very little to gain by this type of activity. Management companies, designated persons ashore (DPA’s) and senior officers on ship should make it clear that it is **not** a benefit to the company, or to their shipmates or their ship, to bypass the oily water separator, and to falsify the Oil Record Book. The costs to comply with MARPOL are small indeed in comparison to the huge penalties, criminal charges, detention of vessels and especially crewmembers who are either defendants or necessary witnesses, which result from violations which are reported or detected.

 The lessons are quite plain: do not violate MARPOL by pumping oily waste directly overboard – even when done in the middle of the ocean, in small quantities, you are subject to criminal prosecution and possible prison, if not for the discharge itself, then for the necessary falsification of MARPOL records in a “Port State” such as the United States. The subordinate lesson would be: “If you did it, do not compound matters by lying about it.” Often the cover-up brings worse consequences than the actual offense.

 Again, more careful screening of crews and their training is of key importance and the company culture of compliance should be emphasized at all levels of management, manning and operations. Shipowners must make clear to their crews that such corner-cutting is not to be done nor tolerated, and should provide the equipment (meaning slop tank capacity and services as well as instruction to crews and the training) to facilitate complying with the law.

(Source of Information: Robert Fisher / Thomas Forbes, Chaffe McCall, L.L.P.)