



BY RANDOLPH C. VISSER, JOHN J. McALEESE III, and ALISON CHASE MANN

VOLATILE COMBINATIONS

THE EVENTS OF SEPTEMBER 11 MAY HAVE INCREASED THE EXPOSURE OF CHEMICAL COMPANIES TO LAWSUITS BASED ON THE USE OF THEIR PRODUCTS IN TERRORIST ACTS

If it were not clear before, the events of September 11, 2001, removed any doubt among the residents of the United States that terrorism inside the nation's borders is no longer a remote possibility. The United States now accepts the fact that terrorist attacks are a constant threat. However, as illustrated by the 1993 World Trade Center and 1995 Oklahoma City bombings, terrorism is neither new to the nation nor limited to the use of hijacked airplanes. In both earlier attacks, terrorists employed seemingly innocuous chemicals, used primarily in agriculture, to produce highly explosive and dangerous weapons. In the wake of those attacks, victims sued chemical manufacturers and distributors.

On the basis of these incidents, attorneys representing entities in the chemical industry face critical questions: Given the consistent threat of terrorist attacks and the previous use of chemicals in prior attacks, what are the

legal responsibilities of chemical companies to aid in the prevention of future attacks and how can these companies avoid potential liability? The answer to these questions lies in an examination of several factors:

- 1) A chemical company's legal right to inquire of its customers.
- 2) A chemical company's duty to inquire of its customers.
- 3) A chemical company's duty to protect its site.
- 4) A chemical company's duty to comply with potentially applicable federal and state statutes.
- 5) Legislative reaction that may impose new responsibilities and liabilities upon chemical companies.

Although a chemical company may, given the current political climate, want to inquire of its customers more thoroughly, its legal right to do so may be limited by civil rights laws. For example, Sections 1981 and 1982 of

the Civil Rights Act¹ present questions regarding the right of a vendor to inquire of its customers. Section 1981, which addresses the making and enforcement of contracts, states, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts..."² Section 1982 states, "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."³

When making a claim under these provisions, a plaintiff must plead three elements:

Randolph C. Visser is a partner in the Los Angeles office of Morgan, Lewis & Bockius LLP. John J. McAleese III is a partner in Morgan Lewis's Philadelphia office, and Alison Chase Mann is an associate in the firm's Philadelphia office.

1) the plaintiff is a member of a racial minority, 2) the defendant had an intent to discriminate on the basis of race, and 3) the discrimination concerned one or more of the activities enumerated in the statute (i.e., the making and enforcing of a contract or refusal to sell property). Furthermore, case law interpreting these two statutes has created several controlling principles:

- Both statutes extend to purely private conduct.⁴
- The statutes apply to national origin as well as race.⁵
- The statutes apply to a denial of admittance to a place of business, requesting a patron to leave a place of business, or a denial of service.⁶
- The failure to contract or sell must pertain to a present desire or attempt to contract or sell; the statutes do not cover prospective contracting or selling.⁷

Because the Civil Rights laws prohibit discrimination on the basis of race or national origin, Sections 1981 and 1982 can affect how a chemical company inquires about the intent and background of potential customers. Thus, liability might arise under these statutes if a chemical company were only to inquire of customers who appear to be of Middle Eastern origin. However, the laws do not preclude a denial of service for specific, enu-

merated, nonracially motivated reasons. A chemical manufacturer may therefore be able to limit its liability for a civil rights claim by asking objective questions to every customer. This policy should protect the interests of the chemical company while providing a defense against a claim that its inquiries were based upon race or national origin.

RIGHTS AND DUTIES OF CHEMICAL COMPANIES

While a chemical company needs to be concerned about whether it *may* inquire of its customers, at the same time it needs to consider whether it *must* inquire of its customers. The answer to this question lies in the special relationship that sellers of dangerous products have with their buyers and their communities. They owe a duty to not sell their product to individuals they know or should know will use the products dangerously.⁸ While generally “a defendant has no duty to control the conduct of another or to warn others endangered by another’s conduct,” exceptions arise when a special relationship exists between the defendant and the person whose conduct needs to be controlled or between the defendant and the person injured by the third party’s conduct.⁹ One type of “special relationship” occurs when the supplier knows or has reason to know that the user is likely to use the product “in a manner involving unreasonable

risk of physical harm to himself and others.”¹⁰ In these cases, the supplier is subject to liability for physical harm caused by the injurious use.¹¹ Thus, a person owes a duty of care “not to provide a dangerous instrumentality to an individual whose use of the instrumentality the supplier knows or has reason to know will result in injury.”¹²

The *Restatement (Second) of Torts* provides further guidance about the liability of sellers of dangerous products when the products are used in a criminal act by third parties to injure others. Section 448 of the restatement sets forth:

The act of a third person in committing an intentional tort or crime is a superceding cause of harm to another resulting therefrom, although the actor’s negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created and that a third person might avail himself of the opportunity to commit such a tort or crime.

In the Oklahoma City bombing case, the court used precisely this section to analyze the conduct of Terry Nichols. The explosive



RON OVERMYER

used in the 1995 bombing was created in part from two tons of ammonium nitrate fertilizer purchased by Nichols for \$457.58 from a farm supply company in central Kansas.¹³

The victims of the bombing brought a class action against ICI, the manufacturer of the ammonium nitrate that was allegedly used to construct the bomb.¹⁴ The plaintiffs claimed that ICI was negligent in making explosive-grade ammonium nitrate available to the perpetrators of the bombing. In analyzing causation, the court stated that causation is generally a question of fact, but that it becomes a question of law when a jury cannot reasonably find the required proximate causal nexus between defendant's act and the plaintiff's injuries. Under Oklahoma law, the causal nexus is broken when there is a supervening cause.¹⁵ "To be considered a supervening cause, an intervening cause must be: 1) independent of the original act; 2) adequate by itself to bring about the injury; and 3) not reasonably foreseeable."¹⁶ As the court noted, a tortious or criminal act is more likely to be seen as a supervening cause.¹⁷

Relying upon Section 448 of the *Restatement (Second) of Torts*, the court determined that a third party's criminal actions are not foreseeable simply because of the existence of a "small fringe group or the occasional irrational individual, even though it is fore-

seeable generally that such groups and individuals will exist." The court also noted that the plaintiffs could point to very few occasions in which ammonium nitrate was used by terrorists due, in part, to the complexity of making the bomb and the general unavailability of many of the necessary components. The court further noted, "We simply do not believe that this is a group which rises to the level of a 'recognizable percentage' of the population."¹⁸ The court therefore found that 1) it was unforeseeable that the ammonium nitrate would be used in the attack, 2) the terrorists' actions was a superceding cause, and 3) the manufacturer was not liable for the terrorist act.

In a similar action, individuals injured in the 1993 World Trade Center bombings filed a claim against the manufacturers, distributors, and sellers of the fertilizer used in the bombing for negligently selling their products to terrorists.¹⁹ Count III of the plaintiffs' complaint stated that the "defendants are liable because they 'failed to provide guidelines, instructions, and/or warnings to their distributors, retailers, dealers or other suppliers to confirm that buyers in the general and unrestricted public market have legitimate and lawful purposes for use of Defendants' products.'"²⁰

In ruling for the defendants, the court

found that "first, the defendants owed no duty to warn the middlemen; [and] second, that plaintiff is unable to allege facts showing that such a warning would have prevented the harm."²¹ The court noted that the plaintiffs could not provide a single case to support its theory that defendants had a duty to warn.²² Rather, the court noted that "no cases, even under the common law, support the existence of such a duty."²³ The court also found that the plaintiffs' "failure to warn" argument failed because the plaintiffs were unable to allege facts showing that an adequate warning would have prevented the harm.²⁴

In addition to inquiring of their customers, chemical companies may also have a duty to protect their sites.²⁵ When the Federal Court of Claims addressed this issue in applying the Federal Water Pollution Control Act, it failed to impose such a liability on the companies.²⁶ However, at least one state's supreme court, the Supreme Court of Alaska, did impose liability on the operators of an explosives storage site for failure to protect that site when thieves broke into it and caused an explosion.²⁷

Important guidance for chemical companies came on October 22, 2001, when, in the aftermath of the events of September 11, the American Chemistry Council, the Chlorine Institute, Inc., and the Synthetic Organic



Chemical Manufacturers Association released newly formulated Site Security Guidelines for the U.S. Chemical Industry.²⁸ The Executive Summary to the guidelines recognizes the historical importance of security but also noted, "During this time of crisis, every effort is being made to secure chemical manufacturing facilities and safeguard employees and communities. This attention to safety contributes to national security as many specific measures adapted to improve safety have the added benefit of enhancing plant and community security."²⁹ Similarly, the introduction to the guidelines states, "In this era of heightened concern about terrorism, sabotage, and industrial espionage, managers at chemical facilities may have even more reason to attend to the security of their companies' people, property and information."³⁰ Counsel to chem-

ical companies or any other site storing hazardous substances or substances that may be used as implements of terror should be acutely aware of these guidelines. (See "The Site Security Guidelines," this page.)

In addition to general site security issues, the guidelines also address employee policies and suggest that a company establish specific hiring protocols in order to avoid hiring someone who may pose a threat. Another suggestion is to establish protocols for the firing of employees in order to avoid the risk of disgruntled employees seeking retaliation. Finally, the guidelines recognize "other areas" in need of security such as operations (processing information, design diagrams, formulations, recipes, client lists, etc.), spoken information, documents, and computer networks. Finally, the guidelines also include

helpful samples of site security analysis sheets, security models, a list of other helpful resources, and a federal agencies contact list.

CIVIL AND CRIMINAL LIABILITY

A chemical company could be held both civilly and criminally liable if a chemical release occurred as a result of a terrorist act on the site or was perpetrated by an individual who obtained inherently dangerous chemicals from a site in the United States. First, a company could be held liable under numerous environmental statutes that impose both civil and criminal penalties.³¹ Second, in some cases more general criminal charges have been brought against corporations and corporate officers as a result of industrial disasters.³² For example, if a chemical facility were the subject of an attack, prosecutors could bring

THE SITE SECURITY GUIDELINES

ON OCTOBER 22, 2001, three chemical industry groups—the American Chemistry Council, the Chlorine Institute, Inc., and the Synthetic Organic Chemical Manufacturers Associations—introduced a new set of guidelines for the chemical industry to follow to enhance site security. In addition to listing the benefits of implementing a site security program, the Site Security Guidelines for the U.S. Chemical Industry suggest concrete steps for achieving site security:

- 1) Conduct a risk assessment of assets (people, information, and property).
- 2) Conduct a risk assessment of threats, vulnerabilities, and consequences, including the following:
 - Chemical hazards evaluation.
 - Process hazard analysis.
 - Consequence assessment.
 - Physical factors assessment.
 - Mitigation assessment.
 - Security assessment/gap analysis.
- 3) Create prevention strategies, including "rings of protection."
- 4) Create security management responsibility.
- 5) Include security as a core value of the company.
- 6) Create relationships with local, state, and federal law enforcement and other public safety agencies.
- 7) Maintain detailed records of security incidents.
- 8) Create an employee hotline for reporting company problems.
- 9) Train employees and contractors in the company's security program and methods.
- 10) Investigate suspicious incidents and security breaches.
- 11) Establish an emergency response and crisis management plan.
- 12) Perform periodic reassessments.

After outlining the basic steps to take to ensure general site security, the guidelines address the methods of securing the physical plant and suggest that companies:

- 1) Establish access control (pass cards, I.D. tags, etc.).
- 2) Create perimeter control (fences, exterior walls, gates, lighting, etc.).
- 3) Consider hiring security officers.
- 4) Consider installing a backup power source.—R.C.V., J.J.M., and A.C.M.

criminal charges against the corporation and its officers for failing to have in place adequate security and safety measures.³³

In addition, various civil claims have been asserted against companies whose products were involved in terrorists attacks, including negligence, negligence per se, negligent entrustment, negligent infliction of emotional distress, intentional infliction of emotional distress, products liability, and strict liability based on an abnormally dangerous activity.³⁴ These cases involving civil claims against manufacturers touch upon the duty and liability of manufacturers.

For example, in the Oklahoma City bombing case, *Gaines-Tabb v. ICI Explosives USA, Inc.*, the court dismissed the plaintiffs' negligence claim, finding that Oklahoma law requires a showing that "[a]n event or injury must be that which in a natural and continuous sequence, unbroken by an independent or supervening cause, produces the event or injury and without which the event or injury would not have occurred."³⁵ Further, the court agreed with the defendants and found that "[t]he bombing did not occur because Nichols and McVeigh acquired AN [ammonium nitrate] fertilizer. The bombing occurred only because of the terrorists' intent to cause harm."³⁶ The court found that the bombing was not a foreseeable act and was, therefore, a supervening cause.

Moreover, the court found that the defendant owed no duty to the plaintiffs "to anticipate and prevent the intentional or criminal acts of a third party."³⁷ Although the court accepted, for purposes of appellate review, the allegation that ICI knew that ammonium nitrate was previously used by terrorists,³⁸ the court concluded that foreseeing "the intentional or criminal acts of third parties was so slight that reasonable persons in defendant ICI's position would disregard it."³⁹ The court also rejected negligence per se liability, ruling that alleged regulatory violations relating to the sale of explosive material were not the proximate cause of the plaintiffs' injuries.⁴⁰

Using similar reasoning, the Third Circuit, in *Port Authority of New York and New Jersey v. Arcadia Corporation*, dismissed the claims of the victims of the 1993 World Trade Center bombing against the companies that manufactured the fertilizer used in the bombing.⁴¹ The plaintiffs brought claims for negligence, products liability, and failure to warn. In affirming the district court's dismissal of all the plaintiff's claims, the Third Circuit held that "the manufacturer of a raw material or component part that is not itself dangerous has no legal duty to prevent a buyer from incorporating the material or the part into another device that is or may be dangerous.... [M]anufacturers have no duty to pre-

vent a criminal misuse of their products which is entirely foreign to the purpose for which the product was intended."⁴² The court noted that reasonable foreseeability "applies to those future occurrences that, in light of the general experience within the industry when the product was manufactured, objectively and reasonably could have been anticipated."⁴³ The court agreed with the district court's conclusion that instances over the previous 50 years in which ammonium nitrate was used to create an explosive would not have indicated that the World Trade Center bombing was more than "a remote or theoretical possibility."⁴⁴

While ammonium nitrate is not in and of itself dangerous without additional manipulation, the Fifth Circuit, nevertheless, followed virtually the same analysis as the *Gaines-Tabb* and *Port Authority* courts when it determined that the federal government was not liable for injuries caused by an inherently dangerous explosive that was unlawfully taken by a serviceman from an Air Force base. In that case, *Garza v. United States*,⁴⁵ the plaintiffs sued the U.S. government under the Federal Tort Claims Act for injuries sustained by their minor son that were caused by the explosive. A serviceman found an unused explosive, stole it from the base (which had no distribution, use, or return procedures for the explosives), and gave it to his civilian roommate. The Fifth Circuit agreed with the trial court that, given the high degree of care imposed by the law to those who handle explosives, the government was negligent in its care.⁴⁶ The court found, however, that the plaintiffs could not show that the government was the proximate cause of their son's injuries because the serviceman's theft was an intervening cause, thus making the injuries unforeseeable to the defendant.⁴⁷ According to the court, "Evidence of past thefts in that area, or in that type of military operation, or some meaningful indication of the likelihood of thefts was required before such a foreseeability finding could be made."⁴⁸

A court could still find the manufacture, storage, or sale of a hazardous substance to be an ultrahazardous or abnormally dangerous activity and, therefore, subject to a strict liability analysis, which does not require a finding of foreseeability.⁴⁹ However, most courts, in assessing civil liability when a product is used by a third party in a criminal or tortious manner, undertake a foreseeability analysis to determine liability.⁵⁰ Courts seem to absolve manufacturers and distributors in the absence of evidence that the supplier knew or should have known that the third party would put others at risk.

These cases involve the conduct of a corporate defendant. However, a corporate offi-

cer could also be held individually liable under the responsible corporate officer doctrine.⁵¹ In practice, the government has tried to link the corporate officer's responsibilities to criminal conduct in such a way as to permit a jury to infer that the corporate officer knew of the violation. Indeed, in every case in which a conviction has been upheld under the responsible corporate officer doctrine, the government established that the corporate officer either had actual knowledge, or deliberately shielded himself from knowledge, of the unlawful activity of his subordinates.⁵²

At least one court, however, has recognized the accused executive's right to raise as an affirmative defense his or her own inability to prevent the offense: "The theory upon which responsible corporate agents are held criminally accountable for 'causing' violations of the Act permits a claim that a defendant was 'powerless' to prevent or correct the violation to 'be raised defensively at a trial on the merits.'"⁵³ Thus, a corporate officer could arguably rebut the claim that he or she is responsible for a terrorist act by arguing that he or she was powerless to prevent the act.⁵⁴

Both the Oklahoma City bombing and the World Trade Center bombing took place in the recent past. Similar conduct by terrorists (whether native or foreign) is becoming more common and arguably more expected. Given the terrorist attacks on September 11, the standard for determining what actions an individual or entity should reasonably recognize as foreseeable will likely change substantially. While the conduct of sellers, manufacturers, and middlemen has been excused as unforeseeable in the past, the same conduct may well be considered foreseeable (or conduct that an individual or entity "should have realized" would result in injury) after the events of September 11.

LEGISLATIVE REACTION

The recognition that these acts are becoming frighteningly more common is evidenced by two initiatives, one on the federal level and the other on the state, to further protect the public from potential chemical attacks. In Washington, Senator Corzine introduced a bill into the Senate on October 31, 2001, titled the Chemical Security Act of 2001.⁵⁵ And on February 21, 2002, Assembly member Jackson introduced into the California Assembly the California Chemical Security and Community Protection Act,⁵⁶ a bill similar to the Corzine legislation. Both bills recognize the public health and safety threats associated with accidents at, terrorist and chemical attacks on, and theft of dangerous chemicals from chemical sources. Although the California legislation did not pass in this year's session and it appears unlikely that the federal bill will be

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Law Office of Donald P. Brigham

23232 Peralta Dr., Suite 204, Laguna Hills, CA 92653

P: 949.206.1661

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enacted this year, counsel representing chemical companies should become familiar with the proposed legislation.

Although a chemical company's right to inquire of a customer to determine if the customer has a legitimate use for its product is limited by federal civil rights laws, companies may, in fact, have a duty to make such inquiry. Likewise, companies may have a duty to take steps to protect their site from theft or attack, as indicated by the promulgation of numerous industry guidelines and pending federal and state legislation. In the past, the majority of courts have failed to impose criminal or civil liability for harm caused by the criminal acts of third parties unless that third-party act was foreseeable. However, courts must now determine whether the events of September 11, 2001, when combined with the 1995 Oklahoma City and 1993 World Trade Center bombings and the political trend to protect the public from potential chemical terrorism, have served to put all industries that deal in hazardous substances on notice to consider the foreseeability of their products being used in a terrorist attack.

If courts determine that terrorist acts involving the use of once seemingly innocuous chemicals are now foreseeable, and that all industries that deal in hazardous substances are now on notice of that foreseeability, counsel representing these companies must be aware that action that once broke the causal chain and thus severed liability may now fail to exonerate chemical manufacturers. Chemical manufacturers, however, may be able to limit their liability by objectively inquiring of all customers to prevent misuse of the product, complying with the suggestions and guidelines set forth by organized bodies representing the chemical and similar industries, and by complying with state and federal statutes and regulations. ■

¹ Civil Rights Act of 1964, amended by the Civil Rights Act of 1991, 42 U.S.C.S. §§1981 *et seq.*

² *Id.*, 42 U.S.C.S. §1982.

³ *Id.*

⁴ See Runyon v. McCrary, et al., 427 U.S. 160 (1976).

⁵ See Shen v. A&P Food Stores, 1995 WL 728416 (E.D. N.Y. 1995).

⁶ See Watson v. Fraternal Order of Eagles, 915 F. 2d 235 (6th Cir. 1990).

⁷ See Morris v. Office Max, Inc., 89 F. 3d 411 (7th Cir. 1996).

⁸ See *Jacoves v. United Merch. Corp.*, 11 Cal. Rptr. 2d 468 (Ct. App. 1992).

⁹ See *id.* at 484.

¹⁰ *Id.* at 485.

¹¹ See *id.*

¹² *Id.*

¹³ See Charles. C. Sinnard, Note, *Growing Crime: The Rising Use of Fertilizer for Illegal Purposes and the Need for Stricter Regulations Concerning Its Sale and Storage*, 4 DRAKE J. AGRIC. L. 505, 510 (Winter 1999).

¹⁴ See *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F. 3d 613 (10th Cir. 1998), *aff'g* 995 F. Supp 1304 (W.D.

Okla. 1996).

¹⁵ See *Gaines-Tabb*, 160 F. 3d 613, 620.

¹⁶ *Id.*

¹⁷ See *id.* at 621.

¹⁸ *Id.* (referencing RESTATEMENT (SECOND) OF TORTS §448 cmt. b).

¹⁹ See Port Authority of New York and New Jersey v. Arcadia Corp., 189 F. 3d 305 (3d Cir. 1999), *affirming* 991 F. Supp. 390 (D. N.J. 1997).

²⁰ Port Authority of New York and New Jersey, 189 F. 3d 305, 310 (quoting Plaintiff Complaint).

²¹ *Id.* at 319.

²² See *id.*

²³ *Id.*

²⁴ See *id.* at 320.

²⁵ See, e.g., *Shelton v. Board of Regents of Univ. of Nebraska*, 320 N.W. 2d 748 (Neb. 1982).

²⁶ See *Chicago, Milwaukee, St. Paul and Pac. R.R. Co. v. United States*, 575 F. 2d 839 (Ct. Cl. 1978).

²⁷ See *Yukon Equip., Inc. v. Fireman's Fund Ins. Co.*, 585 P. 2d 1206 (Sup. Ct. Alaska 1978).

²⁸ Site Security Guidelines, available at <http://www.americanchemistry.com>.

²⁹ See *id.* (Executive Summary).

³⁰ See *id.* (Introduction).

³¹ See, e.g., Emergency Planning and Community Right to Know Act (SARA Title III), 42 U.S.C. §§11001-50, 11045(b); Clean Air Act, 42 U.S.C. §§7412(r), 7413(b)-(c); Occupational Safety and Health Act (OSHA), 29 U.S.C. §§654(a)(1)-(2), 666; Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6922, 6923, 6924, 6928(d), & 6972; Toxic Substances Control Act (TSCA), 5 U.S.C. §§2604, 2605, 2606, 2615, & 2619.

³² See *Bano v. Union Carbide Corp.*, No. 99 Civ. 11329(JFK), 2000 WL 1225789, at *1 (S.D. N.Y. Aug. 28, 2000). The Indian Government also attempted to indict

Warren Anderson, Union Carbide's CEO. United States extradition law prevented Anderson from being formally prosecuted; see also, *Commonwealth v. Godin*, 371 N.E. 2d 438 (Mass. 1977) and *Commonwealth v. Welansky*, 55 N.E. 2d 902, 907 (Mass. 1944).

³³ See, e.g., *People v. Deitsch Textile Corp.*, 470 N.Y.S. 2d 158 (N.Y. App. Div. 1983). Courts have not, however, imposed liability when the cause of the industrial disaster is unforeseeable to the defendants. See, e.g., *People v. Warner-Lambert Co.*, 414 N.E. 2d 660 (N.Y. 1980).

³⁴ See, e.g., *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 995 F. Supp 1304 (W.D. Okla. 1996).

³⁵ *Id.* at 1312.

³⁶ *Id.* at 1315 (quoting Supplemental Memorandum in Support of Defendants' Motion at 8).

³⁷ *Id.* at 1316.

³⁸ See *id.* at 1318.

³⁹ *Id.*

⁴⁰ See *id.* at 1323.

⁴¹ See Port Authority of New York and New Jersey v. Arcadia Corp., 189 F. 3d 305, 313 (3d Cir. 1999).

⁴² *Id.* at 313.

⁴³ *Id.* at 315 (quoting *Oquendo v. Bettcher Indus. Inc.*, 939 F. Supp. 357, 361 (D. N.J. 1996)).

⁴⁴ *Id.*

⁴⁵ *Garza v. United States*, 809 F. 2d 1170 (5th Cir. 1987).

⁴⁶ See *id.* at 1172.

⁴⁷ See *id.* at 1174.

⁴⁸ *Id.* at 1175.

⁴⁹ See *Wendt v. Balletto*, 224 A. 2d 561 (Super. Ct. Conn. 1966); *Yukon Equip., Inc. v. Fireman's Fund Ins. Co.*, 585 P. 2d 1206 (Sup. Ct. Alaska 1978).

⁵⁰ See *Gaines-Tabb v. ICI Explosives USA, Inc.*, 995 F. Supp 1304 (W.D. Okla. 1996); *Port Authority of New York and New Jersey v. Arcadia Corp.*, 189 F. 3d 305

(3rd. Cir. 1999).

⁵¹ The responsible corporate officer doctrine had its genesis in two Supreme Court cases arising under the Food, Drug and Cosmetic Act (FDCA). See *United States v. Dotterweich*, 320 U.S. 277 (1943) and *United States v. Park*, 421 U.S. 658, 671-72 (1975). The responsible corporate officer doctrine also has a statutory basis in environmental criminal prosecutions. For example, the Clean Water Act specifically defines the term "person" to include a "responsible corporate officer." See 33 U.S.C.A. §1319 (c) (6) and *United States v. Iverson*, 162 F. 3d 1015 (9th Cir. 1998).

⁵² See Joshua Safran Reed, *Reconciling Environmental Liability Standards after Iverson and Bestfoods*, 27 ECOLOGY L.Q. 673, 697 (2000).

⁵³ *Id.* at 673.

⁵⁴ Unlike the statute at issue in *Dotterweich* and *Park*, the majority of environmental criminal statutes do not impose strict liability but rather set forth violations based on "knowing" conduct, a term which in an environmental criminal case simply means that an individual is conscious of his or her actions, not that he or she knows that the conduct is illegal. However, the *Iverson* court's aggressive application of the responsible corporate officer doctrine permits the government to impute the criminal knowledge of a subordinate to a corporate officer in authority and therefore allows a criminal prosecution of that officer without regard to actual knowledge or criminal culpability. See, Thomas A. Shook, *Ninth Circuit Rejects Narrow Interpretation of "Responsible Corporate Officer"*, 8 S.C. ENVTL. L.J. 111, 116 (Summer 1999).

⁵⁵ See Chemical Security Act of 2001, S. 1602, 107th Cong. §1 (2001).

⁵⁶ California Chemical Security and Community Protection Act, AB 2479, 2001-02 Reg. Sess. (Ca. 2002).



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