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A crucial quest for new look at liability

Corporate criminal standards at stake.

Marcia Coyle / Staff reporter
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WASHINGTON — A group of business, legal and defense organizations, assisted by the former Enron federal prosecutor, has launched an amicus effort aimed at persuading federal courts to re-examine the standard for holding corporations criminally liable for the acts of their agents.

The immediate target is a case pending on appeal in the 2d U.S. Circuit Court of Appeals: *U.S. v. Ionia Management*, No. 07-5801, in which a Greek company that manages a fleet of tanker vessels, was convicted and sentenced for its role in falsifying records to conceal the overboard dumping of waste oil from one of its vessels into international waters.

"We were looking for a case where this legal issue was relevant," said Andrew Weissmann, partner in the New York office of Chicago-based Jenner & Block, and author of the amicus brief supporting Ionia Management S.A.

"There aren't that many criminal prosecutions of corporations which result in a conviction at trial as opposed to either a guilty plea or a deferred prosecution agreement," Weissmann said. "It's tricky to find a case. This is just the 2d Circuit and there are many other circuits."

Weissmann, former director of the U.S. Department of Justice's specially-formed Enron Task Force, filed the amicus brief on behalf of six organizations: the Association of Corporate Counsel, the U.S. Chamber of Commerce, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, the New York State Association of Criminal Defense Lawyers and the **Washington Legal Foundation.**

The *Ionia* appeal may be "the case" in which a court begins to examine the development of vicarious corporate criminal liability, said white-collar crime scholar Ellen Podgor of Stetson University College of Law.

"Most courts just say it exists and apply it broadly" based on a 1909 U.S. Supreme Court decision, she said. But corporate criminal liability is not what it was nearly a century ago, she added.

"I think it's really important that courts start reading a good-faith affirmative defense into these corporate criminal cases," she said. "The time is right now for this to be adopted in large part because of the way in which the law has developed."

Advocating good faith

In their amicus brief, the groups argue that the trial court, like many federal courts, gave a common instruction to the jury on vicarious liability based on a mistaken application of the Supreme Court's ruling in *New York Central & Hudson River Railroad v. U.S.*, 212 U.S. 481 (1909).

That high court case, said Weissmann, determined only that Congress has the constitutional power to include respondeat superior principles in a criminal statute.

"The decision said nothing whatsoever about the criteria that govern the imputation of corporate criminal liability for those federal criminal statutes where Congress has made no such choice," Weissmann said.

Under most courts' instructions, a corporation is criminally responsible for the actions of any of its employees taken within the scope of their employment and for the benefit of the corporation.

But Weissmann and others contend the Supreme Court has never addressed how vicarious corporate criminal liability should be determined when a statute is silent on imputing liability of an employee to the corporation.

Recent high court rulings in the job bias context, as well as actions by the states, limit the application of respondeat superior in determining vicarious corporate liability, said Weissmann.

The high court's sexual harassment decisions created an affirmative defense for employers facing liability for the acts of supervisors: if the employer had reasonable and effective policies in place to deter the conduct and the employee did not avail him- or herself of those policies.

Virtually the same approach is embraced by the Model Penal Code, he also argues, which provides an affirmative defense for corporations whose officers "exercised due diligence to prevent [the crime's] commission."

States have already changed

A majority of states has adopted similar provisions in their criminal codes, according to a number of studies.

"One of the main rationales for criminal law is the heavy deterrent factors that supposedly attaches to criminal penalties," said Stephanie Martz, director of the white-collar crime project of the National Association of Criminal Defense Lawyers. "But holding a company automatically liable for the criminal acts of employees that it could not have controlled — let's say it really was a rogue employee and the company had a compliance program — what message are we sending to business by making them strictly liable for that conduct?"

Weissmann said allowing corporations to present evidence of effective compliance programs as a defense is more consistent with the recent Supreme Court rulings and the purpose of corporate criminal liability.

Such a defense, he noted, would not have exonerated Enron, WorldCom or other recent troubled companies because those companies' compliance programs were "more façade than real."

Today, he added, "It is quite ironic you now have a situation where it's easier to impute liability in the criminal case than in some civil cases."

Is it the right case?

Besides the issue of vicarious criminal liability, Ionia Management raises other issues on appeal, said its counsel, noted white-collar criminal defense attorney Irwin Schwartz of Seattle. But, he added, his case is a strong one for a re-examination of vicarious corporate criminal liability.

"This is a company that had an explicit policy, trained its people rigorously on that policy and put superintendents aboard vessels periodically to see what was going on," he said. "The crewmen all testified they knew the policy and their duty, and yet they just went their merry way. Short of putting a policeman in every part of every ship in which this activity can occur, there's not much more a company can do."

Schwartz insisted that no one is arguing that a company is not responsible in appropriate circumstances.

"But more than 40 years ago, the Model Penal Code was drawn up in a way that really focused on this issue and created several different tiers of liability with increasingly different burdens of proof for the kind of crime involved," he noted. "That was the rational approach adopted in one form or another by probably two-thirds of the states. But in federal law, we're still dealing with a 100-year-old common law."

And companies might have greater incentive to create good compliance programs if they knew they would get a legal benefit, added Stetson's Podgor.

That argument might carry some weight if the facts in *Ionia* were different, countered Charles Cray, director of the Center for Corporate Policy, a nonprofit public interest organization working to curb corporate abuses.

The Department of Justice, he noted, has called *Ionia* a repeat offender, with a history of ignoring environmental laws and obstructing U.S. Coast Guard investigations.

"There's no evidence of a robust compliance program here," he said, adding, "Too often companies use claims of a good compliance program as a fig leaf. This is an argument in search of a client, which is typical of groups like the Chamber and the [Washington Legal Foundation.](#)"

The Justice Department said it will file its brief in the *Ionia* case next month.

Time for re-examination

But the department cannot make a legitimate argument in favor of the general rule today, insisted John Hasnas, a professor of business and law and a white-collar crime scholar at Georgetown University. Vicarious criminal liability adopted in 1909 was done simply as an analogy to tort liability, he said. "At the time, there was no experience with it, no reason for a court to think through all of its implications."

Now is the right time for a re-examination and for a good-faith affirmative defense, he said, because the department uses the standard for vicarious corporate criminal liability today not to get corporate convictions but as a threat so corporations will enter deferred-prosecution agreements or agree to work with the department to make cases against employees.

But Hasnas said he was "very skeptical" that courts would take the lead.

"The argument will not carry the day for courts that feel bound to follow precedent," he said. "But there's always a chance and an increasing chance as time goes forward and courts see how this standard is misused by the department."

Congress is the more appropriate place for change, he added.

"But politically speaking, the chances of Congress doing something that would be depicted as going easy on corporations is even more remote than the courts," Hasnas said. "Courts will be amenable to the strength of the argument. Congress will be subject to political considerations."

But Weissmann and his clients are undeterred.

"It is certainly appropriate for courts to revise the standards they have created," said Weissmann. "We're trying to make sure people are aware of this issue and raising it in appropriate situations. Even if the 2d Circuit ultimately disagrees, we're trying to make sure the issue is at least addressed."