



**Testimony of Lynn D. Helms
Director, North Dakota Industrial Commission Department of Mineral Resources
January 7, 2021
Senate Natural Resources Committee
SB 2064**

The North Dakota Industrial Commission (NDIC) prefiled SB 2064 and urges a do pass.

The responsible corporate officer doctrine was first articulated by the Supreme Court in *United States v. Dotterweich*, 320 U.S. 277, 284, 64 S.Ct. 134 (1943), which held that a corporate officer is criminally liable under a public welfare statute—in *Dotterweich*, the Federal Food, Drug, and Cosmetic Act—if he had “a responsible share in the furtherance of the transaction which the statute outlaws.”

The Park Doctrine, also called the “Responsible Corporate Officer” Doctrine, is a doctrine under which potentially unassuming corporate officers whose companies engage in unlawful activities may be held strictly liable for violations. The Park Doctrine draws its name from a 1975 Supreme Court decision: *United States v. Park*, 421 U.S. 658 (1975). John Park was the president of a large national food chain that operated several warehouses that the FDA determined to be infested with rodents.

***United States v. Hodges X-Ray, Inc.*, 759 F.2d 557, 561 (6th Cir.1985):**

Courts have generally rejected the notion that the responsible corporate officer doctrine should only apply with respect to statutes imposing criminal penalties, rather than civil penalties. As the Sixth Circuit noted in a case involving another public welfare statute, the Radiation Control for Health and Safety Act of 1968:

[T]he rationale for holding corporate officers criminally responsible for acts of the corporation, which could lead to incarceration, is even more persuasive where only civil liability is involved, which at most would result in a monetary penalty. The fact that a corporate officer could be subjected to criminal punishment upon a showing of a responsible relationship to the acts of a corporation that violate health and safety statutes renders civil liability appropriate as well.

Federal courts have applied a similar theory to impose personal liability on corporate officers for violations of the RCRA. *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 745 (8th Cir.1986) (Corporate officers can be held “individually liable if they were personally involved in or directly responsible for corporate acts in violation of [the] RCRA.”

Franklin v. Birmingham Hide & Tallow Co., No. CV 98-BU-0259-S, 1999 WL 35235824 (N.D. Ala. Apr. 22, 1999):

The corporate-officer defendant argued that he could not be held personally liable for his company's violations of its National Pollution Discharge Elimination System permit. He argued that because the “responsible corporate officer” language is included only in the criminal penalties provision of the Clean Water Act (CWA), a responsible corporate officer can only be held criminally—not civilly—liable. See id. at *14. The district court denied the defendant's motion to dismiss, stating that “a number of courts have found that corporate officers who are responsible for violations of public health statutes, including the CWA, may be both civilly and criminally liable in their individual capacity for such violations, notwithstanding that the wrongful actions were undertaken on behalf of a corporate entity.” Id. at *13 (citing *United States v. Gulf Park Water Co.*, 972 F.Supp. 1056 (S.D.Miss.1997); *United States v. Mac's Muffler Shop, Inc.*, No. CIV.A. C85-138R, 1986 WL 15443 (N.D. Ga. Nov. 4, 1986).

Several states have established common law Responsible Corporate Officer Doctrines:

California:

***People v. Roscoe*, No. 02AS01581, 2008 WL 5378254 (Cal. Ct. App.)**

Connecticut:

***Celentano v. Rocque*, 923 A.2d 709, 722 n.12 (Conn. 2007)**

Delaware:

***T.V. Spano Building Corp. v. Dep't of Natural Res.*, 628 A.2d 53, 61 (Del. 1993)**

Indiana:

***Indiana Dep't of Env'tl. Mgmt. v. RLG, Inc.*, 755 N.E.2d 556, 559 (Ind. 2001)**

***Comm'r, Indiana Dep't of Env'tl. Mgmt. v. RLG, Inc.*, 755 N.E.2d 556 (Ind. 2001)**

Minnesota:

***Matter of Dougherty*, 482 N.W.2d 485, 488 (Minn. App. 1992)**

Missouri:

***State ex rel. Webster v. Missouri Resource Recovery, Inc.*, 825 S.W.2d 916, 925-26 (Mo. Ct. App. 1992)**

Washington:

***Washington State Dep't of Ecology v. Lundgren*, 94 Wash. App. 236, 971 P.2d 948 (1999)**

***K.P. McNamara Nw., Inc. v. State*, Washington Dep't of Ecology, 292 P.3d 812, 830–31 (2013)**

***Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wash.2d 745, 753, 489 P.2d 923 (1971)**

***State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wash.2d 298, 322, 553 P.2d 423 (1976)**

***Grayson v. Nordic Constr. Co.*, 92 Wash.2d 548, 551, 554, 599 P.2d 1271 (1979)**

Two of the thirty-six complaints filed by the NDIC since 2015 are believed to involve responsible corporate officers. However, North Dakota has no common law or statutory definition:

An out of state corporation acquired several wells in North Dakota. The financing corporation assumed operation of the wells and a corporate officer negotiated new leases with mineral owners and filed a new Organization Report with the NDIC. When a serious spill occurred at one of the operated sites the response of the corporate officer was “we do not have a pumper for that location, we won’t have a pumper, and we do not plan to send anyone to address the issue”. The NDIC spent \$127,620.80 to respond to and remediate the spill. Then NDIC had to confiscate the orphaned well and site and pay for plugging the well and reclaiming the site. However, the corporation has refused to pay mineral owners, non-operated working interest owners, and vendors. All income has been transferred out of the corporation and it now has insufficient assets to reimburse the state for spill cleanup (\$127,621), plugging (\$62,947) and site remediation (\$65,680), or to pay the mineral owners, non-operated working interested owners, and vendors.

Another out of state corporation constructed and operated a facility in North Dakota where a willful spill incident occurred. A corporate officer dismissed the responsible employee then attempted to reduce remediation costs by violating additional regulations. Ultimately the facility was abandoned, and the NDIC has spent more than \$500,000 to remediate the spill and reclaim the abandoned site. All income has been transferred out of the corporation it now has insufficient assets to reimburse the state for spill and site remediation costs NDIC believes a statute change as significant as this one should originate in the legislature instead of through common law decisions.

In the common law cases provided, the courts imposed several factors that must be considered before holding a corporate officer personally responsible.

NDIC recommends that SB 2064 be amended to create a definition for Responsible Corporate Officer based upon those factors as follows:

SECTION 2. AMENDMENT. Subsection 18 of section 38-08-02 of the North Dakota Century Code is added as follows:

18. “Responsible Corporate Officer” means 1) a person in a position of responsibility which allows them to influence corporate policies or activities; 2) a person in a position with a nexus to the violation such that the person could have influenced the corporate actions or inactions which constituted the violation; and 3) a person who’s actions or inactions facilitated a violation involving serious actual or potential harm to the public.

Subsections 18-20 are renumber as subsections 19-21.

Addition of this definition should avoid excessive application of the Responsible Corporate Officer Doctrine.