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Fiduciary Duties: Expanding the Use of the Responsible Corporate Officer Doctrine to Statutes with a Scienter Requirement

FIDUCIARY DUTIES: EXPANDING THE USE OF THE RCO DOCTRINE TO STATUTES WITH A SCIENTER REQUIREMENT

I. INTRODUCTION

Prompted by an investigation opened by the National Highway Safety Traffic Administration (NHSTA), Firestone initiated a massive recall of approximately 6.5 million tires[1] on August 9, 2000.[2] Prior to the recall, NHSTA received "90 complaints, including reports of 33 crashes resulting in 27 injuries and 4 deaths."[3] NHSTA's investigation did more than prompt Firestone's recall, however, it also sparked congressional hearings on the case and the interest of the Justice Department, which is now looking into filing criminal or civil charges.[4]

One of the most enlightening moments during the two days of congressional hearings came when Congresswoman Heather Wilson questioned Gary Crigger, the executive Vice President for Business Planning at Firestone. The exchange brought out the fact that although Firestone had received hundreds of complaints from customers who claimed the tires had

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[1] Nedra Pickler, *U.S. Weighs Tire Death Charges Actions of Firestone, Ford Execs Examined*, CHI. TRIB., Sept. 8, 2000, at 3.

[2] *Three Ford Truck Factories to Stay Closed Another Week*, MILWAUKEE J. SENTINEL, Sept. 9, 2000, at D15.

[3] *Id.* The number of deaths linked to the problem with the tires has ranged from four to eighty-eight in the United States and injuries from twenty-seven to 250. *See id.*; Pickler, *supra* note 1, at 3.

[4] *NPR: All Things Considered* (National Public Radio, Inc. broadcast, Sept. 8, 2000), *available at* 2000 WL 21471918.

separated, Firestone used these complaints to prepare a cost-benefit analysis in order to determine the best way to deal with its product liability rather than establishing a plan to deal with the problem of consumer safety.[5]

Ford Motor Company, whose popular light trucks and sport utility vehicles are equipped with Firestone tires, also came under fire with NHSTA for its role in the consumer safety problems. Although Ford issued a Firestone tire recall in sixteen foreign countries, beginning in August 1999 in the Middle East,[6] "[n]o law required Ford to notify U.S. authorities, and the company did not."[7]

This lack of a notification requirement prompted the introduction of two bills in the Senate. The first bill, introduced by Senator Patrick Leahy of Vermont, would require U.S. tire and automakers to notify federal regulators within two days of an overseas product recall.[8] The second bill, introduced by Senator Arlen Specter of Pennsylvania, would establish Federal criminal penalties of up to fifteen years in prison for defects that lead to death and five years for injuries when corporate *executives* intentionally withhold information on defective products.[9] But are these measures going to be enough? The problem with these bills and similar ones that are introduced in a piecemeal fashion is that they are only band-aids to respond to a current particularized problem. The difficulty in bringing a corporate criminal case in general, as summarized by Joan Claybrook,[10] is the requirement that one would have "to have knowing and willful reckless disregard and [the authorities would] have to pinpoint the individual in the company who had that knowledge . . . ."[11] Currently NHTSA is looking for evidence of that knowledge in the Ford/Firestone case, but even if they find it, the maximum fine is less than a million dollars.[12]

Can a corporation really allow a defective product that is linked to twenty-seven injuries and four deaths remain on the market and even if discovered, only be slapped with a fine of less than a million dollars? The problem stems from the inability of the U.S. justice system to deal with corporate crime. The United States' solution to crime is imprisonment. However, a corporation is a fictitious person, with no body to imprison. Furthermore, performance-based pay schemes that provide incentives for

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5 *See id.*

6 *See Three Ford Trucks Factories to Stay Closed Another Week*, *supra* note 2.

7 Pickler, *supra* note 1.

8 *See id.*

9 *See id.*

10 Joan Claybrook is President of Public Citizen, a Washington, D.C. based lobbying group and former head of the National Highway Traffic Safety Administration.

11 *NPR: All Things Considered*, *supra* note 4.

12 *See id.*

executives to break laws, combined with the decentralized corporate structure that makes it difficult to place the blame on any particular individual, facilitate corporate crime.[13]

One controversial alternative has been to hold corporate officers and directors liable for the criminal acts of the corporation, based upon their position in the company and their ability to prevent the violation of the law, and not upon proof of intent to break the law. This is known as the Responsible Corporate Officer Doctrine (RCO doctrine). Established by the United States Supreme Court in *United States v. Dotterweich*,[14] and reinforced in *United States v. Park*,[15] proponents of the RCO doctrine suggest that it is a controversial alternative employed to "take a bite out of corporate crime."[16] Discussing *Park* in general, one author suggests that:

> Lawmakers have qualms about deviating from the traditional standard of proving intent – and they should move slowly. The Supreme Court decision undermined a fundamental protection offered by the legal system [requiring that each criminal offense be done with intent]. But the disturbing regularity with which corporate leaders avoid responsibility suggests that it may be time to consider novel solutions.[17]

Although Crock admits that "nobody knows how much of a problem corporate crime really is"[18] he states that "Justice Department's Ogren estimates that price-fixing, consumer and defense-procurement fraud, and similar crimes may cost the public hundreds of billions of dollars."[19] Additional support for the RCO doctrine is suggested by a study by Marshall B. Clinard, professor emeritus at the University of Wisconsin, claiming that it is a misconception that top managers truly don't know when their subordinates are violating the law.[20] Clinard claims that in "a survey of retired middle managers, 72% said that upper management knew about improper conduct while it was going on or soon after."[21]

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13 *See* Stank Crock, *How to Take a Bite Out of Corporate Crime*, BUS. WK., July 15, 1985, at 122.

14 320 U.S. 277 (1943).

15 421 U.S. 658 (1975).

16 *See* Crock, *supra* note 13.

17 *See id.*

18 *Id.*

19 *Id.*

20 *See id.*

21 *Id.*

Part two of this note will discuss both the historical basis and the United States Supreme Court's decisions establishing the RCO doctrine. This section will also discuss the various policy reasons for the creation of the doctrine. Part three of this note will discuss the application of the RCO doctrine to the Resource Conservation and Recovery Act and the various decisions by the Circuit Courts of Appeals which split over whether the doctrine can be applied to a statute which has a scienter element. Part four of this note discusses the fiduciary obligations of a corporate officer or director and how these obligations can in certain circumstances provide the requisite scienter element for criminal prosecution. Part five then proposes the expanded use of the RCO doctrine to other corporate crimes with a scienter requirement where the policy reasons set out by the United States Supreme Court are met.

II. RCO DOCTRINE

A. *Background*

Two state supreme court cases preceded the United States Supreme Court decisions in *Dotterweich*[22] and *Park*[23] that marked the beginning of the RCO doctrine. The first was a Colorado Supreme Court case, *Overland Cotton Mill Co. v. People*.[24] In that case, a superintendent of a cotton mill was found guilty of hiring and employing a child under the age of fourteen in violation of Colorado statutes.[25] On appeal from his conviction, the defendant contended that the evidence was not sufficient to justify his conviction.[26] The court however, stated that "an agent of a corporation is presumed to have the knowledge of its affairs particularly under his control and management which, by exercise of due diligence, he would have ascertained."[27] In this case, the defendant was the assistant superintendent, he was engaged at the mill, and in the performance of his duties had authority to hire and fire employees.[28] The court therefore found that because of "his relationship to the company, and the performance of his duties, he either knew, or, by the exercise of due diligence upon his part,

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22 320 U.S. 277 (1943).

23 421 U.S. 658 (1975).

24 75 P. 924 (Colo. 1904).

25 *See id.* at 925 (providing that any person who shall hire and employ a child under fourteen years of age in any mill or factory shall be guilty of a misdemeanor).

26 *See id.* at 926.

27 *Id.*

28 *See id.*

should have known, that a minor under the prohibited age was in the employ of the company."[29] The court concluded "[f]or this reason he must be held as violating the statute, for it was within his power, by virtue of the relationship he bore to the company to have prevented the employment."[30]

Another case that preceded the United States Supreme Court decisions on the RCO doctrine is *State v. Burnham*.[31] There, the Washington Supreme Court affirmed the conviction of a secretary-treasurer-manager of a dairy company for having in his possession, with intent to sell and deliver substandard milk.[32] The court cited *Overland Cotton Mill*, approving the proposition that "an agent of a corporation is presumed to have [the] knowledge of its affairs particularly under his control and management which, by the exercise of due diligence, he would have ascertained."[33] However, the Washington Supreme Court went one step further, adding:

> We think the rule applied to the principal in the cases cited from this court should be extended to a managing agent *when the offense consists in the violation of a police regulation when neither a guilty knowledge nor a criminal intent is made an element of the offense*.[34]

B. *United States Supreme Court Decisions*

United States v. Dotterweich[35] is generally cited as the birth of the RCO doctrine. *Dotterweich* involved a president of a corporation who was held liable for adulterated or misbranded food under the Federal Food, Drug, and Cosmetic Act. Simultaneously, the company in which Dotterweich was the President was found not guilty.[36] The Federal Food, Drug, and Cosmetic Act prohibited "the introduction or delivery for introduction into interstate commerce of any . . . drug . . . that is adulterated or misbranded."[37] Further the act provided that "any person" violating this provision is . . . made guilty of a misdemeanor."[38] On appeal, Dotterweich claimed that since the company had already been charged, in essence, he could not also be

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29 *Id.*

30 *Id.*

31 128 P. 218 (Wash. 1912).

32 *See id.* at 219.

33 *Id.*

34 *Id.* (emphasis added).

35 320 U.S. 277 (1943).

36 *See id.* at 278.

37 21 U.S.C. §331 (1938), *amended by* 21 U.S.C. §331 (1997).

38 21 U.S.C. §333 (1997).

charged.[39] In other words, the specific issue before the court was, did the term "person" within the statute limit liability to one or the other? The United States Supreme Court held that "[t]he offense is committed, unless the enterprise which they [RCO] are serving enjoys the immunity of a guaranty, by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws . . . ."[40] Therefore, by holding that a responsible corporate officer shared the liability with the corporation, the RCO doctrine was born. This is significant because earlier cases involving the prosecution of corporate officers had not primarily relied on sharing liability but rather the proposition that a corporate officer may be held liable *in addition to* the corporation's liability, i.e., if he could be proven independently liable.[41] The RCO doctrine alleviated the need to prove independent liability of a corporate officer. Instead, a corporate officer could now share liability based upon his position in the corporation, *and* his ability to prevent violations of the law. The United States Supreme Court, in *Dotterweich*, declined to indicate what class of employees would stand in responsible relation or who had a responsible share,[42] leaving it to the "good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries."[43] This has been a rather unhelpful test, leading many to speculate that occupying the position of president of a corporation would lead to convictions under the RCO doctrine.[44] As examined herein, many courts have reached differing conclusions as to who exactly is a responsible corporate officer.

The Supreme Court's justification for holding a responsible corporate officer liable for the crime of the corporation was that "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."[45] Balancing the relative hardships, the Court continued, "Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."[46] The

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39 *See Dotterweich*, 320 U.S. at 281.

40 *Id.* at 284.

41 *See supra* Part II.A.

42 *See Dotterweich*, 320 U.S. at 285.

43 *Id.*

44 *See infra* Part III.

45 *Dotterweich*, 320 U.S. at 281.

46 *Id.* at 285.

Supreme Court's justification follows the rationale of the director's duty of care in that directors have a duty to inform themselves.[47]

United States v. Park[48] decided by the Supreme Court nearly thirty years after *Dotterweich*, reaffirmed the Court's decision to apply a strict liability standard to a responsible corporate officer in the context of the Food, Drug and Cosmetic Act.[49] Since the statute required no mens rea, the RCO sharing the corporation's liability required no mens rea either. The Court quoted *Dotterweich* saying "[t]he [Federal Food, Drug and Cosmetic] Act is of a now familiar type which dispenses with the conventional requirement for criminal conduct, awareness of some wrongdoing."[50] The Court opined that "the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur."[51] The Court went on to state, "the requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises . . . ."[52] Again, the courts reasoning implicates the duty of care that corporate officers owe to their corporations.[53] "Central to the Court's conclusion that individuals other than proprietors are subject to the criminal provisions of the Act was the reality that 'the only way in which a corporation can act is through the individuals who act on its behalf.'"[54] Here again, the court examined the question of who would be responsible[55] citing the court in *Dotterweich*, "[t]he test of responsibility, therefore, depended on the evidence produced at the trial and its submission – assuming the evidence warrants it – to the jury under appropriate guidance."[56]

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47 *See infra* Part IV.A.

48 421 U.S. 658 (1975).

49 *See id.* at 676 (concluding "[w]e are satisfied that the Act imposes the highest standard of care and permits conviction of responsible corporate officials who, in light of this standard of care, have the power to prevent or correct violations of its provisions.").

50 *Id.* at 668 (quoting United States v. Dotterweich, 320 U.S. 277 (1943)).

51 *Id.* at 672.

52 *Id.*

53 *See infra* Part III.A., discussing the corporate officer and director's duty of care requiring implementation of adequate oversight procedures.

54 *Park*, 421 U.S. at 668 (quoting United States v. Dotterweich, 320 U.S. 277 (1943)).

55 The Court surveyed cases decided after *Dotterweich* to decide who bore a responsible relation to the criminal violation. The Court stated "the Courts of Appeals have recognized that these corporate agents vested with the responsibility and power commensurate with that responaibility, to devise whatever measures are necessary to ensure compliance with the Act bear a 'responsible relationship' to, or have a 'responsible share' in violations." *Park*, 421 U.S. at 672.

56 *Id.* at 669 (quoting United States v. Dotterweich, 320 U.S. 277 (1943)).

In *Park*, the Court drew a roadmap, showing how the concept of holding corporate officers criminally liable, when they had a responsible share in the furtherance of the transaction the statute outlawed, was not "formulated in a vacuum."[57] The Court stated that under the previous 1906 Act, knowledge or intent were not required to be proved in prosecutions under its criminal provisions.[58] The generally accepted principal, where a corporate officer caused the corporation to commit a crime, he himself was not immune from liability, added strength to the argument.[59] Further, the Court reasoned, the causes were not limited to a positive act, but also included default or omission.[60] "In cases decided after *Dotterweich*, the Courts of Appeals have recognized that those corporate agents vested with the responsibility, and power commensurate with that responsibility, to devise whatever measures are necessary to ensure compliance with the Act bear a 'responsible relationship' to, or have a 'responsible share' in, violations."[61] It is important to note that both *Dotterweich* and *Park* dealt with violations of the Federal Food, Drug, and Cosmetic Act. Therefore, since there is no mens rea requirement, this was a strict liability crime.[62]

The Supreme Court implied an expanded use of the RCO doctrine in *United States v. International Minerals & Chemical Corp.*[63] Decided in 1971, prior to *Park*, the Supreme Court determined the word "knowingly" applied only to knowledge of the facts, not knowledge of the regulation or a violation of the regulation.[64] The defendant was charged with shipping sulfuric and hydrofluosilicic acids in interstate commerce and "knowingly fail[ing]" to indicate on the papers that they were corrosive liquids in violation of

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[57] *Id.* at 670.

[58] *See id.*

[59] *See id.* at 671.

[60] *See id.* The court stated:

> The principal has been applied whether or not the crime required consciousness of wrongdoing and it had been applied not only to those corporate agents who themselves committed the criminal act, but also to those who by virtue of their managerial positions or other similar relation to the actor could be deemed responsible for it's commission.

Id. (citations omitted).

[61] *Id.* at 672.

[62] In *Dotterweich*, the court stated that "such legislation [referring to the Federal Food, Drug and Cosmetic Act] dispenses with the conventional requirement for criminal conduct – awareness of some wrongdoing." 320 U.S. 277, 280 (1943); *see also* BLACK'S LAW DICTIONARY 378 (7th ed. 1999) (defining a strict liability crime as "a crime that does not require a *mens rea* element . . . .").

[63] 402 U.S. 558 (1971).

[64] In *International Minerals*, the court stated "we decline to attribute to Congress the inaccurate view that the Act requires proof of knowledge of the law, as well as the facts, and that it intended to endorse that interpretation by retaining the word 'knowingly'." *Id.* at 653.

regulations.[65] The Court opined that where dangerous products are involved, "the probability of regulation is so great, that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."[66] Justice Stewart disagreed with the majority. In his dissent, he stated that the majority's holding meant that a person who had never heard of the regulation might make a single shipment in his lifetime and be guilty of a criminal offense punishable by a year in prison.[67] The majority answered Justice Stewart's concern with a well-settled legal principal of criminal law, "ignorance of the law is no excuse."[68]

III. CIRCUIT COURTS SPLIT OVER SCIENTER REQUIREMENT IN RCRA ACT

There seems to be much confusion and debate between the circuits on whether or not the RCO doctrine might apply to other public welfare statutes that have a scienter element. The favored vehicle in this expansion is the Resource Conservation and Recovery Act (RCRA).[69] Since the RCRA is at least arguably ambiguous about which elements the "knowing" requirement applies to,[70] the circuits have split in determining whether there

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[65] *See id.* at 558.

[66] *Id.* at 565.

[67] *See id.* at 569 (Stewart, J., dissenting). Justice Stewart pointed out that:

> The only real impact of this decision will be upon the casual shipper, who might be any man, woman, or child in the Nation. A person who had never heard of the regulation might make a single shipment of an article covered by it in the course of a lifetime. It would be wholly natural for him to assume that he could deliver the article to the common carrier and depend upon the carrier to see that it was properly labeled and that the shipping papers were in order. Yet today's decision holds that a person who does just that is guilty of a criminal offense punishable by a year in prison.

Id.

[68] *Id.* at 565. The court opined that it would be a different story if the statute had provided that "whoever knowingly violated a regulation of the Interstate Commerce Commission shall be guilty of an offense." *Id.* In that case, a person would have to know the regulation existed in order to knowingly violate that regulation.

[69] The expansion of the RCO Doctrine into the RCRA has generated much controversy. *See* M. Diane Barber, *Fair Warning: The Deterioration of Scienter Under Environmental Criminal Statutes*, 26 LOY. L.A. L. REV. 105, 147-48 (1992) (arguing against lowering mens rea requirements for environmental crimes); Kevin L. Colbert, *Consideration of the Scienter Requirement and the Responsible Corporate Officer Doctrine for Knowing Violations of Environmental Statutes*, 33 S. TEX. L.J. 699, 701-02 (1992). *But see* Barry M. Hartman & Charles DeManaco, *The Present Use of the Responsible Corporate Officer Doctrine in the Criminal Enforcement of Environmental Laws*, 23 ENVTL. L. REP. (ENVTL. L. INST.) 10151 (Mar. 1993) (stating that the RCO doctrine does not eliminate the applicable statutory requirements for knowledge in criminal litigation).

[70] Resource Conservation and Recovery Act of 1976, 18 U.S.C. § 2 (1976), *as amended*, 42 U.S.C. § 6928(d) (1999).

must be actual knowledge or whether knowledge can be inferred by circumstances. The ambiguity in the statute exists because the term knowingly could apply to any one of the following six elements: (1) Defendant transported waste to a facility, (2) the waste was hazardous waste, (3) the facility did not have a permit, (4) that the facility is required to have a permit, (5) that regulations require a permit, or (6) that transporting to a facility without a permit is unauthorized or illegal.[71]

The Third Circuit Court of Appeals in *United States v. Johnson & Towers, Inc.*[72] held the RCRA required knowledge of both the regulation and the violation,[73] therefore the defendants must have knowingly violated all six of the above elements. The defendants in this case were charged with pumping hazardous wastes into a trench without a permit.[74] The company plead guilty to the RCRA counts, but the individual employees, a foreman and a service manager, pled not guilty. [75] Although the Third Circuit Court of Appeals added knowledge of the regulation, it did not really change the definition of knowing from that of the Supreme Court in *International Minerals*.[76] The court stated that "our conclusion that 'knowingly' applies to all elements of the offense in section 6298(d)(2)(A) does not impose on the government as difficult burden as it fears."[77] The Third Circuit Court of Appeals stated that owners or operators of the facility could be held responsible if they knew or should have known that their company had not complied with the RCRA's permit requirements.[78] The court went on to conclude that such knowledge,

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> [a]ny person who
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> ....
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> (2) Knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter - -
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> (A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act . . . or
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> (B) in knowing violation of any material condition or requirement of such permit.

Id.

[71] The division of knowing into six elements is suggested by Rebecca S. Webber, *Element Analysis Applied to Environmental Crimes; What Did They Know and When Did They Know It?*, 16 B.C. ENVTL. AFF. L. REV. 53, 84 (1988).

[72] 741 F.2d 662 (3d Cir. 1984).

[73] *See id.* at 668 (concluding that "either that the omission of the word 'knowing' in (A) was inadvertent or that 'knowingly' which introduces subsection (2) applies to subsection (A).").

[74] *See id.* at 664.

[75] *See id.*

[76] *See id.* at 669. The court indicated that they were guided by the Supreme Court's holding in *International Minerals*. *See id.; see also supra* text accompanying notes 63 to 68.

[77] *Johnson & Towers*, 741 F.2d at 669.

[78] The court stated that although § 6925 of the RCRA requires owners and operators to secure a permit, "Congress did not explicitly limit criminal liability for impermissible treatment, storage, or

"including knowledge of the permit requirement may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant."[79]

The Eleventh Circuit Court of Appeals in *United States v. Hayes International Corp.*,[80] held a conviction under RCRA's permit provision[81] required only that the defendant knew there was no permit for the disposal site, and that the waste disposed of was a mixture of paint and a solvent.[82] In other words, the Eleventh Circuit Court of Appeals specifically limited the knowing requirement to the facts, not the law. Therefore the defendant's claim that he did not know that paint waste was hazardous waste within the meaning of the regulations and that he did not know a permit was required amounted to no more than a mistake of law and once again defeated the claim on the principal that ignorance of the law is no excuse.[83]

Three years later, in *United States v. Hoflin*,[84] the Ninth Circuit Court of Appeals also disagreed with the court in *Johnson & Towers* and went even farther than the court in *Hayes International*, holding that knowledge that a disposal permit had not been obtained was not required for a conviction for improper disposal under RCRA.[85] The court based its reasoning in part on congressional intent, stating:

> Had Congress intended knowledge of the lack of a permit to be an element under subsection (A) it easily could have said so. It specifically inserted a knowledge element in subsection (B), and it did so notwithstanding the 'knowingly' modifier which introduces subsection (2). In the face of such obvious congressional action we will not write something into the statute which Congress so plainly left out.[86]

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disposal to owners and operators." *Id.* at 667. Therefore, even though it was not their responsibility to acquire the permit, the defendants only had to know that one was required. *See id.*

79 *Id.* at 670.

80 786 F.2d 1499 (11th Cir. 1986).

81 42 U.S.C. § 6928(d)(1) (1983). The statute provides criminal sanctions for any person who (1) knowingly transports any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under § 6925 of this title. As amended, 42 U.S.C. § 6928(d)(1) (1985), makes the statute applicable to anyone who "transports or causes to be transported".

82 *Hayes International*, 786 F.2d at 1505.

83 *See id.*

84 880 F.2d 1033 (11th Cir. 1989).

85 *See id.* at 1039.

86 *Id.* at 1038.

The court also specifically approved *International Minerals'* presumption that anyone dealing in hazardous materials has knowledge of the regulations governing them.[87]

In *United States v. Dee*, [88] and in *United States v. Baytank (Houston), Inc.*[89] the Fourth and Fifth Circuit Courts of Appeals respectively followed *Hayes International* and *Hoflin's* lead by requiring only that the defendant's knew what they were doing and not what the law required.[90]

While most of the circuits seemed to be following the United States Supreme Court's lead in *International Minerals*, the First Circuit Court of Appeals, deciding *United States v. MacDonald & Watson Waste Oil Co.*[91] in 1991, refused to apply the responsible corporate officer doctrine to the RCRA.[92] The court stated that:

> Simply because a responsible corporate officer believed that on a prior occasion illegal transportation occurred, he did not necessarily possess knowledge of the illegal shipment he was charged with. In a crime having knowledge as an express element, a mere showing of official responsibility under *Dotterweich* and *Park* is not an adequate substitute for direct or circumstantial proof of knowledge.[93]

Therefore, until the Supreme Court decides to hear a case deciding the limitations on use of the RCO doctrine in the context of the Resource Conservation Recovery Act, the lower federal courts have been left up their own interpretations.[94]

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[87] *See id.*

[88] 912 F.2d 741 (4th Cir. 1990).

[89] 934 F.2d 599 (5th Cir. 1991).

[90] *See Dee*, 912 F.2d at 745 (holding that the government did not need to prove defendant's knew a violation of the RCRA was a crime but that the defendant's had to know of the general hazardous character of the waste); *Baytank*, 934 F.2d at 613 (holding that 'knowingly' means no more than the defendant knows factually what he is doing, it is not required that he know that there is a regulation).

[91] 933 F.2d 35 (1st Cir. 1991).

[92] *See id.* at 55. The court generally agreed that:

> Knowledge could be inferred from circumstantial evidence, including position and responsibility of defendants such as corporate officers, ... However . . . proof that a defendant was a responsible corporate officer . . . would [not] suffice to conclusively establish the element of knowledge expressly required under [§ 6928(d)(1)] . . . .

Id.

[93] *Id.*

[94] *See* United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984) *cert. denied*, 469 U.S. 1208 (1985); United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989) *cert. denied*, 493 U.S. 1083 (1990); United States v. Dee, 912 F.2d 741 (4th Cir. 1990) *cert. denied*, 499 U.S. 919 (1991).

As we have seen, courts have been willing to find the requisite statutory mens rea in a variety of circumstances in order to hold a responsible corporate officer liable. They have allowed knowledge to be inferred from the circumstances without proof of actual knowledge. If circumstantial evidence might be used, what about imputing knowledge to a responsible corporate officer because he has a duty to know?

IV. DIRECTOR'S DUTY OF CARE

A. *Director's Fiduciary Duties*

A director's fiduciary duties are generally made up of the duty of care and the duty of loyalty. While the duty of loyalty generally involves faithfulness to and non-competition with the director's company, the duty of care implicates the way corporate officers engage in company business.[95]

The duty of care requires directors and officers to maintain adequate oversight of corporate operations and to obtain adequate and reliable information before making decisions. The duty of oversight requires a director or officer to take an active role in monitoring the corporation's activities.[96] Additionally, in the case of *In re Caremark International, Inc. Derivative Litigation*,[97] the court concluded that in light of the adoption of federal sentencing guidelines in 1991, for crimes committed by corporations, a director's duty of care requires them to establish such oversight procedures and reporting systems.[98] The *Revised Model Business Corporation Act* takes a similar stance stating:

> The members of the board of directors or a committee of the board, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, *shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.*[99]

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[95] *See* REV. MODEL BUS. CORP. ACT § 8.30 OFFICIAL CMT. (1983) (setting forth the standards of conduct for directors by focusing on the manner in which directors perform their duties).

[96] See *infra* Francis v. United Jersey Bank, 432 A.2d 814 (1981), notes 119 to 122 and accompanying text, where the court lists several steps that a reasonably prudent director should take in order to maintain proper oversight over a corporation's affairs.

[97] 698 A.2d 959 (Del. Ch. 1996).

[98] *See id.* at 970.

[99] REV. MODEL BUS. CORP. ACT § 8.30(b) (1983) (emphasis added); *see also* REV. MODEL BUS. CORP. ACT § 8.42 (1983) (setting out similar duties for corporate officers).

Additionally, the American Law Institute in its *Principles of Corporate Governance* dictate that a director or officer has a duty to the corporation to perform the director's or officer's functions in good faith, in a manner that he or she reasonably believes to be in the best interests of the corporation, and with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances.[100] Generally the purpose of these sections, which are common in every type of jurisdiction, is to require officers and directors of a corporation to adequately inform themselves before making decisions and to require the officer or director to fulfill a duty of oversight in the corporation. In other words, the director or officer has a duty to the corporation not only to make decisions that will not get it into trouble, but also to make sure that no one else in the corporation allows it to get into trouble. Once it is established that the director/officer owes this duty to the corporation, that is, once it has been established that directors and officers owe a duty of care to the corporation, the next step is to show that corporations have a duty not to violate the law.

It is well settled law in almost every jurisdiction that a "corporation can break the law.[101] It is also well known that corporations cannot act except by or through their agents.[102] This is the point where the RCO doctrine and the director's duty of care differ. Under the RCO doctrine, it is the government that prosecutes violations of the law. On the other hand, violation of the duty of care is generally actionable in a shareholder's derivative suit, a civil action. This comment does not argue that shareholders should be able to press criminal charges against directors for breach of the duty of care. And this comment does not argue that criminal prosecution is the appropriate remedy for all breaches by corporate officers of their duty of care. It is only at the point where a corporate officer or director's violation of the duty of care results in the corporations being accused of breaking the law that criminal prosecution of that corporate officer is appropriate.[103] If it is

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[100] *See* AMERICAN LAW INSTITUTE, PRINCIPALS OF CORP. GOVERNANCE; ANALYSIS AND RECOMMENDATIONS § 4.01 (1994).

[101] *See* United States v. Dotterweich, 320 U.S. 277, 281 (1943) (where Federal Food, Drug, and Cosmetic Act specifically defines person to include corporations); *see also* State v. Kailua Auto Wreckers, Inc., 615 P.2d 730, 736 (Haw. 1980) (holding a corporation liable under State Public Health Regulations); *see generally* Crock, *supra* note 3.

[102] *See Dotterweich*, 320 U.S. at 281, *citing* New York Central & H.R.R. Co. v. United States, 212 U.S. 481 (1909) (stating "the only way in which a corporation can act is through the individuals who act on its behalf.").

[103] *See* Francis v. United Jersey Bank, 432 A.2d 814, 826 (N.J. 1981) (stating that negligence [in duty of care] of Mrs. Prichard [Defendant] does not result in liability unless it is a proximate cause of the loss.).

appropriate to punish a corporate officer if it can be shown that he actively participated in or directed the conduct,[104] then it follows that the officer who failed in his duty to keep his corporation from breaking the law, even if he was not the person who actually did the deed, should also be liable. The criminal law has generally borrowed from the law of agency[105] and tort law[106] in this area requiring an act or direction by the responsible corporate officer. Generally, the participation principal of tort law holds that knowledge of tortuous conduct is not enough. Indeed it is not even enough to show that an omission caused the tortuous act, there must be action by the responsible officer. This gives rise to the distinction between commission of a crime and omission.[107] In criminal law, a violation of the law generally requires an act, (*actus reas*) and an intent to commit the crime (*mens rea*), except in the area of strict liability.[108] Interestingly, however, in criminal law where there is a duty to act, and one fails to do so, the omission is also a crime.[109] In the corporate structure, as we have seen, the corporate director/officer has a duty of oversight.[110] It follows then that the omission or failure to comply with this duty of oversight must also lead to criminal liability. This, therefore, is one distinction that the RCO doctrine makes from generally accepted corporate criminal liability. The general dispute that most commentators have is not whether the corporate officer actually committed the act, but whether the officer/director had the mens rea to

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104 *See In re* Matter of Dougherty, 482 N.W.2d 485, 488 (Minn. Ct. App. 1992) ("A corporate officer may be held liable for hazardous waste violations if the officer personally participates in the wrongful, injury producing act. . . . However, the evidence must show that the individual either directs or participates in the violations.").

105 *See generally* TIMOTHY P. BJUR AND JEFFREY REINHOLTZ, 3A FLETCHER CYCLOPEDIA CORPORATIONS § 1135 (1990) (stating that "corporate officers, charged in law with the affirmative official responsibility in the management and control of the corporate business, cannot avoid personal liability for wrongs committed by claiming that they did not authorize and direct that which was done in the regular course of that business, with their knowledge and with their consent or approval . . . ."); *see also* 2 RESTATEMENT (SECOND) OF AGENCY §§ 343-44 (1958) (stating that an act or omission by corporate officer logically leads to inference he participated in act).

106 *See* Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 173 (5th Cir. 1985) (stating that "Mississippi follows the general rule that when a corporate officer directly participates in or authorizes the commission of a tort, even on behalf of the corporation, he may be held liable.").

107 *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.07 (1995) (stating that a defendant's omission of a common law duty to act, assuming that she was able to perform the act, will serve as a substitute for a voluntary act).

108 *See id.* (stating that except in rare circumstances, a person is not guilty of an offense unless he performs a voluntary act [or omits an act that is his legal duty to perform] that causes social harm [the actus reus], with a mens rea [literally, a "guilty mind"] unless it is a strict liability offense).

109 *See id.*

110 *See supra* notes 95-100.

commit that particular crime.[111] Generally the law agreed with these commentators. But, where public welfare statutes have been involved, the courts many times have been less strict about the applicable mens rea requirement. In these contexts, the courts have generally been saying that we *can* hold *some* corporate officers or directors liable, either with or without the corporation, as long as they stood in a responsible relation to the violation and they failed to prevent the violation.[112]

An example of a civil case where a corporate director was held personally liable for failure in her duty of care is *Francis v. United Jersey Bank*.[113] The facts of this case are particularly egregious and may well have led to criminal charges against the corporation. Mrs. Pritchard was a director and the largest single shareholder of Prichard & Baird, a reinsurance broker.[114] After Mrs. Pritchard's husband died, and she inherited his shares, and her sons, also directors in the company, began to siphon off funds from the corporation under the guise of loans.[115] The "loans" far exceeded their salaries and financial resources.[116] Consequently, the firm filed for bankruptcy. Mrs. Pritchard, on the other hand, was not active in the business and knew virtually nothing of its corporate affairs. She briefly visited the corporate offices on one occasion and never read nor obtained any annual financial statement. She was unfamiliar with even the rudiments of reinsurance and made no effort to familiarize herself with the policies and practices of the corporation. Additionally, she did not ensure that the policies and practices of the firm pertaining to the withdrawal of funds, complied with industry custom or relevant law.[117] The relevant statutory provision dealing with the director's duty of care, provided that it was incumbent upon the directors to "discharge their duties in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions."[118] The court opined several rules that a

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[111] *See* Cynthia H. Finn, *The Responsible Corporate Officer, Criminal Liability, and Mens Rea: Limitations on the RCO Doctrine*, 46 AM. U.L. REV. 543, 556-562 (1996) (arguing that expansion of the RCO doctrine is unjustified in light of the Supreme Court's recent strengthening of the statutory mens rea requirements); Stefan A. Noe, *"Willful Blindness": A Better Doctrine For Holding Corporate Officers Criminally Responsible for RCRA Violations*, 42 DEPAUL L. REV. 1461 (1993).

[112] *See supra* Part II.A.

[113] 432 A.2d 814 (N.J. 1981) (holding that defendant was personally liable as a corporate officer where she had the power to prevent losses due to other insider's actions and failed to do so).

[114] *See id.* at 816.

[115] *See id.* at 818.

[116] *See id.* at 819.

[117] *See id.*

[118] *Id.* at 820 (construing New Jersey Business Corporations Act, N.J. STAT. ANN. §14A: 6-14 (Supp. 1981-82)).

director should follow in exercising her duty of care. First, the director should obtain a basic understanding of the corporation's business activities and should decline to serve if she is unable to comprehend the fundamental aspects of its operations.[119] Second, the director should regularly attend board meetings, review all documents presented to the board, and otherwise maintain a "general monitoring of corporate affairs and policies."[120] Third, the director should review the company's financial statements regularly and inquire into any questionable or adverse conditions that are revealed by those statements.[121] Lastly, the director should make a reasonable inquiry into any improper or irregular corporate activities that come to her attention.[122] The court went on to point out that the negligence of a director, here Mrs. Prichard, does not result in liability unless it is a proximate cause of the loss.[123] In other words, if the officer/director had observed his or her duty of care, the loss would not have occurred.[124] The importance of the proximate cause requirement in a director's duty of care is that it correlates to the "responsible relation" requirement of the responsible corporate officer doctrine.[125] In other words, a director or officer need not fear any litigation against himself either civil or criminal, unless he/she was the one who could have prevented the violation of the law.[126] These proximate cause/responsible relation requirements should relieve directors and officers and prevent a mass hysteria (or mass resignation) should the RCO doctrine be implemented in a wider range of areas. In the case of Mrs. Pritchard, the court had no trouble determining that Mrs. Pritchard's neglect of her duties had proximately caused the loss to the firm.[127]

B. *State Cases Analyzing the RCO Doctrine and Fiduciary Duties*

In particular, two state supreme court cases have emphasized the close correlation between the responsible corporate officer doctrine and the corporate officers fiduciary duties. The first *State v. Kailua Auto Wreckers,*

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119 *See id.* at 821.

120 *See id.* at 822.

121 *See id.* at 823.

122 *See id.*

123 *See id.* at 826.

124 *See id.*

125 *See supra* notes 42 to 43 and accompanying text.

126 This paper does not try to distinguish between the corporate responsibilities of outside directors and inside directors. Generally outside directors do not incur the same oversight responsibilities that corporate insiders do.

127 *Francis*, 432 A.2d at 829.

Inc.,[128] involved a closely held corporation between a husband and wife. The wife was president-treasurer in name only,[129] and characterized herself as a housewife.[130] The husband was the vice-president, general manager, secretary and director.[131] The husband was also in charge of the day to day running of the business. The husband burned automobiles to sell for scrap in violation of Hawaii's State Public Health Regulation.[132] The corporation was cited with seventeen violations of the Public Health Regulations, and the husband and wife were each cited individually for the violations.[133] The corporation, the husband, and the wife were held liable at the trial level. "The evidence at trial overwhelmingly established that KAW violated PHR Ch. 43, Sec. 7 on seventeen different occasions in 1976."[134] The trial court noted that a corporation is merely an artificial entity and can only act through the individuals who act on its behalf.[135] In 1976, KAW had only two agents, the husband and wife. Therefore, the trial court deduced that the husband and/or wife had authorized or committed the offense themselves.[136] On appeal, the husband and wife claimed that they could not be held personally liable because the trial court failed to establish their participation in the unlawful acts. The appellate court had no problem in holding the husband liable as he had admitted in court that he engaged in the burnings. The wife, however, was a different matter. Even though she held a high corporate position, she did not take an active part in the business and never set company policy.[137] Because there was no direct proof that Mrs. Weber either performed or authorized the performance of KAW's illegal open burning, she could not be held personally liable under Hawaii Penal Code § 702.228(1).[138] However, the court did find liability under the RCO doctrine[139] after first

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128 615 P.2d 730 (Haw. 1980).

129 *See id.* at 733.

130 *See id.* at 737.

131 *See id.* at 733.

132 *See id.* The defendant admitted at trial to committing these violations. *See id.*

133 *See id.*

134 *Id.* at 736.

135 *See id.*

136 *See id.*

137 *See id.* at 737.

138 *See id.* at 736. Section 702.228 provides:

> Liability of persons acting, or under a duty to act, in behalf of corporations or unincorporated associations . . . .
>
> (1) A person is legally accountable for any conduct he performs or causes to be performed in the name of a corporation . . . to the same extent as if it were performed in his own name or behalf.

HAW. REV. STAT. § 702.228 (1972).

139 *See Kailua Auto Wreckers*, 615 P.2d at 737.

stating that it is "critical in our determination . . . that the instant case involve corporate violations of a police regulation intended to protect the public from the harmful effects of air pollution."[140] The court went on to review *Park*, determining that "the court considered two primary factors in setting for the standard for determining the personal liability of responsible corporate officers for corporate violations of the Federal Food, Drug and Cosmetic Act; the first factor was the nature of the statute involved; the second, the harm sought to be prevented."[141] The court held that:

> [I]n accordance with the principles set forth in *Park* . . . high corporate officers who possess managerial authority bear a personal responsibility to the public to exercise reasonable care to discover any violation of the open burning regulation, *to remedy any such violation of which the officer knows or should have known*, and to prevent future violations.[142]

This holding imposes a negligence standard on the responsible corporate officer. The court noted:

> Courts may consider numerous factors in determining whether a corporate officer has been negligent and, therefore, should be held liable for a corporate violation. Relevant factors include, but are not limited to, the degree of harm to the public, the egregiousness of the violations, the supervisory authority and control vested in a particular corporate position, and the size of the corporation.[143]

This case shows quite clearly the correlation between the Responsible Corporate Officer Doctrine and a corporate officers duty of care. The housewife in this case, Mrs. Weber, claimed that she could not be convicted of the charges because she was a "mere housewife".[144] The court, in a footnote, stated that:

> Corporate officers are not free from personal liability where they serve in those capacities only as an "accommodation" and do not participate actively in the corporation's affairs. A person cannot divorce the responsibilities of a corporate position from the statutory

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140 *Id.* at 738.

141 *Id.* at 738-39.

142 *Id.* at 740. (emphasis added).

143 *Id.*

144 *See id.* at 738.

> and common law duties it carries with it by accepting the position merely as an accommodation.[145]

Isn't the director's factual situation in this case substantially similar to that of Mrs. Pritchard in *Francis v. United Jersey*?[146] They were both "housewives" who were placed in the position of being directors of corporations that neither one participated in. Neither one went to board meetings, neither one took interest in the day-to-day operations of the corporation. What is the difference? KAW was convicted of seventeen counts of openly burning automobiles on seventeen different occasions in violation of State Public Health Regulations, a criminal offense. Pritchard & Baird went bankrupt. In both cases, the housewife was held personally liable because they held corporate officer positions and had a responsible relation to the violation.

BEC Corp.(Rule 10.2.1(c)) v. The Department of Environmental Protection,[147] involved a closely owned corporation that operated an oil storage facility. Irvin Shiner was President[148] and his son Michael Shiner was Vice-President/Secretary of the corporation.[149] Both were held individually liable for the corporation's violations of Connecticut's Clean Water Act.[150] The court discussed how personal liability for environmental violations is recognized under federal law.[151] The court also recognized that the RCO doctrine would apply if three elements were met:

> 1) the individual must be in a position of responsibility which allows the person to influence corporate policy or activity, 2) the existence of a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constitute the violations; and 3) the individual's actions or inactions facilitated the violations.[152]

The court also recognized that these cases do not involve or require a piercing of the corporate veil. The court distinguished piercing the corporate

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145 *Id.* at 738 n.10.

146 *See supra* notes 113 to 127 and accompanying text.

147 BEC Corp. v. Dep't of Envtl. Protection, No. CV 98-0492627S, 1999 WL 300649 (Conn. Super. Ct. May 3, 1999).

148 *See id.* at *3.

149 *See id.* at *4.

150 *See id.* at *8.

151 *See id.*

152 *Id.* at *9 (quoting *In re* Matter of Dougherty, 482 N.W.2d. 485 (Minn. Ct. App. 1992)).

veil, where the owner does not fully honor the corporate structure of the entity, from personal liability for environmental law violations premised on the personal involvement of the decision makers.[153] The court found that the President, Irvin Shiner, stood in a responsible relation, not because he was President, but rather because "his complete control of the day to day operations of the site, his presence at the site five days a week since 1970, and his knowledge of the operations of the facility are connected to the history of repeated oil leaks and failure of soil remediation" which violated the statute.[154] The court also found Michael Shiner stood in a responsible relation because he was responsible for environmental compliance, and his inactions facilitated the violations.[155]

V. EXTENDING RCO DOCTRINE TO OTHER CLASSES OF CASES

Beaulieu v. RSJ, Inc.[156] involved a charge of sex discrimination against a corporation and its corporate officer.[157] The facts of this case revealed that Joseph Schaefer and his wife were seventy percent shareholders of RSJ, which operated a restaurant known as Jose's American Bar and Grill.[158] Joseph Schaefer made decisions concerning the operation of the restaurant.[159] In 1989, he instituted a uniform change requiring the waitress' to wear revealing uniforms.[160] Several waitresses were allegedly fired for refusing to wear the new uniforms and six employees filed charges with the Minnesota Department of Human Rights (MDHR) .[161] An administrative law judge determined that Schaefer was liable under the Responsible Corporate Officer doctrine.[162] On appeal, the appellate court overturned, stating that the responsible corporate officer doctrine did not apply because the Minnesota Human Rights Act did not impose strict liability.[163] Instead, liability "only

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153 *See id.* at *8.

154 *Id.* at *9.

155 *See id.*

156 532 N.W.2d 610 (Minn. Ct. App. 1995) *rev'd* 552 N.W.2d 695 (Minn. 1996).

157 *RSJ, Inc.*, 552 N.W.2d. at 696. The facts of this case are more fully set out in the Minnesota Supreme Court decision, therefore, I will use that decision for the facts even though the Minnesota Supreme Court refused to decide the issue of whether the RCO doctrine would apply in this case. *See id.* at 700 n.4.

158 *See id.* at 698.

159 *See id.*

160 *See id.* The new uniforms consisted of a white tank top and tight fitting orange running shorts similar to those worn by waitresses in the "Hooter's" restaurant chain. *See id.*

161 *See id.*

162 *See* State v. RSJ, Inc., 532 N.W.2d 610, 612 (Minn. Ct. App. 1995).

163 *Id.* at 614.

[attached] if the employer *knows or should know* of the existence of the harassment and fails to take timely and appropriate action."[164] Note that the standard of knowledge applied in this case was the same that was applied in *State v. KAW Auto Wreckers*.[165] The Supreme Court of Minnesota, on appeal by the Department of Human Rights, affirmed the court of appeals but only to the extent that the claim was time-barred.[166] In dismissing the action as time-barred, the Minnesota Supreme Court did not touch the issue of whether the administrative law judge was correct to apply the RCO doctrine cases which involved a Human Rights violation, or whether the Court of Appeals was correct in that the "knowing" requirement prevented application of the RCO doctrine.[167]

If such a case were to come back before the Minnesota Supreme Court, there are many reasons why the responsible corporate officer doctrine should apply. The facts of this case reveal that after MDHR made its probable cause findings, Jose's and MDHR engaged in conciliation unsuccessfully. Less than six months after Jose's received notice of the probable cause findings, Jose's assets were sold. Six months after that, the MDHR filed a complaint against Jose's and Schaefer. Again, six months later, Schaefer filed for Chapter 11 bankruptcy.[168] It's evident that Schaefer was intentionally trying to evade any liability for implementing a policy that exposed the corporation to liability. He first sold the assets of the company after the MDHR made a probable cause determination that the company was guilty of discrimination. He then filed bankruptcy himself after he was personally charged with aiding and abetting the discrimination.[169] Secondly, the factors that determine application of the RCO doctrine in Minnesota set out in *BEC, Corp.* would fit this case.[170] Although the Minnesota Human Rights Statute is not an environmental statute, there are strong public policy reasons for holding corporate officers liable whose actions cause the corporation to violate a person's human rights. Schaefer's actions fit the "nexus" required by RCO

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164 *Id.* (emphasis added).

165 *See supra* note 142 and accompanying text.

166 *See RSJ, Inc.*, 552 N.W.2d at 700.

167 *See id.* at 700 n.4.

168 *See id.* at 699.

169 *See RSJ, Inc.*, 532 N.W.2d at 611. The court of appeals took a different view of these facts, justifying its enforcement of the statute of limitations by stating:

> Realtors did not learn of the charges against them until more than three years after the alleged events occurred. RSJ had sold its assets and gone out of business before the *complaint* was filed. By the time the hearing took place, Schaefer had filed for bankruptcy. More than five years separated the hearing from the complained of events.

Id. at 612-13 (emphasis added).

170 *See supra* note 152 and accompanying text.

doctrine in that he had control over the day to day running of the company, he was the one who implemented the new uniform policy, and he was the one who fired the waitresses who refused to wear the new uniform.[171] "The uniforms for managerial employees and the other line employees did not change at this time."[172]

Additonally, even if the statute does not impose strict liability for violations, the statute itself states that liability attaches if the employer knows or *should know* of the existence of the harassment.[173] This is the same standard of care that was used in *Overland Cotton Mill*,[174] *Burnham*,[175] and *Kailua Auto Wreckers*[176] to impose liability on a responsible corporate officer whose actions or inactions resulted in a corporation's liability.

VI. CONCLUSION

The scienter requirement in a statute should not really bar the expansion of the RCO doctrine. As we have seen, knowledge can be imputed to someone by circumstantial evidence, and by willful blindness. Moreover, as Crock points out in his article, many times corporate higher-ups actually do know what is going on.[177] Since knowledge can be satisfied in a statute with a scienter requirement (colloquial) is there any reason why knowledge should not be imputed to someone who had a duty to know? The safeguard against unlimited liability to the RCO doctrine is the requirement of proximate causation. If the breach of the duty of care did not cause the violation by the corporation, then the responsible corporate officer should not be criminally liable. On the other hand, where the breach of the duty of care proximately causes the violation the corporation is charged with, the responsible corporate officer should share the criminal liability.

As for Ford and Firestone, only time will tell, but the recent fiasco has many people reminiscing about the Pinto disaster. In that case the federal government did not bring criminal charges against Ford executives and when a local prosecutor tried, the executives were acquitted.[178] The most promising route seems to be yet another civil suit if it can be shown that Ford knew it had a defective product and failed to notify NHTSA under

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171 *See RSJ, Inc.*, 552 N.W.2d at 698.

172 *Id.*

173 *See* MINN. STAT. § 363.01 (1991) (emphasis added).

174 *See supra* note 29 and accompanying text.

175 *See supra* note 33 and accompanying text.

176 *See supra* note 142 and accompanying text.

177 *See* Crock, *supra* note 13.

178 *See NPR: All Things Considered*, *supra* note 4.

federal regulations that require notification within five days of discovering a defective product in the United States.[179] A civil suit, like the Pinto case, may not be enough to prevent a reoccurrence in corporate crime, however, and more lives may be lost. Additionally, measures like those recently introduced by Senators Leahy and Specter are only band-aids applied to a particular problem. The courts need to take the lead and show the corporate world that corporate crime will not be tolerated. As Harvard Business School Professor, John B. Matthews noted "[t]he best way to get management's attention is to punish management directly."[180]

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[179] *See id.*

[180] Crock, *supra* note 13.