

THE RESPONSIBLE CORPORATE OFFICER DOCTRINE: INDIVIDUAL LIABILITY OF OFFICERS, DIRECTORS, & SHAREHOLDERS IN ENVIRONMENTAL CASES

Or

NO WHERE TO RUN TO, NO WHERE TO HIDE

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THIS MEANS YOU

- Facility operators & managers
 - Owners
 - Contractors



YOU Could be Individually Responsible for:

- Civil Penalties – FINES
- Criminal Penalties – FINES & JAIL
- & Restoring the Property or Cleaning the Contamination Up or Assuming the Cost of Compliance **ALL BY YOURSELF**



Erosion of Traditional “Corporate Veil”

- Traditionally, Officers, Directors ≠ Liable for Torts of a Corporation Because of Your Position Unless You Commit or Participate in Commission of a Tort
 - Environmental Violations = Torts
- DEP Position: Fiction in Environmental Context. You are likely liable if you are in a position of responsibility & authority.

Elements of RCO Doctrine

- Does Not Require Government to:
 - Pierce corporate veil
 - Show that officer personally perpetrated or participated in the wrongful act
- Key to Liability
 - Failure to use authority to assure compliance with laws & regulations

How YOU Are Liable

- **“Participation”** – Imposing Responsible Corporate Officer (“RCO”) Liability for Activities That YOU Participate In
- **“Control”**- Imposing RCO Liability for Activities That YOU Don’t Participate In But over which YOU have Direct Control or Supervision
- **“Prevention”** – Did YOU Turn a Blind Eye??

WHY AM I RESPONSIBLE?

- Environmental Laws = Protection of Public Health, Safety & Welfare Is seen as a Superior Goal As Compared to the Policy Behind the Corporate Veil (genesis of doctrine's application was in food & drug laws)
- Environmental Laws Define "Person" to mean person
 - & "person" is defined specifically to mean corporate officer in some environmental statutes

Public Health & Welfare Statutes

- Key Federal Environmental Statutes
 - Clean Air Act
 - Clean Water Act
 - Comprehensive Environmental Response Compensation & Liability Act (CERCLA)
 - Oil Pollution Control Act
 - Resource Conservation & Recovery Act (RCRA)

Public Health & Welfare Statutes

- Key State Environmental Statutes
 - Air Pollution Control
 - Water Pollution Control
 - Hazardous Waste
 - Water Diversion
 - Wetlands
- Questions to Ponder:
 - Is it a public health & welfare statute?
 - How is "person" defined?
 - Do I hold a position of responsibility & authority within the company in order to be held personally liable?

The BEC Case

- In 2001, the Connecticut Supreme Court assessed liability against a company's president & vice president for violations of CT's Water Pollution Control Act.
- General facts of case:
 - BEC operated an oil storage & distribution facility. Heavy rains caused the water level at tank farm to rise and flood storage tanks, which had a 30 year history of oil spills.
 - Owners/operators removed tank covers. Failed to operate a manual pump to drain water. Spill occurred. Continued Pattern of Actions/Inactions. Bulkhead wall failed. Needed repair... Orders... Failure to Comply ... More Spills

BEC Liability

- President & Vice President argued for protection of the “corporate veil”
- DEP & AG argued that RCO doctrine applies
- Court said: RCO doctrine applies. No need to pierce the veil.
- Court looked at state statute:
 - CGS § 22a-432: “[i]f the commissioner finds that any *person* has established or created a condition...or is maintaining any facility or condition which reasonably can be expected to create a source of pollution to the wathers of the state, he may issue an order...”

- Statutory Language: Person definition includes “any individual, partnership, association, firm, limited liability company, corporation or other entity,... and *any officer or governing or managing body of any partnership, association, firm or corporation or any member or manager of a limited liability company*”
- Statute may have simply “Gilded the Lily”
- Open question: whether statutory language is truly determinative of RCO liability (NB: not all state statutes define “person” the same way)

The BEC Test

■ The Principles:

- The officer is in a position of responsibility that allows that officer to influence corporate policies & activities
- There is a nexus between the officer's actions or inactions in that position and the violation such that the corporate officer influenced the corporate actions that constituted the violation
- The corporate officer's actions or inactions resulted in the violation

BEC Acts of Commission & Omission

- Act of Participation – RCO had a share in the wrongful act of the corporation that constituted the offense
- Omission – Fact that RCO didn't themselves spill the oil not relevant
 - RCOs influenced corporate behavior
 - Supreme Court: “although it is true that a corporate officer is not personally liable simply by virtue of having supervisory authority when a corporation's employee may cause pollution, if the corporate officer's actions or inactions create conditions that ‘reasonably can be expected to create a source of’ water pollution, then that officer may be held personally liable....”

Response to The BEC Decision

- Journal Inquirer: July 2001, "Officials Hailing Environmental Decision" by Harlan Levy
 - Attorney General Richard Blumenthal: "Any responsible corporate officer may be compelled to pay the costs of cleanup." The case is a "a warning to all corporations and corporate defendants."
 - Deputy Commissioner Jane Stahl: "Whether it be the person running the equipment or the corporate officer, each person with responsibility to adhere to and follow Connecticut's environmental laws can and will be held accountable...This decision is a clear message to all who manage the day-to-day operations of facilities in Connecticut that all levels of a company are responsible for being good environmental stewards."

Post-BEC Applications...

- Soil pollution under State's Water pollution laws. Court imposed civil penalties against a managing corporate officer for violations of water discharge statutes based upon RCO doctrine. *In Rocque v. Biafore, in 2003, Connecticut Superior Court found personally liable an individual who:*
 - *owned 50% of company that was a landlord of a PCB-contaminated site*
 - *was primary contact with DEP*
 - *made financial decisions*
 - *made all decisions*
 - *Convened no Board of directors meetings*
 - *Was responsible for the landlord corporation*

Landlord was not the source of the contamination but was "maintaining" it because landlord failed to investigate and remedy the PCBs. Landlord was issued Order by DEP but failed to fully comply.

Court held individual personally responsible for investigating and remediating the parcel and for a \$55,000. fine.

- Solid Waste. RCO found liable for violating solid waste laws (unlawful disposal of tires & other wastes). President of company also signed Consent Order but failed to comply. *Rocque v. Farricielli (2001).* RCO faced judicial order against himself to comply & fines.

- **Wetlands.** *In Ventres v. Goodspeed Airport & DEP v. Goodspeed Airport (2004), DEP sought relief against a sole member LLC and the individual for violations of wetlands statutes for clear-cutting trees on 2.5 acres of floodplain forest. Some of land was owned by wrong doer; other part was owned by a land trust & Nature Conservancy. Land was cleared without a permit or landowner permission.*
 - RCO arguments included corporate veil, protections afforded by sole member LLC law & that action was proper due to airport development & prescriptive easement.
 - Court ordered fines to be paid by corporation or RCO, as both are jointly & severally liable for the costs & RCO is enjoined from engaging in any regulated activity without a permit on the land, among other relief granted by the Court.

- **Dam Safety.** Administrative enforcement action against individual. Dam safety statute authorizing inspection and issuance of repair orders by DEP Commissioner is a strict liability public welfare statute & RCO doctrine applies if no compliance occurs, responsible relationship exists and RCO had power to prevent violations. *See In the Matter of Vincent D. Celentano, et al. (DEP Office of Adjudications, May 28, 2004 – Final Decision.)*

DEFENSES

- Impossibility
 - In Position of Authority but Powerless to Prevent or Correct the Violation
 - RCO exercised extraordinary care and skill and could not prevent violations

- Lack of Knowledge
 - Did the RCO have the requisite knowledge... (but re: ignorance of the law is no defense). Important for Criminal Intent

- Involvement & Responsibility
 - Were you involved in the corporate decisions relating to environmental compliance matters?

Protection of Corporate Directors, Officers & Employees

- Obtain Permits & Comply
- Obey DEP Orders
- Establish environmental regulatory compliance, investigation & remediation programs
- Hold regular meetings & training sessions for employees concerning environmental compliance
- Mandate that subordinates supervising the company's environmental compliance, investigation and remediation program keep diligent records of pollution prevention, investigation & remediation activities
- Post signs
- Respond with due diligence to all spills and releases
- Ensure that all contracts are negotiated and executed by one with authority on behalf of the company and not on behalf of the company in his/her personal capacity
- Promote, enhance, foster & encourage environmental stewardship among all personnel – top/down
- Report & Act
- Inspect & Act

Summary

- In DEP's view, everyone may be potentially liable – from the employee to the officer to the director to the shareholder of a company.
- RCO liability, while not a foregone conclusion, requires a fact specific inquiry.
- Powerful weapon for DEP to use. Claims against individual corporate officers of landowner companies, developers, as well as operators, are increasing in number. DEP is blind as to whether the company is large or small.
- When responding to an RFP or RFQ, include in bid & carefully consider costs of proper permitting, operations & management plans, and environmental compliance (e.g., stormwater, wetlands, floodplains, contamination management). Don't ignore DEP permit requirements & orders & regulatory compliance. Communicate with DEP. Better to pay now rather than pay individually later.

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