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A legal update from Dechert's White Collar and Securities Litigation Group

Second Circuit Rejects Opportunity to Limit Application of Vicarious Liability Doctrine to Corporate Criminal Defendants

Should a corporation be held criminally liable for illegal acts of its employees that are contrary to the corporation's express instructions and/or policies? Despite arguments that such liability is fundamentally unjust, the United States Court of Appeals for the Second Circuit recently rejected an invitation to limit application of the *respondeat superior* doctrine to corporate criminal defendants. That doctrine, which attributes to employers the illegal acts of employees acting "within the scope of their employment," has long been a fixture of tort law, but has been vigorously criticized by respected scholars and members of the bench and bar when applied in the criminal context.

In *United States v. Ionia Management S.A.*, No. 07-5801-cr, 08-1387-cr, 2009 WL 116966 (2d Cir. Jan. 20, 2009), the Second Circuit affirmed the conviction of Ionia Management, S.A. ("Ionia"), following a jury trial before Judge Janet Bond Arterton of the U.S. District Court for the District of Connecticut. *Ionia*, 2009 WL 116966, at *1. The jury found Ionia, a Liberian-incorporated company headquartered in Greece, guilty of violating, among other statutes, the Act to Prevent Pollution on Ships ("the Act"), 33 U.S.C. § 1901 *et seq*. *Id.* The conviction arose from the acts and omissions of crew members aboard the M/T *Kriton*, a Bahamian-flagged oil tanker that was managed by Ionia, although not owned by it. *Id.*

Regarding the alleged liability of Ionia for the acts and omissions of members of the *Kriton*'s crew, Judge Arterton instructed the jury that "a corporation can only act vicariously through its agents; that is, through its directors, officers, and employees or other persons authorized to act for it." Jury Instructions, 2007 WL 4998564. On the issue of agency, more specifically, Judge Arterton said that "[e]ven if the act or omission was not specifically authorized [by the employer], it may still be within the scope of an agent's employment if (1) the agent acted for the benefit of the corporation and (2) the agent was acting within his authority." *Id.* Indeed, Judge Arterton told the jury that as long as "the agent was acting within the scope of his employment, *the fact that the agent's act was illegal, contrary to his employer's instructions, or against the corporation's policies, will not necessarily relieve the corporation of responsibility for the agent's act*." *Id.* (emphasis added).

On appeal, Ionia did not itself challenge the district court's charge to the jury on *respondeat superior* liability, an effort that was left to various friends of the court, who filed a joint brief on behalf of the Chamber of Commerce of the United States, the Washington Legal

Foundation, the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, and the New York State Association of Criminal Defense Lawyers.

The *amici curiae* argued that: (1) Judge Arterton's vicarious liability jury instruction was not mandated by either the applicable criminal statutes or Supreme Court precedent; and (2) the Second Circuit should require the government to prove that the corporate defendant did not have "effective policies and procedures to deter and detect criminal actions by their employees" in order for vicarious liability to attach. Amicus Br. at 23 (citation and quotation marks omitted).

The *amici*'s first argument was well-founded and should have been persuasive. Their brief pointed out that, while the Supreme Court has not yet addressed the application of *respondeat superior* liability where such liability is not statutorily mandated, Supreme Court opinions in the civil context suggest that the Court would likely not have accepted such rigorous application of the doctrine here. *Id.* at 9. Because this case law establishes a stricter standard for holding corporate defendants vicariously liable than the one adopted by Judge Arterton's jury instructions, the *amici* argued that the district court's instruction "makes it easier to impute liability [to corporations] in *criminal* settings than in a variety of *civil* settings." *Id.* at 6.

In *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, the *amici* noted, the Supreme Court held that a corporation's adoption of policies to address sexual harassment by supervisory employees could, in certain circumstances, support an affirmative defense—i.e., a defense of "reasonable care"—to a Title VII claim premised upon a theory of vicarious liability. *Faragher*, 524 U.S. 775, 807-08 (1998); *Ellerth*, 524 U.S. 742, 765 (1998). Similarly, in *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999), the Court held that "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII." *Kolstad*, 527 U.S. at 545 (quotation marks omitted).

Relying upon the Court's reasoning in *Kolstad* that broad vicarious liability would create a "perverse incentive[]" for employers to decline to establish compliance programs and policies, *Kolstad*, 527 U.S. at 545, the *amici* argued that *respondeat superior* liability should be at least so limited in the criminal context in order to more effectively accomplish the deterrent function of the criminal law. Amicus Br. at 13. In other words, "where a company has undertaken all reasonable measures to deter and detect the employee's criminal actions, the company has done all that can be expected, i.e., there is nothing that the criminal law is serving to deter or punish since there is no action by the *corporation* that it should have otherwise taken." *Id.*

The *amici* made the further argument that the Second Circuit should effectively create an additional element to be proven by the government in criminal *respondeat superior* cases: i.e., "that a corporation *lacks*" relevant compliance programs. Amicus Br. at 23 (emphasis added). The civil cases relied upon by the *amici*, however, stood for the more modest principle that corporate compliance programs may sometimes provide *relevant evidence* of an employer's good faith in an affirmative defense. This falls short of the far more ambitious goal of creating an additional burden of proof for the prosecution in criminal cases.

In its *per curiam* opinion affirming the conviction below, the Second Circuit noted that the *amici*'s argument that the government should be required to prove the absence of corporate policies and procedures had been waived by Ionia. *Ionia*, 2009 WL 116966, at *5. The court nonetheless summarily dismissed the argument on its merits, stating that "the argument, whoever made it, is unavailing." *Id.* This was so, the court said, because "[a]dding such an element [to the government's burden of proof] is contrary to the precedent of our Circuit on this issue." *Id.* (citing *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989), stating that "compliance program, however extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law").

The Second Circuit's rejection of this limit on *respondeat superior* liability—although only in a *per curiam* opinion and arguably dictum—is sure to be cited by the government in future similar cases. This highlights the need for Supreme Court review of the application of *respondeat superior* liability to corporate criminal defendants where no statute imposes such liability. *Ionia* itself is unlikely to provide the vehicle for such analysis, given Ionia's failure to raise the arguments advanced by the *amici*.

Until the Supreme Court weighs in, corporate clients would be well advised to continue to maintain and monitor their compliance programs, notwithstanding the "perverse incentives" mentioned above. Even where such compliance programs are not mandated by law,

their existence reflects good corporate citizenship and can help educate employees to avoid wrongdoing in the first instance. Furthermore, these programs can be extremely important to corporate defendants under the so-called "Filip Memorandum,"[1] which makes the existence of compliance programs a factor in the government's decision whether to charge a corporation.

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This update was authored by Cheryl Krause (+1 215 994 2139; cheryl.krause@dechert.com) and Justin C. Danilewitz (+1 215 994 2629; justin.danilewitz@dechert.com).

[1] *See* U.S. Department of Justice revised "Principles of Federal Prosecution of Business Organizations" announced by Deputy Attorney General Mark R. Filip on August 28, 2008.

Practice group contacts

If you have questions regarding the information in this legal update, please contact the authors, one of the attorneys listed, or the Dechert attorney with whom you regularly work. Visit us at www.dechert.com/securities.

Catherine Botticelli
Washington
+1 202 261 3368
catherine.botticelli@dechert.com

Stephen D. Brown
Philadelphia
+1 215 994 2240
stephen.brown@dechert.com

Robert A. Cohen
New York
+1 212 698 3501
robert.cohen@dechert.com

William K. Dodds
New York
+1 212 698 3557
william.dodds@dechert.com

Michael S. Doluisio
Philadelphia
+1 215 994 2325
michael.doluisio@dechert.com

Joseph F. Donley
New York
+1 212 649 8724
joseph.donley@dechert.com

Steven B. Feirson
Philadelphia
+1 215 994 2489
steven.feirson@dechert.com

Michael J. Gilbert
New York
+1 212 698 3886
michael.gilbert@dechert.com

Frederick G. Herold
Silicon Valley
+1 650 813 4930
frederick.herold@dechert.com

David S. Hoffner
New York
+1 212 649 8781
david.hoffner@dechert.com

David M. Howard
Philadelphia
+1 215 994 2218
david.howard@dechert.com

Paul Huey-Burns
Washington
+1 202 261 3433
paul.huey-burns@dechert.com

Nicolle L. Jacoby
New York
+1 212 698 3820
nicolle.jacoby@dechert.com

Robert J. Jossen
New York
+1 212 698 3639
robert.jossen@dechert.com

Michael L. Kichline
Philadelphia
+1 215 994 2439
michael.kichline@dechert.com

David A. Kotler
Princeton
+1 609 955 3226
david.kotler@dechert.com

Cheryl A. Krause
Philadelphia
+1 215 994 2139
cheryl.krause@dechert.com

Matthew L. Larrabee
San Francisco
+1 415 262 4579
matthew.larrabee@dechert.com

Thomas H. Lee II
Philadelphia
+1 215 994 2994
thomas.lee@dechert.com

Andrew J. Levander
New York
+1 212 698 3683
andrew.levander@dechert.com

Kathleen Massey
New York
+1 212 698 3686
kathleen.massey@dechert.com

Edward A. McDonald
New York
+1 212 698 3672
edward.mcdonald@dechert.com

Charles I. Poret
New York
+1 212 698 3532
charles.poret@dechert.com

Adam J. Wasserman
New York
+1 212 698 3580
adam.wasserman@dechert.com

Gary J. Mennitt
New York
+1 212 698 3831
gary.mennitt@dechert.com

Louis M. Solomon
New York
+1 212 698 3690
louis.solomon@dechert.com

Kevin J. O'Brien
New York
+1 212 698 3697
kevin.obrien@dechert.com

Neil A. Steiner
New York
+1 212 698 3822
neil.steiner@dechert.com

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