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Respondeat Superior in Criminal Cases

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CRIMINAL JUSTICE

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RESPONDEAT SUPERIOR IN CRIMINAL CASES

This Column of *Criminal Justice* will turn attention to one aspect of the increasing exposure of corporations to criminal prosecution. We have all seen in the last twenty or thirty years a different attitude toward the criminal liability of corporations resulting in an increase in the criminal cases brought against corporations, particularly for regulatory offenses. Criminal investigative agencies have proliferated in the federal government and the number of departments with Special Agents carrying badges and guns has multiplied. In turn, corporations have had to develop

criminal defense strategies to avoid prosecution and to immediatley respond if there is a criminal investigation or, ultimately, an indictment.

In this column we will explore the lack of a clear legal standard for criminal liability under *respondeat superior* and the issue as to whether or not such liability is applied too liberally. Are there legal and policy reasons to limit criminal liability to, at least, the standards required for punitive damages in civil cases?

CORPORATE LIABILITY UNDER RESPONDEAT SUPERIOR

While there is statutory liability which specifically applies to corporations, a basic premise of corporate liability is *respondeat superior*. Civil lawyers are certainly familiar with the concept as it applies in tort law. In essence, an employer (including a corporate employer)[1] may be responsible for damages for harm to a plaintiff caused by an employee acting within the scope of her or his employment.

In 1909, the United States Supreme Court held that a corporation could be held criminally liable for the acts of its employees under the traditional civil doctrine of *respondeat superior*. The case did not set forth any standards for this extension of criminal liability. Subsequently, the Supreme Court has not decided any cases which are of great assistance in further delineating these standards in criminal cases.

On the other hand, in civil cases, the Supreme Court and state courts have further refined the doctrine of *respondeat superior*. For instance, a plaintiff cannot recover against the corporation for an employee acting outside the scope of her or his employment. In addition, *respondeat superior* has been held not to extend to certain civil rights violations or sexual harassment claims, including punitive damages. Furthermore, there is some case law limiting corporate liability based on the position of the employee in the corporation for certain acts.

Yet, to the contrary, corporate liability for criminal conduct has been expanding. It has become more common for prosecutors to charge or threaten to charge corporations for serious crimes even though they arise out of regulatory matters and previously were handled administratively. For instance, the Environmental Protection Agency has been criticized for prosecuting cases which historically had been handled civilly. Yet, the EPA, itself in a news release states: "The proposed 2009 spending plan proposes the largest enforcement budget ever: an increase of $9 million for a total budget of $563 million. This includes the largest criminal enforcement budget ever: an increase of $2.4 million for a total of $52 million."[2]

This budget does not include the costs of the United States Attorney' Office, the federal courts or the services of other agencies associated with criminal prosecutions like U.S. Probation, Pre-Trial Services or U.S. Marshal. While criminal sanctions may be necessary for some kinds of environmental offenses, the question has been raised as to whether or not criminalization (or threatened criminalization) is appropriate for much of what is prosecuted.[3]

The effects of criminalizing corporations are even more far reaching and expensive. Corporations of any significance have established relationships with criminal defense counsel and the larger ones have criminal law firms on retainer. Corporate internal investigation have become *de rigueur* to avoid the harsh penalties of the United States Sentencing Guidelines. Of course, corporations which are convicted face fines, disgorgement of profits and terms of probation. They also may face collateral consequences such as being banned and barred from government contracts (state and federal) or consequences with the SEC or other regulatory agencies.

There has also been much to do about the process of deferred prosecutions of corporations. This process has allegedly been used to extort money and concessions from corporations which would not be enforceable in court. Although we will not go into detail here, deferred or non prosecution agreements have involved forcing attorney client privilege waivers, open-ended cooperation agreements and other abuses. For instance, in a recent matter a federal judge found that the prosecutor exceeded his constitutional authority by requiring KMPG to stop paying attorney's fees for their employees in order to obtain a deferred prosecution agreement.[4] It is also reported that a major corporation agree to endow a professorship at the AUSA's alma mater in exchange for a deferred prosecution.[5]

Given the seriousness of criminal prosecution or the threat of prosecution to corporations, the liability of corporations should be clearly circumscribed. Yet, as noted above, the courts have not clearly delimited one of the primary principles of liability, *respondeat superior*.[6]

THE DOCTRINE OF RESPONDEAT SUPERIOR

Generally, under the United States Code, a corporation is considered a person.[7] Under California criminal statutes, a corporation can be charged and summoned to court.[8] However, under neither the general principles of either federal or state statue is there an explanation of how criminal liability would be ascribed to the corporation under the *respondeat superior* doctrine. The United States Supreme Court addressed the availability of *respondeat superior* as a theory of corporate liability in the 1909 case of *New York Central & Hudson River Railroad v. United States*.[9] But that case, again, indicated that *respondeat superior* may be applied in criminal cases but it did not define under what circumstances.

The federal courts generally impose criminal liability on corporations whose employees commit a crime, within the scope of their employment for the benefit of the corporation. This broad instruction does not take into account the level or stature of the employee or any connection that employee has with management. Section 2.01 of The Model Penal Code suggests some limitation by providing that a corporation is criminally liable for conduct that was "authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation with in the scope of his office or employment." A high managerial agent is anyone "having duties of such responsibility that [their] conduct may fairly be assumed to represent the policy of the corporation or association."

One could argue that the requirement that the employee was acting within the scope of employment would limit liability if corporation’s management could show that the employee was violating company policy by engaging in such conduct. A rogue employee would not qualify under the Model Penal Code definition and, arguably, not

under the current federal standard because his illegal conduct was not within the scope of the corporate policy surrounding his employment. Nevertheless, the Ninth Circuit has held that *respondeat superior* may apply even in those circumstances where the relatively low level manager had the apparent authority to speak for the corporation and even where the corporation did not endorse the conduct and demonstrated it was not in its interest.[10] So, criminal corporate liability remains fairly wide open.

Yet, in the civil context, *respondeat superior* is limited in ways that it is not in criminal. For instance, in police misconduct cases under 42 U.S.C. Section 1983, ordinary *respondeat superior* liability is not available against the employer of the officer who violated the constitutional rights of the civil plaintiff.[11] Instead, the plaintiff may only recover damages against the employer (a *Monell* claim) if s/he can show that the action by the officer was following a formal policy or standard operating procedure or that someone with final policymaking authority had a policy of inaction that amounted to a knowing failure to protect constitutional rights and allow the conduct.

Also, in sexual harassment cases, under Title VII of the Civil Rights Act,[12] the United States Supreme Court limited vicarious corporate liability to acts of supervisors and then held that it would be an affirmative defense if the corporation had reasonable polices to deter offensive conduct and that the plaintiff did not pursue the employer's private remedies.[13] The Supreme Court has also held that an employer cannot be held liable for punitive damages even if the employee is a manager as long as the employer otherwise made good faith efforts to comply with Title VII.[14]

It is hard to understand why corporate criminal liability should be imposed under a broader definition of *respondeat superior* when the Court seems to recognize that it would be unfair to hold police agencies responsible for excessive force or other illegal acts of its agents absent a separate showing of wrongdoing on the part of the entity. *Monell* claims do not represent a modification of *respondeat superior* but are a separate cause of action. Similarly, there are corporate affirmative defenses and a prohibition of punitive damages against corporations in Title VII actions. Yet, in criminal cases, a corporation can be convicted if the employee was merely acting within the scope of his employment for the benefit of the corporation.

CONCLUSION

The issue of the extent of corporate liability for the criminal acts of its employees is probably going to make its way to the United States Supreme Court. The disparity of treatment between civil and criminal cases sets the stage. However, there is probably a need to rethink the issue on policy lines. We do not want corporations to run amok and violate the law and, yet, it does not seems right to criminally punish corporations for the criminal acts of rogue employees when the corporation itself is acting in good faith. As in any other area of criminal law, there must be a balance in which fairness is given an advantage over punitive enforcement. We have probably gone so far that even an adjustment of *respondeat superior* will not reduce the cost of compliance and prevention programs or the need for all corporations to be prepared to defend against potential criminal investigations, actual criminal investigations and even indictment. But such an adjustment may make the system more fair and avoid the abuses of prosecution or deferred prosecution in cases where criminal liability has no real place or purpose.

We will see if the Supreme Court takes this on.

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[1] We will discuss corporate liability but much of the discussion would apply to other forms of business ownership.

[2] *EPA Press Release* February 4, 2008, at http://yosemite.epa.gov/opa/admpress.nsf/9335cfcd942ef57f852573590040443...

[3] See, e.g., "EPA Enforcement Polices," Chapter 2 of *Federal Erosion of Business Civil Liberties*, Washington Legal Foundation (2008). On the other hand, officials within the Department of Justice, have complained that the Bush Administration has been retraining them from pursuing corporations, particularly big corporations, as aggressively as they would like. (Based on a personal interview by the author).

[4]*United States v. Stein*, 435 F.Supp.2d 330 (S.D.N.Y 2006).

[5]Amicus Brief in United States v. Ionia Management (United States Court of Appeal for the Second Circuit, case number 07-5801-CR) citing: Corp. Crime Rep. Dec. 12, 2005 at 14-15.

[6]Note that there are a number of other factors which have been alleged to contribute to increased criminal liability, such as the reduction or elimination of *mens rea* requirements for prosecution of corporations in certain circumstances. See, e.g., *Federal Erosion*, *supra*, Chapter 1. We will limit this discussion to the doctrine of *respondeat superior*.

[7]1 U.S.C. Section 1.

[8]California Penal Code Section 1390. The California Civil Code says that a corporation is included within "person" as used in that Code but it may not apply under a strict reading to the Penal Code.

[9]212 U.S. 481 (1909).

[10]*United States v. Hilton Hotels Corporation*, 467 F.2d 1000 (9th Cir. 1972),

[11]*Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658.

[12]42 U.S.C. Sections 2000(e) *et seq*.

[13]*Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlinton Industries, Inc. V. Ellerth*, 524 U.S. 742 (1998).

[14]*Kolstad v. Am. Dental Ass'n,* 527 U.S. 526 (1999)