

# The Responsible Corporate Officer Doctrine:

## A Due Diligence Danger

Lindsay T. Boyd

*No responsible corporate officer would go forward on an acquisition without it, but the due diligence process can uncover some things that could lead to personal liability under the responsible corporate officer doctrine.*

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**AN ESSENTIAL STEP** in every merger or acquisition is the due diligence process. But it can be the proverbial double-edged sword. The officers and directors of the acquiring company can learn things that can help them to avoid liability, but they may also learn things that put them in the crosshairs of environmental enforcement actions, and even personal liability.

Successor liability has always been an issue for corporations in the environmental arena, but

now it may be a personal issue for corporate officers. The responsible corporate officer doctrine has been around for years, but it is now a formidable weapon in ensuring that the states have some person to pay for environmental damage. States that aggressively enforce their environmental or health and safety laws may find that the responsible corporate officer doctrine and successor liability, when used together, constitute the one-two punch necessary to

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ensure compliance with environmental regulation—and impose personal liability on corporate officers.

This article will provide a brief overview of the responsible corporate officer doctrine, successor liability, and how, together, they can have the slightly paradoxical result of making due diligence in an acquisition a dangerous thing—or at least making some transactions too risky to undertake.

**RESPONSIBLE CORPORATE OFFICER DOCTRINE** • In its current form, the responsible corporate officer doctrine can be traced back to *United States v. Dotterweich*, 320 U.S. 277 (1943). In *Dotterweich*, the United States Supreme Court allowed criminal liability to be imposed on any person in a corporation who could be responsible for violating a law that touches “phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection.” *Id.* at 280. The responsible corporate officer doctrine has been applied to so-called public welfare offenses when:

- A statute is intended to improve the common good; and
- The legislature eliminates the normal requirement for culpable intent, resulting in strict liability for all those who have a responsible share in the offense.

See *Commissioner, Indiana Department of Environmental Management v. RLG, Inc.*, 755 N.E. 2d 556, 560 (Ind. 2001) citing *Matter of Dougherty*, 482 N.W.2d 485, 489 (Minn. Ct. App. 1992).

### Consistent Schemes And Adoption Of The Responsible Corporate Officer Doctrine

Before the introduction of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”), state

environmental protection laws were inconsistent, and regulatory schemes varied widely. After CERCLA, many states modeled their environmental regulatory schemes along federal lines, and based many of their initial regulations on CERCLA or other federal regulations.

Similarly, several states have adopted the responsible corporate officer doctrine as appropriate under state legislation addressing public safety, in particular, disposal of hazardous waste. These have included:

- *Matter of Dougherty*, 482 N.W.2d at 485, 488-90 (Minn. Ct. App. 1992) (Minnesota’s hazardous waste laws are public welfare statutes and subject to the responsible corporate officer doctrine);
- *State ex rel. Webster v. Mo. Res. Recovery, Inc.*, 825 S.W.2d 916, 924-26 (Mo. Ct. App. 1992) (applying doctrine to Missouri’s Hazardous Waste Management Law);
- *State Dep’t of Ecology v. Lundgren*, 971 P.2d 948, 951-53 (Wash. Ct. App. 1999) (sole shareholder of corporation that operated sewage treatment plant is personally liable for violation of Washington’s Water Pollution Control Act);
- *State v. Rollfink*, 475 N.W.2d 575, 576 (Wis. 1991) (corporate officer may be held personally liable for violations of Wisconsin’s solid and hazardous waste laws if the “officer is responsible for the overall operation of the corporation’s facility which violated the law”).

The responsible corporate officer doctrine was an outgrowth of federal jurisprudence and states, such as Hawaii, Missouri, Florida, Connecticut, Minnesota, Wisconsin, and Indiana, have used legislation to codify many of the essential elements of the responsible corporate officer doctrine.

### No Need To Pierce The Corporate Veil

But doesn’t the corporate veil protect corporate officers from personal liability? With re-

spect to actions premised on the responsible corporate officer doctrine, the answer is “no.” In general, courts respect the corporate form and provide the officers of corporations with protection from suit and personal liability. However, piercing the corporate veil occurs when evidence shows misuse of the corporate form to perpetuate fraud or promote injustice. *RLG*, supra, 755 N.E.2d at 563. “Unlike the responsible corporate officer doctrine, or specific statutory liability, veil piercing is not dependent on the nature of the liability.... The responsible corporate officer doctrine is distinct from piercing the corporate veil, and explicitly expands liability beyond veil piercing.” *Id.* at 563.

#### *No Mens Rea Requirement*

Under the responsible corporate officer doctrine, a state does not have to show that a corporate officer had sufficient knowledge of the violation. Most environmental laws are laws of strict liability and have no mens rea requirement. Thus, if the corporate officer “had, by reason of his position in the corporation, responsibility and authority either to prevent...or promptly to correct, the violation...and failed to do so” liability may be assessed. *Id.* at 559-60.

For example, in *Hawaii v Kailua Auto Wreckers, Inc.*, 615 P.2d 730 (Haw. 1980), the state of Hawaii prosecuted two corporate officers for violation of an open burning prohibition. The Hawaiian Supreme Court held that even though a corporate officer “did not take an active part in the...business operations and never set company policy...as president and treasurer...may nevertheless be held personally liable for the corporation’s violations....” *Id.* at 737. Further, the Court stated that “[C]orporate officers are not free from personal liability where they serve in those capacities only as an ‘accommodation’ and do not participate actively in the corporations affairs.” *Id.* at 738, citing *Minton v Cavaney*, 364 P.2d 473 (Cal. 1961); 2 F. Hodge

O’Neal and Robert B. Thompson, *Thompson’s Close Corporations* §8.22 (West, 3d ed. 2002 & Supp. 2003); see generally Note, *Corporations: Use of Accommodation Incorporators, Directors, Officers: Potential Liability of Accommodation Personnel*, 47 Cornell L.Q. 443 (1962).

Although the corporate veil may protect officers, directors, and shareholders from the majority of liability, the responsible corporate officer doctrine expands the states’ ability to protect its citizens’ public health and welfare. Environmental regulations are laws that affect public health and welfare and lead to the possibility of the imposition of the responsible corporate officer doctrine.

#### **The Due Diligence Danger**

Currently, most state statutes require the corporation to disclose any violations of environmental laws. Failure to disclose an environmental violation or possible violation can lead to additional penalties and liability. For the corporate officer acquiring a target corporation or its assets, the self-reporting requirement is particularly troublesome. If the purchasing corporation finds after a phase one or phase two environmental survey that environmental problems may or do exist and they conclude the transaction, as owners or operators they are required to report the problems to the state agency.

Under the corporate officer doctrine there is a possibility that the new officers and directors could be liable for the malfeasance of prior owners and operators. This possibility may arise out of traditional successor liability principles. If successor liability principles apply and the state applies the responsible corporate officer doctrine through statute or common law, then additional representations and warranties may have little effect on purchaser’s ultimate liability or exposure.