

Court Excludes Evidence of OWS Replacement

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On September 29, 2015, the U.S. District Court for the Southern District of Alabama held that corrective actions taken after an alleged criminal offense are inadmissible to show guilt in a criminal trial, rejecting contrary precedents.

As the case of *U.S. v. DSD Shipping S.A.* moves closer to trial on criminal charges for alleged bypasses of oil pollution prevention equipment and false record books on the tanker *STAVANGER BLOSSOM*, the prosecutors revealed that they intended to introduce evidence that DSD had replaced the oily water separator on the vessel. The prosecutors' stated purpose for the evidence was to show that the original oily water separator didn't work, to establish their theory that the crew must have bypassed it, and therefore the vessel's Oil Record Book must be false, and therefore DSD must be guilty.

DSD opposed the proposed evidence, noting that Federal Rule of Evidence 407 prohibits the introduction of subsequent remedial measures to show culpability. DSD pointed out that the replacement of the oily water separator had come about because the Coast Guard had recommended an external audit of the vessel's safety management system, DSD had voluntarily commissioned the audit, the auditor had found some slight corrosion in the OWS and had recommended repair or replacement, and DSD had carried out a prompt replacement.

The issue raises serious implications beyond the DSD case itself. In proposing the evidence, the prosecutors argued that Rule 407 applies only in civil negligence cases and not in criminal trials. They further pointed out that the only two federal courts to have considered the issue had concluded that Rule 407 applies to civil cases only. The Government position indicates that prosecutors could view any post-incident corrective action by a vessel owner as an admission of fault and use the action against the vessel owner in a subsequent prosecution.

However, the judge held that Rule 407 does indeed apply in criminal trials and ordered the evidence of the oily water separator replacement inadmissible to prove culpability. While basing her decision on the structure of the Federal Rules of Evidence, the judge noted that the reason behind Rule 407 is to avoid discouraging persons from taking remedial steps to prevent further violations and harm, which can apply in criminal trials as well as civil cases.

While the decision is a positive one for vessel owners, the issue is far from resolved. The Government's eagerness to use such evidence is troubling, and the risk remains that prosecutors may try similar evidence in other federal districts.

U.S. v. DSD Shipping, A.S., Crim. No. 15-00102-CG-B (Docket No. 187).

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