INDIVIDUAL LIABILITY OF CORPORATE OFFICERS AND OTHER INDIVIDUALS: THE NET EXPANDS*

*Brian C.S. Freeman and Pamela K. Elkow***

Generally a corporate officer or employee is not individually liable for the corporation's actions solely by virtue of being an officer or employee. However, various federal or state courts have held that an individual acting in a corporate capacity with respect to environmental matters is personally liable under one or more of several theories:

— the "responsible corporate officer" doctrine;
— direct liability, based on the individual's active participation in a tort or crime;
— liability created by specific statutes; and
— derivative liability, a/k/a "piercing the corporate veil."

The year 2001 produced four reported cases regarding individual liability of individuals acting in a corporate capacity. In two cases (*BEC Corp. v. Connecticut Department of Environmental Protection,* 256 Conn. 602, 775 A.2d 928 (2001), and *Indiana Department of Environmental Management v. RLG, Inc.,* 755 N.E.2d 556 (2001)), state supreme courts adopted the "responsible corporate officer" doctrine as state law. The third case (*United States v. Hong,* 242 F.3d 528 (4th Cir. 2001)) dealt with the "responsible corporate officer" doctrine under the federal Clean Water Act (CWA). Each of these three cases also addressed direct liability, statutory liability, or both. In the fourth case (*Carter-Jones Lumber Co. v. LTV Steel Co.,* 237 F.3d 745 (6th Cir. 2001)), the court pierced the corporate veil, in a broad interpretation of the traditional derivative liability theory. In all four cases, the individual defendant was found liable.

With respect to the "responsible corporate officer" doctrine, it is worth noting that one of the three cases (*Hong*) involved not a corporate officer, but an employee. While unusual, this is not unprecedented. Even so, this result highlights that the liability created under this doctrine is more expansive than its name suggests.

Collectively, these cases suggest several themes.

First, as in prior years, state and federal courts continue to expand the net of individual liability.

Second, the various avenues to individual liability are not always easily distinguished. For example, where the "responsible corporate officer" doctrine is called upon to flesh out statutory-based individual liability, as in *BEC* and *RLG,* it is not clear that these two concepts actually present separate avenues to liability. Also, as "responsible corporate officer" liability continues to be extended to nonofficer employees, the boundary between "responsible corporate officer" liability and direct liability is less clear. Similarly, the distinction between derivative liability and direct liability can be blurred where (as in *Carter-Jones Lumber*) the law of the particular state in issue allows corporate veil-piercing for equitable factors independent of more objective criteria such as failure to respect the corporate form.

Third, typical articulations of the "responsible corporate officer" doctrine do not readily indicate limits on the types of issues for which individual liability can be found. All three "responsible corporate officer" cases discussed below involved apparently significant environmental hazards or threats to the public welfare. However, the statement and rationale of the holdings in these cases would seem equally to support liability of corporate officers or employees for all manner of environmental regulatory violations, without regard to whether the violation involved any realistic or immediate potential for injury to environment or human health

** *Brian C.S. Freeman and Pamela K. Elkow are with the law firm of Robinson & Cole LLP in Hartford, Connecticut.*

or safety. Such a result would seem to significantly expand the "responsible corporate officer" doctrine beyond its original stated purposes of protecting public health and the environment.

I. *BEC Corp. v. Connecticut Department of Environmental Protection*

In *BEC Corp. v. Connecticut Department of Environmental Protection,* 256 Conn. 602, 775 A.2d 928 (2001), the Connecticut Supreme Court held in a case of first impression that a corporate officer can be personally liable to the Connecticut Department of Environmental Protection (CTDEP) for actual or potential water pollution related to the corporation. The *BEC* case involved a series of closely held family companies that owned a waterfront bulk oil storage facility. The companies' president and vice-president/secretary had responsibility and authority for addressing environmental issues at the facility, and for overseeing operations at the facility generally. There were a series of oil releases at the facility from the 1970s through the early 1990s. At least one release reportedly resulted from the two officers' failure to take preventative steps that may have prevented a release. When the various releases occurred, the officers had directly overseen or coordinated the facility's response efforts. These efforts included removing the released oil, but did not include investigation or remediation of underlying soils or groundwater.

In mid-1996, CTDEP issued a cleanup order to the company that currently owned the facility as well as to the two officers individually, on the grounds that each officer, as much as the company, had created or was maintaining a "facility or condition that reasonably could be expected to pollute the waters of the state." The officers argued that even if the company was liable to CTDEP for cleaning up the site, they could not be held personally liable. On appeal, the state supreme court rejected that argument.

The court noted that Connecticut General Statutes § 22a-432 (which is part of the state Water Pollution Control Act) authorizes the CTDEP to issue a cleanup order to "any person" who establishes or maintains a potential source of pollution to the waters of the state. The court then noted that "person" for purposes of this statute was defined (in a related statutory section, § 22a-423) expressly to include an "individual" and a "corporate officer," as well as corporations and other business entities. To address when a corporate officer could be held personally liable for a cleanup order, the court adopted the "responsible corporate officer" doctrine, based on three criteria:

(1) the officer is in a position of responsibility, which allows that officer to influence corporate policies or activities;
(2) the officer's actions or inactions in that position influenced the actions of the corporation that created or maintained the potential water pollution source; and
(3) the officer's actions or omissions resulted in the violation.

The court borrowed the statement of these criteria directly from *Matter of Dougherty,* a 1992 Minnesota Court of Appeals decision (482 N.W.2d 485). In support of its holding, the Connecticut Supreme Court emphasized the broad remedial purposes of the statute that empowered CTDEP to issue cleanup orders.

The court emphasized that an officer is not responsible for any and all corporate acts generally, or solely by virtue of his or her position (a/k/a "vicarious liability"). Rather, the court stated, the officer must have a "responsible relationship" to the corporation's actions, through authority and control over day-to-day operations, or over environmental matters at the facility in question. In the present case, the court found that the corporate officers directly controlled operations and environmental response efforts at the site, and had knowledge of the contamination at the site. Additionally, and apparently most significantly, at one point the officers were aware that certain measures were necessary to prevent additional releases, but the officers did not take these measures. On the basis of these facts, the court held that the officers were personally liable, together with the corporation, for investigating and remediating environmental impacts at the facility as ordered by CTDEP.

It should be noted that the liability addressed by the *BEC* decision was a cleanup order from the environmental agency. However, the *Dougherty* case adopted by the *BEC* court concerned liability for violation of an environmental protection statute and regulations. In borrowing from the *Dougherty* opinion, the *BEC* opinion

repeats this "violation" language, notwithstanding its inapplicability to the case at hand. This suggests a broader application of the "responsible corporate officer" doctrine in Connecticut beyond the particular context in *BEC*.

II. *Indiana Department of Environmental Management v. RLG, Inc.*

The *Indiana Department of Environmental Management (IDEM) v. RLG, Inc.*, 755 N.E.2d 556 (2001), case involved violations of environmental statutes and regulations at a landfill owned and operated by a small, closely held corporation. The violations included both acts and omissions. The individual defendant, Lawrence Roseman, was the sole shareholder and director of the corporation, and held all of the corporate offices. After winning a judicial order for over $3 million in penalties against the insolvent corporation, amended its complaint to seek personal liability for Roseman. The trial court and the intermediate appeals court rebuffed IDEM's position, citing the importance of the corporate form and a lack of evidence of personal involvement by the individual defendant in the environmental violations. On review, the Indiana Supreme Court reversed.

The court adopted the same three-part "responsible corporate officer" doctrine as stated in *Dougherty*, the earlier Minnesota decision. In so doing, the court also discussed the roots of the doctrine in older federal case law (namely, *United States v. Dotterweich*, 302 U.S. 277, 88 L. Ed. 48, 64 S. Ct. 134 (1943), and *United States v. Park*, 421 U.S. 658, 44 L. Ed. 2d 489, 95 S. Ct. 1903 (1975)). The Indiana court further noted that individual liability can arise from direct liability (*i.e.*, an individual who participates in a crime or tort is personally liable, even if acting in a corporate capacity), and from statutory liability created by the specific environmental protection statute in question. All three avenues to individual liability, according to the court, serve to "heighten attention to compliance, and also to remove the ability of fly-by-night operators to escape reimbursing the public cost of irresponsible operations." 755 N.E.2d at 559.

Applying these three theories of liability to the facts at hand, the court found Roseman liable under each of them. Under the "responsible corporate officer" doctrine, the court emphasized that Roseman, as the sole office-holder of the corporation, had authority over the corporation's operation of the landfill and, in fact, had personally directed and involved himself in these operations, including actions or inactions targeted by IDEM's enforcement efforts. The court also emphasized that the corporation's application to IDEM for a solid waste permit had named Roseman as the "responsible party" for purposes of the facility's compliance with applicable requirements. (The reason for this emphasis is not clear, in that the state statutes cited by the court's decision indicate that a "responsible party" must be either a senior management official of the applicant, or the owner of at least a certain percentage of the company. It is possible that the court's emphasis on this point stemmed from due process considerations: *i.e.*, to demonstrate that Roseman had been put on prior notice of his individual exposure, and had chosen to have his company designate himself for this role.)

In finding direct liability, the court again discussed Roseman's "direct participation in the environmental violation," and his identification as the "responsible party" in the permit application and other documents that the corporation filed with IDEM. In finding Roseman directly liable, the court apparently viewed direct liability to apply to regulatory violations equally as to crimes and torts, the subject of prior case law regarding direct liability.

Under the statutory liability test, the court noted that the state environmental statute in question imposes civil liability on "persons," and that "persons" was defined to include "an individual," as well as various business organizational forms. (In this aspect, the *RLG* decision appears to be more aggressive than the Connecticut decision in *BEC*. Recall that the Connecticut statute expressly defined potentially liable "persons" to include a "corporate officer.") The court again noted that Roseman had been designated as "responsible party" in the corporation's permit application to IDEM.

The defendant Roseman had argued that he could be held personally liable only if the corporate veil were pierced (which, under Indiana law, can be done only where corporate formalities have not been observed, and the corporate form is used in a manner constituting fraud or promoting injustice). The court flatly rejected this position. To bolster the point, the court stated that the record in the case at hand did not support piercing

the corporate veil. However, the court noted that since Roseman tripped the liability triggers under each of the "responsible corporate officer," direct liability, and statutory liability theories, the issue of veil-piercing was moot.

As a result, the court found Roseman personally liable for over $3 million in penalties that IDEM had sought against the corporation.

III. *United States v. Hong*

The "responsible corporate officer" doctrine has also been the basis of a decision finding an individual responsible, even when that individual is not an officer. In *United States v. Hong,* 242 F.3d 528 (4th Cir. 2001), the Fourth Circuit upheld a decision of the District Court Eastern District of Virginia decision convicting James Hong for violations of the federal CWA, 33 U.S.C. § 1251 *et seq.*

James Hong acquired a wastewater treatment facility in Richmond, Virginia, in September 1993, and operated the facility under several names, finally calling it Avion Environmental Group. He later moved the company's operations to a new facility, on Stockton Street in Richmond. Hong was not identified as an officer of the company, and avoided any formal association with Avion. However, the court found that he negotiated the lease, participated in the purchase of a wastewater treatment system (which was the subject of the enforcement action), reviewed marketing reports, controlled the finances of Avion, including payment of expenses, and generally played a substantial role in the company's operations. Lastly, he maintained an office at the Avion facility, from which he conducted business.

In late 1995, Hong and Avion's general manager began to investigate the acquisition of a new treatment system for the Stockton Street facility, which had lacked a treatment system. They were informed that the system they were considering was designed to be the final stage of treatment, and that pretreatment would be necessary. Despite this warning, Avion purchased the system and used it as the sole wastewater treatment system for the Stockton Street facility. The system quickly became clogged and ineffective. Avion employees advised Hong of the problems with the system, and he personally inspected it on at least one occasion.

In May 1996, Avion employees began discharging untreated wastewater into the Richmond sanitary sewer system in violation of Avion's discharge permit. This continued throughout 1996. Based on these activities, Hong was charged with thirteen criminal counts of negligently violating pretreatment requirements under the CWA — one count of failing to properly maintain and operate a treatment system, and twelve counts of discharging untreated wastewater. In each count, it was alleged that Hong committed the violations as a "responsible corporate officer." The magistrate judge before whom he was tried found Hong guilty on all counts, and sentenced him to thirty-six months' imprisonment and a fine of $1.3 million, $100,000 for each count.

Hong argued that the government had failed to prove he was a "responsible corporate officer." Specifically, he argued that the government had failed to prove that his relationship with the company was such that he had the authority to prevent the illegal discharges. The court disagreed, finding that while Hong had gone to great lengths to avoid formal association with Avion, he substantially controlled corporate operations. In addition, the court noted that he was involved in the purchase of the treatment system and had been personally informed that this system was not sufficient; that he was in charge of Avion's finances and refused to purchase additional filtration media; and that he was frequently present at the facility and discharges occurred openly in his presence. The court also rejected Hong's challenge to his sentence on the grounds that it was cruel and unusual punishment, finding that he had failed to challenge it at trial, and that there was no plain error committed.

IV. *Carter-Jones Lumber Co. v. LTV Steel Co.*

While the three cases discussed above used the "responsible corporate officer" doctrine to hold an individual liable for what might otherwise have been regarded solely as the actions of a corporation, the final case to be discussed used traditional "corporate veil-piercing" to hold a defendant sole shareholder jointly liable for response costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*

In *Carter-Jones Lumber Co. v. LTV Steel Co.,* 237 F.3d 745 (6th Cir. 2001), the Sixth Circuit affirmed the decision of the District Court for the Southern District

of Ohio holding that the individual sole shareholder was jointly liable for CERCLA response costs more particularly discussed in an earlier opinion, *Carter-Jones Lumber Co. v. Dixie Distributing Co.*, 166 F.3d 840 (6th Cir. 1999). In its earlier decision, the court had reversed the district court, which had found that Harry C. Denune, the sole shareholder of Dixie Distributing (Dixie), was not jointly liable for the judgment against Dixie. The court had remanded on the question of whether Denune could be jointly liable on a veil-piercing theory. Following an evidentiary hearing, the trial court found that Denune was in fact jointly liable for Dixie's judgment. Denune appealed.

The facts included the following. Denune and two others incorporated Dixie in 1963. The corporation held annual and special meetings of its board of directors and of its shareholders from 1985 to 1999. Denune was the sole shareholder, and served as a director through 1989. He did not commingle personal and corporate funds, and the corporation was sufficiently capitalized at the time it was engaged in the activities that created its CERCLA liability. While Denune did not control every aspect of corporate business, he was present at and clearly controlled those transactions that had resulted in the polychlorinated biphenyl (PCB) release (and created CERCLA liability for Dixie). He was personally involved with the illegal management and disposal of the PCBs, and misled a state environmental inspector about those activities.

The court of appeals looked to Ohio law to determine whether the corporate veil could be pierced to hold Denune liable. *Citing Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos., Inc.*, 67 Ohio St. 3d 274, 617 N.E.2d 1075 (1993), as the leading Ohio case on veil piercing, the court quoted a three-prong test to determine whether a shareholder is liable for the wrongdoing of the corporation:

(1) control over the corporation was so complete that the corporation had no separate mind, will, or existence of its own;
(2) control over the corporation was exercised in such a manner as to commit fraud or an illegal act against the plaintiff; and
(3) injury or unjust loss resulted to the plaintiff as a result of the control and wrong.

Denune did not argue that the second and third prongs were not met. Rather, he argued that the district court's veil-piercing holding was erroneous because it

— regarded control over the illegal transactions as sufficient, without regard to additional factors set out in another state case on veil piercing, *LeRoux Billyle Super Club v. Ma*, 77 Ohio App. 3d 417, 602 N.E.2d 685 (1991); and
— contradicted *United States v. Bestfoods*, 524 U.S. 51, 141 L. Ed. 2d 43, 118 S. Ct. 1876 (1998).

The Sixth Circuit rejected Denune's first argument. The court held that while Ohio courts have in various cases used a multifactor approach in deciding whether to pierce the corporate veil, Ohio case law establishes that veil-piercing doctrine is equitable in nature, and no single list of factors can be exclusive or exhaustive. Further, Ohio case law allows the veil to be pierced if an injustice would otherwise result. The Sixth Circuit also noted that courts applying veil-piercing law in conjunction with a CERCLA action should keep CERCLA's broad remedial purpose in mind. The court then discussed a number of cases in which the corporate veil was pierced under a wide variety of circumstances, but the crux of the decision was that if the corporate veil were not pierced in the present case, Denune would be allowed to hide behind Dixie. As the court put it, "Denune's argument, if we adopted it, would straightjacket the courts in situations where equity demands that the fiction of corporate personhood be ignored." 237 F.3d at 749.

In sum, then, the court endorsed holding an individual derivatively liable based in whole or in part on his or her extensive control over the corporation, or at least the corporate actions in question. Note that this analysis sounds very much like the "responsible corporate officer" doctrine.

The court also rejected the Denune's argument that to hold him liable based on his control over the corporation would disregard the distinction drawn in *United States v. Bestfoods* between direct and derivative liability. On the contrary, the court held that *Bestfoods* instructed federal courts to continue to look to the common law to determine whether corporate veil piercing and individual liability was appropriate. The court held that state rather than federal common law was appropriate in such situations. In a further blurring of the distinctions

between different avenues to individual liability, the court acknowledged that in this case the state common law allows derivative liability under roughly the same conditions that CERCLA imposes direct liability. However, the court dismissed this as "a coincidental fact about Ohio law." 237 F.3d at 750. ■