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COURT UPHOLDS CRIMINAL LIABILITY OF CORPORATION BASED ON MISCONDUCT OF LOW-LEVEL EMPLOYEES

(U.S. v. Ionia Management, S.A.)

The U.S. Court of Appeals for the Second Circuit today upheld the criminal conviction of a ship management company, based on the misconduct of several lower-level employees. The employees were accused of failing to report that their foreign-based ship had discharged improperly treated waste water on the high seas.

The decision in the case, *United States v. Ionia Management, S.A.*, was a setback for the Washington Legal Foundation (WLF), which had filed a brief urging that the conviction be overturned. WLF argued that a corporation should not be held criminally liable for the misconduct of its low-level employees when, as here, they acted in direct contravention of corporate policy and a robust regulatory compliance program. The appeals court disagreed, ruling that imposing criminal liability on a corporation based on a *respondeat superior* theory is permissible so long as there is evidence that the corporation's employees were acting within the scope of their employment.

In filing its brief in the case, WLF joined with the U.S. Chamber of Commerce, the National Association of Manufacturers, the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the New York State Association of Criminal Defense Lawyers. WLF's brief was drafted with the pro bono assistance of Andrew Weissmann, Richard F. Ziegler, Joseph J. McFadden, and Luke P. McLaughlin, attorneys in the New York City office of Jenner & Block, LLP.

"Imposing criminal liability under these circumstances is wholly inconsistent with three recent Supreme Court decisions, which severely restrict corporate *respondeat superior* principles," said WLF Chief Counsel Richard Samp in response to the court decision. "This decision turns upside down the public policy objectives of the criminal justice system, which focus on deterrence and punishing wrongdoers. Branding a corporation as an outlaw will accomplish neither of those objectives when a corporation has done all that it can do to ensure that its employees comply with the law," Samp said.

The case involves alleged violations of the Act to Prevent Pollution on Ships (APPS). The United States, along with other nations, has an interest in preventing ships

from discharging pollutants on the high seas. But the U.S. has no way of directly regulating such discharges by foreign ships, because its jurisdiction does not extend to the high seas. Instead, the APPS requires that foreign ships that visit U.S. ports maintain accurate "oil record books." The U.S. alleges that a ship managed by Ionia routinely dumped untreated wastes on the high seas; but that when the ship docked in U.S. ports, its oil record books had been doctored to make it seem as though the wastes had been properly treated before being discharged. Ionia's corporate policy dictates that its ships will not discharge untreated wastes, and it has in place a robust compliance program to ensure that its employees comply with that policy. Senior Ionia officials had no knowledge that employees aboard one of its ships were not complying with that policy and were falsifying ship records to cover up their non-compliance.

The trial court nonetheless instructed the jury that Ionia could be held responsible for the employees' misconduct so long as they were acting within the scope of their employment responsibilities when they engaged in that misconduct. Ionia appealed the jury's guilty verdict. Today's decision affirms the conviction.

WLF argued that when it adopted the APPS, Congress did not intend to permit corporations to be held criminally liable when, as here, they have done all that reasonably could have been expected of them to discourage employee wrongdoing. The appeals court disagreed, holding that prosecutors seeking to impose criminal sanctions on a corporation need not demonstrate that "managerial employees" condoned the wrongdoing. The court also suggested that the shipboard "Chief Engineers" (who allegedly were aware of the misconduct) could be deemed "managerial employees." The Court rejected WLF's argument that prosecutors bringing cases under the APPS must demonstrate that the corporate defendant "lacked effective policies and procedures to deter and detect criminal actions by its employees."

WLF is a public interest law and policy center with supporters in all 50 States. It devotes a significant portion of its resources to preventing the "criminalization" of the free enterprise system and opposing use of the criminal laws to address what should more properly be deemed regulatory offenses.

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For further information, contact WLF Chief Counsel Richard Samp. A copy of WLF's brief is available on its website at www.wlf.org.