



CLIENT ALERT:

UNITED STATES VS. FAFALIOS: A recent decision by the U.S. Court of Appeals in the Fifth Circuit may have implications on the prosecution of future MARPOL violations in the U.S.

March 31, 2016

SUMMARY OF THE CASE:

United States v. Fafalios, 2016 U.S. App. LEXIS 4658 (5th Cir. Mar. 14, 2016).

Matthaios Fafalios, Chief Engineer of the M/V TRIDENT NAVIGATOR, was alleged to have ordered the unlawful discharge of bilge waste oil/water from the vessel while in international waters in December 2013. Upon the vessel's arrival in New Orleans, Louisiana, based in large part on the corroborating testimony of one of the vessel's fitters, Fafalios was charged with and subsequently convicted of the following:

(i) Failure to maintain an oil record book (ORB) pursuant to the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. § 1908(a), the U.S. codification of MARPOL, and the related regulations set forth at 33 C.F.R. § 151.25.

(ii) Obstruction of justice, 18 U.S.C. § 1505.

(iii) Witness tampering, 18 U.S.C. § 1512(b)(3).

Fafalios appealed his conviction on the APPS count for failure to maintain the vessel's ORB. However, he did not appeal his convictions on the obstruction of justice or witness tampering charges, and both of those convictions still stand.

Fafalios' appeal of his conviction on the APPS violation focused largely on the language of the implementing regulations set forth at 33 C.F.R. § 151.25, which requires that each operation covered by that section "*shall be fully recorded without delay in the Oil Record Book ...*" and that each such completed operation "*shall be signed by the person or persons in charge of the operations concerned and each completed page shall be signed by the master or other person having charge of the ship.*" 33 C.F.R. § 151.25(h). The regulation further goes on to specify that "*The master or other person having charge of a ship required to keep an Oil Record Book shall be responsible for the maintenance of such record.*" 33 C.F.R. § 151.25(j).

As a preliminary matter, the Court noted that Fafalios, as Chief Engineer, could not be convicted under the APPS statute, 33 U.S.C. § 1908(a), for the failure to properly and timely record and sign for an operation in the ORB that occurred in international waters, *i.e.*, outside the jurisdiction of the United States. However, the question remained whether the Chief Engineer could be held liable for the failure to "maintain" an accurate ORB once the vessel enters U.S. waters. In addressing this latter issue, the Fifth Circuit focused on the language of 33 C.F.R. § 151.25(j)

whereby “[t]he master or other person having charge of a ship required to keep an Oil Record Book shall be responsible for the maintenance of such record.” To the extent that Fafalios, as Chief Engineer, was not “the master or other person having charge of [the] ship,” the Fifth Circuit reversed the APPS conviction.

RECONCILING THE *FAFALIOS* DECISION WITH THE FIFTH CIRCUIT’S PRIOR HOLDING IN *JHO*

The recent decision in Fafalios is not the first time that the Fifth Circuit has attracted the attention of attorneys and others in the maritime industry who take a keen interest in the prosecution of APPS/MARPOL in the United States. In 2008, the Fifth Circuit had previously addressed similar APPS/MARPOL violations by a chief engineer relating to the failure to record alleged unlawful waste oil discharges in international waters. See *United States v. Jho*, 534 F.3d 398 (5th Cir. 2008). In that case, the APPS charges were initially dismissed by the U.S. District Court on the grounds that the alleged violations took place in international waters and thus outside the jurisdiction of the United States.

The Fifth Circuit Court of Appeals reversed the District Court and reinstated the APPS charges. While the Fifth Circuit acknowledged that the unlawful discharges and resulting erroneous entries/omissions in the ORB occurred in international waters, the Court held that there may still be a criminal violation of APPS based on the failure to “maintain” an accurate ORB once the vessel enters U.S. waters, regardless of where the vessel was when the underlying discharges and the associated erroneous entries/omissions in the ORB occurred. Significantly, the Government alleged, and the Fifth Circuit agreed, that while the chief engineer of the vessel may not be responsible for maintaining the ORB under the applicable regulations, such chief engineer may be charged under a theory of “aiding and abetting” the failure to maintain an accurate ORB in U.S. waters. It was on this basis that the Fifth Circuit in *Jho* upheld the APPS/MARPOL charges against the chief engineer.

Thus, the Fifth Circuit’s decision in *Fafalios* can be read consistently with its prior holding in *Jho*, the distinction being that in *Fafalios*, for reasons not entirely clear, the Government did not charge the Chief Engineer under an “aiding and abetting” theory.

WHAT IMPACT DOES THE FIFTH CIRCUIT’S *FAFALIOS* HOLDING HAVE ON THE FUTURE PROSECUTION OF MARPOL VIOLATIONS IN THE U.S.?

While the net result of the *Fafalios* holding remains to be seen, the likely impact of the decision on the U.S. Government’s prosecution of APPS/MARPOL violations in the U.S. may prove to be more limited than one would otherwise expect. One likely result from the holding may be an increased reliance by the Government on “aiding and abetting” and “conspiracy” charges with respect to chief engineers and/or other engine room personnel. The Government may also focus more heavily on vessel masters in determining what charges to bring in an APPS/MARPOL case. Thus, vessel masters, who generally have not been the primary focus of the criminal prosecutions in these cases, may find themselves under increased scrutiny in terms of what they actually know with respect to engine room operations, the accuracy of entries being made in the ORB, and their interactions/communications with the chief engineer and other engine room personnel. The limitation of this possible recourse by the Government, and the reason that masters are generally not the primary target of MARPOL cases, is that the APPS violation must be based on a

“knowing” failure to maintain an accurate ORB, a burden that the Government may have difficulty in meeting with respect to the vessel’s master, who will generally have limited personal knowledge as to the operations in the engine room.

It is also important to appreciate that the *Fafalios* holding is limited only to APPS/MARPOL charges. As we have seen repeatedly over the years, these types of APPS/MARPOL cases – often referred to as “magic pipe” cases – often result in additional charges being brought for obstruction of justice, witness tampering, and violations of the False Statement Act (18 U.S.C. § 1001), as well as other similar types of charges. These alternative charging mechanisms available to the Government in these types of MARPOL cases, where the facts warrant, will not be affected by the *Fafalios* decision. However, this by no means should be construed as meaning that the Government will be looking to abandon or move away from charging under APPS. The statute contains a whistle blower provision which is a very important tool for the Government, and the vast majority of these cases are heavily reliant on corroborating testimony, often with photos and videos provided by fellow crew members.

In the event you have any questions regarding this client alert, please feel free to contact William J. Pallas, Esq. at pallas@freehill.com, or any other member of the FH&M Criminal Defense Team (Thomas Russo, russo@freehill.com, Michael Fernandez, fernandez@freehill.com and Daniel Fitzgerald, fitzgerald@freehill.com).

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