

The D & O Diary

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The Responsible Corporate Officer Doctrine



In order to assign responsibility in connection with the enforcement of public welfare objectives, courts have developed the "responsible corporate officer doctrine," which in recent years has been applied with increasing frequency in environmental enforcement. A California appellate court recently applied the doctrine to enforce civil liability on the officers of a family run business. The case, and indeed the doctrine itself, raise important concerns about the potential liability of directors and officers.

Background

John and Ned Roscoe were officers, directors and shareholders of a family company that had a underground storage tank. The tank leaked 3,000 gallons of gasoline. A company employee notified the county and hired a consultant to clean up the leak. However, as the appellate court later put it, cleanup "did not proceed timely and adequately," and though regulators sent multiple notices to the company, no one from the company "attempted to make sure the problems were addressed."

The county filed a civil lawsuit against the Roscoes and their family company for failure to remediate and to file certain reports as required by law. Following a bench trial, the court found the Roscoes and their company jointly and severally liable for \$2.4 million in "civil penalties."

The trial court specifically found that the Roscoes had "overall authority" for the company, could have remediated the problems, but did not "exercise their responsibilities and power to use all objectively possible means" to remedy the problem. The Roscoes appealed.

The Appellate Ruling

In a December 26, 2008 opinion ([here](#)), the California Court of Appeal for the Third Appellate District applied the "responsible corporate officer doctrine" and affirmed the trial court.

As the appellate court noted, the responsible corporate officer doctrine was developed by the U.S. Supreme Court in the 1943 case of [United States v. Dotterweich](#), to hold corporate officers in responsible positions of authority personally (and in that case, criminally) liable for violating strict liability statutes protecting the public welfare.

Though the *Dotterweich* case involved a criminal proceeding, the California court in *Roscoe* applied the doctrine to uphold the imposition of civil liability. The *Roscoe* court described the doctrine as "a common law theory of liability separate from piercing the corporate veil or imposing personal liability of direct participation in tortious conduct."

The appellate court in the *Roscoe* case held that the trial court properly applied the doctrine to the *Roscoes* because they had "overall authority," they "could have prevented or remedied promptly the problem," and because they did not "exercise their responsibilities and power to use all objectively possible means" to remedy the problem.

Discussion

Typically, the corporate veil doctrine would shield corporate officers or shareholders from direct personal liability for legal violations of the corporation, consistent with long-developed notions of the distinct and separate legal identity involved with the corporate form.

But the "responsible corporate officer doctrine" expands the power of government to impose liability on individuals, seemingly in disregard of the corporate form, and apparently without requirement of participation in the wrongful conduct or even the requirement of a culpable state of mind, in the name of protecting public health and welfare.

I understand from reviewing a variety of articles online (refer for example [here](#)) that there arguably may be nothing new about the California court's invocation of the responsible corporate officer doctrine. It apparently has been applied in any number of states (refer for example [here](#)) and seems to be most frequently used in connection with environmental enforcement actions.

Indeed, the doctrine is embodied in the statutory wording of several fundamental federal environmental statutes and has now found its way into the environmental statutes of many states that modeled the statutory scheme on the federal laws. I understand from conversations with an environmental attorney (I happen to be married to one) that this is a recognized and well-established doctrine in environmental law.

That the doctrine may have a lengthy pedigree behind it does not make it any less troubling to me. The idea that liability could be imposed on an individual for corporate misconduct, in apparent disregard of the corporate form and without even a requirement for a culpable state of mind, seems inconsistent with my (perhaps not fully informed) assumptions about the way the law ought to work.

To my mind, this doctrine seems to impose liability for nothing more than a person's status. The word "responsible" in the responsible corporate officer doctrine's name does not mean that the individual was responsible for the *misconduct*, but only that the individual was responsible for the corporation that was responsible for the *corporation*.

The California court did specify prerequisites that could circumscribe the doctrine's application; that is, the court indicated that "there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions" and that "the individual's actions or inactions facilitated the violations." But while these requirements could constrain the doctrine's application, they also seem to relate more to an individual's position or status, rather than the individual's actual state of mind or even direct culpability.

It appears that other courts have considered knowledge of the violation a prerequisite to the imposition of liability based on the responsible corporate officer doctrine, which to me seems like a minimal requirement for the doctrine's application to be consistent with traditional notions of justice and fair play.

In any event, the typical directors and officers liability insurance policy would not likely respond to provide indemnification for these kinds of awards, for at least two reasons. The first is that most policies contain a broad form pollution exclusion. The second is that most policies will not cover fines and penalties.

While the typical D&O policy would not cover these kinds of penalties, I can imagine an argument that there should be insurance for these kinds of exposures. The fines are imposed on individuals essentially because they occupied a corporate office – that is, by reason of their status, seemingly without regard to actual fault. (It may well be that there are separate environmental liability insurance policies available in the marketplace that are designed to respond to these very exposures, an issue on which I invite readers' comments and observations.)

A public policy advocate might well argue that individuals should have to pay these amounts out of their own resources, in order that the liability threat will deter future violations and motivate compliance. These kinds of arguments seem most compelling to someone who is secure in the knowledge that *they* will never have to worry about having liability imposed on them for conduct of which they might have

been completely unaware.

A January 14, 2009 memorandum from Foley & Lardner law firm discussing the Roscoe case can be found [here](#).

Special thanks to Damien Brew for providing a copy of the Roscoe opinion. I hasten to add that the views expressed in this post are exclusively my own.

Climate Change Disclosure: In prior posts, I have noted a variety of developments that are increasing pressure on publicly traded companies to increase their disclosure on climate change related issues. For example, I noted [here](#) the Petition for Interpretive Guidance on Climate Risk Disclosure filed with the SEC on September 18, 2007 by the Coalition for Environmentally Responsible Economies (CERES) and others. In another post ([here](#)), I discussed the settlements that Xcel Energy and others reached with the New York Attorney General regarding climate change risk disclosure.

These developments raise the question whether these and other circumstances have changed public companies disclosure practices regarding climate change issues. In a January 15, 2009 memorandum ([here](#)), the [McGuire Woods](#) law firm reports the results of its survey of the of the 2008 10-K filings of approximately 350 companies in order to determine the state of SEC disclosure practices regarding climate change.

What the law firm found was that "very few companies made any type of 10-K disclosure regarding [greenhouse gas, or GHG] emissions or climate change." Only 42 of 350 companies reviewed, about 12.2% made any disclosure whatsoever regarding GHG emissions or climate change. Unsurprisingly, the largest concentration of companies making some disclosure on these issues was among utility companies, particularly large utilities. Of the 26 non-utility companies making some disclosures, the next largest concentrations were in the energy and industrial sectors.

The memorandum observes that "very few companies outside the energy and utilities industries made any type of GHG emissions or climate change-related disclosures" in 2008. The memo goes on to predict, however, that "this state of affairs is likely to change in 2009, as a result of the change in administration and the changing political climate, as well as changing regulator and investor expectations.

The report concludes that "each company that does not currently provided GHG or climate change disclosures will need to carefully evaluate whether that is a reasonable approach given the kinds of risks,

and opportunities, that GHG and climate change issues present." The report ends by noting that "we expect the number of public companies that make GHG and climate change disclosures in their SEC reports will increase in 2009."

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Joe Monteleone - *January 19, 2009 9:55 AM*

Like the D&O Diary, I am uncertain as to whether an environmental impairment liability type of policy may respond. However, the situation here may be covered under some of the more ambitious Side A DIC D&O initiatives out there. Although a privately-held company like that of the Roscoes likely would not have Side A DIC coverage, I have seen in my practice many of these policies that forego any pollution exclusion. Further, I have seen at least endorsements that purport to treat statutory penalties in the same manner as punitive damages, i.e. the insurer will not contest their coverage as long as some applicable law does not prohibit their insurability. An argument could be made in such a scenario that in the vast majority of states that allow for the insurability of punitive damages, a statutory fine or penalty may be treated the same way.

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