Responsible Officer Doctrine

California Appellate Case Demonstrates How a Corporate Officer Can Become Personally Liable

by John D. Cromie and Noel D. Humphreys

Sometimes, the law puts a corporate officer's personal assets at risk for actions of the corporation on the theory that the corporate officer is the actor, despite the broad protection that corporate forms afford shareholders, directors and officers. A recent California case, *People v. John F. Roscoe*,[1] illustrates the risk. The *Roscoe* decision cautions attorneys to remember that shareholders, directors and officers do not enjoy complete immunity.

In *Roscoe*, a California Court of Appeals, relying on the "responsible corporate officer doctrine," held individual corporate shareholders, officers and directors of the closely held business liable for $2.5 million in connection with cleanup of a spill.

Under this doctrine, typically applied where 'bad intent' is not an element, courts have imposed on corporate officers both civil and criminal liability for corporate violations of statutes affecting the public welfare—sometimes, even if the individual did not previously participate in the wrongdoing. Liability has been found where an officer holds a position that influences corporate activities.

Here's how the *Roscoe* decision happened. In 1994, an underground storage tank owned by a family-owned business leaked 3,000 gallons of gasoline into the ground near Sacramento. The company reported the leak and hired a remediation consultant. However, according to the trial court, "Cleanup of the leak did not proceed timely and adequately."

After eight years and repeated notices, the county brought a civil action against the company and its owners for failing to provide proper cleanup plans and procedures.

Invoking the responsible corporate officer doctrine, the trial court found the owners and officers, John and Ned Roscoe, personally liable for $2.5 million in penalties. Why? These individuals retained "overall authority for company affairs." They could have but did not "exercise their responsibilities and power to use all objectively possible means to discover, prevent and remedy any and all violations."

The appellate court affirmed, saying, first, the responsible corporate officer doctrine can apply in a civil case. Second, as a matter of statutory construction, the company's officers or directors, not simply the company, should be treated as the 'operator' of the tank.

A U.S. Supreme Court case, *United States v. Dotterweich*,[2] initiated the responsible corporate officer doctrine. In that decision, written by Justice Felix Frankfurter, Mr. Dotterweich had been criminally convicted of selling adulterated, misbranded pharmaceuticals. Dotterweich was president of a company whose brand was affixed to the drugs' packaging. The jury convicted Dotterweich but not the company.

The statute in *Dotterweich* referred to "any person" who put the misbranded or adulterated drugs into commerce. The Federal Food, Drug and Cosmetic Act[3] dispensed with "the conventional requirement for criminal conduct—awareness of some wrongdoing." Justice Frankfurter wrote, "In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."

"The offense is committed," Justice Frankfurter wrote, "by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws."

The *Dotterweich* court imposed criminal liability. Similarly, in *United States v. Park*,[4] the Supreme Court upheld the criminal conviction of a national supermarket chain CEO under the Food, Drug and Cosmetics Act.

Chief Justice Warren Burger's opinion said:

> Reading the entire charge satisfies us that the jury's attention was adequately focused on the issue of respondent's authority with respect to the conditions that formed the basis of the alleged violations. Viewed as a whole, the charge did not permit the jury to find guilt solely on the basis of respondent's position in the corporation; rather, it fairly advised the jury that to find guilt it must find respondent 'had a responsible relation to the situation,' and 'by virtue of his position...had...authority and responsibility' to deal with the situation.

Three judges dissented in *Park*. Nonetheless, in dissent, Justice Pot-

ter Stewart wrote:

> The *Dotterweich* case stands for two propositions, and I accept them both. First, 'any person' within the meaning of 21 U.S.C. § 333 may include any corporate officer or employee 'standing in responsible relation' to a condition or transaction forbidden by the Act. 320 U.S., at 281, 64 S.Ct., at 136—137. Second, a person may be convicted of a criminal offense under the Act even in the absence of 'the conventional requirement for criminal conduct—awareness of some wrongdoing.' *Ibid.*

Dotterweich and *Park* provided little guidance, however, on two important questions. First, how does "responsible corporate officer" apply outside Food, Drug and Cosmetics Act cases? Second, if proceedings should convict a person "standing in responsible relation to a public danger," what characteristics determine whether the defendant stands in a responsible enough position to impose liability? Justice Frankfurter's ambiguous answer is that "the good sense of prosecutors, the wise guidance of trial judges and the ultimate judgment of juries must be trusted."

California's *Roscoe* decision exemplifies the experience since *Dotterweich*.The California appellate court's *Roscoe* decision implicitly compares California's underground tank law with the federal Food, Drug and Cosmetics Act.

The California court wrote:

> Central to the [Supreme] court's holding was that the [federal] Act was public welfare legislation and the statute imposed strict liability. Specifically, the [federal] Act extended the range of Congress's "control over illicit and noxious articles and stiffened the penalties for disobedience," thus "touch[ing] phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection." And the statute allowed for criminal conviction without proof of "awareness of some wrongdoing," thus "put[ting] the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." [Citations omitted]

Prosecutors did not apparently show that Dotterweich and Park were extensively personally involved in the statutory violations. Instead, each of Dotterweich and Park was simply in general charge of the corporation's business.

Justice Burger, in *Park,* wrote:

> The Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.

Under *Roscoe*, personal liability requires three tests:

> the individual must be in a position of responsibility which allows the person to influence corporate policies or activities; (2) 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 which constituted the violations; and (3) the individual's actions or inactions facilitated the violations.

The trial court did not commit error in determining that John and Ned Roscoe satisfied these tests.

In general, outside California, the responsible corporate officer doctrine has applied to so-called public welfare offenses where: 1) a legislative body has adopted a statutory scheme intended to improve the common good, and 2) the normal requirement for culpable intent has been removed.[5]

Several jurisdictions, including New Jersey, Hawaii, Missouri, Florida, Connecticut, Minnesota, Wisconsin and Indiana, have codified by statute the doctrine's essential elements in the context of public safety issues, including environmental compliance. Although corporate form affords many protections, the responsible corporate officer doctrine expands the government's ability to impose personal liability expressly in the context of public health and welfare issues.

In some jurisdictions, including New Jersey, New York and Pennsylvania, courts have declined to apply the responsible corporate officer doctrine, despite a statutory predicate, where there was no showing that a corporate officer had active responsibility for the condition or was in a position to prevent the occurrence of the violation.[6]

In contrast, in *Hawaii v. Kailua Auto Wreckers*,[7] the state prosecuted corporate officers for violating a state law prohibiting open burning. Although these officers did not actively participate in the operations, and never set company policy, the court ruled they could be held liable personally for the corporation's conduct.

While the corporate responsibility doctrine has typically applied to regulated industries such as food and drugs, or in environmental law where public safety is paramount, the *Roscoe* decision shows that shareholders, directors and officers have an independent duty to exercise their obligations responsibly, especially where there is the potential for statutory culpability and the individuals have knowledge and the opportunity to address an area of concern. ■

ENDNOTES

1. 169 Cal.App. 4th 829 (Cal.App. 3d Dist. 2008).
2. 320 U.S. 277 (1943).
3. 21 U.S.C. § 301 *et seq*.
4. 421 U.S. 658 (1975).
5. See *Commissioner*, *Indiana Department of Environmental Management v. RIG, Inc.*, 735 N.E. 2d 556, 560 (Ind. 2001); *Matter of Dougherty*, 482 NW 2d 485, 489 (Minn. Ct. App. 1992).

6. *State Department of Environmental Protection v. Standard Tank Cleaning Corp.*, 284 N.J. Super. 381, 665 A.2d 753 (App. Div. 1995); *State v. Markowitz*, 273 A.D. 637, 710 N.Y.S. 2d 407 (3d Dep't 2000); and *Karter v. Commissioner of Department of Environmental Resources* 108 Pa. Commw. 267, 529 A.2d 1148 (1987).
7. 615 P.2d 730 (Haw. 1980).

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Indemnification

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ENDNOTES

1. N.J.S.A. 42:2B-1.
2. N.J.S.A. 14A:3-5.

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do so" have refused to bring the desired action.

8. *See* N.J.SA. §42:2B-61.
9. *See* RULLCA §903.
10. *See* RULLCA §905(e).
11. *See* RULLCA §905(a).

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