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New Limits To The Corporate Veil?

'Responsible corporate officer' doctrine, 'direct participation' principle both expanded

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BUSINESS LAW

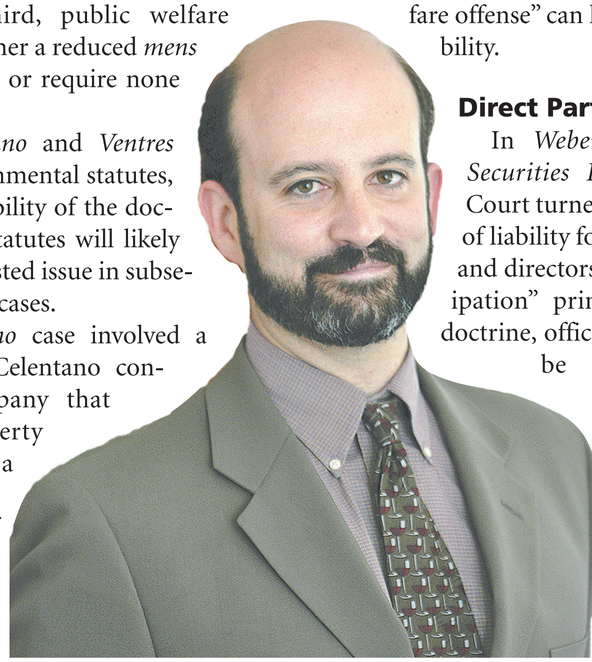
The corporate veil covers much, but it does not cover everything. That could have been the opening line of each of two important business law decisions handed down by the Connecticut Supreme Court a week apart this past summer: *Celentano v. Rocque*, 282 Conn. 645 (2007), and *Weber v. U.S. Sterling Securities Inc.*, 282 Conn. 722 (2007).

Ordinarily, the corporate or LLC form shields officers, directors and owners from liability for a company's debts or liabilities. Recently, though, the Supreme Court has articulated new exceptions to that rule for officers and directors, separate from the longstanding doctrine of piercing the corporate veil.

Protecting The Public

In *Celentano*, the court expanded the "responsible corporate officer" doctrine, first adopted in *BEC Corp. v. DEP*, 256 Conn. 602 (2001), from the Minnesota Court of Appeals. Under the usual rule, of course, officers are not held responsible for their company's misdeeds. The responsible corporate officer doctrine deviates from that rule, making an individual officer personally liable for the company's action whenever the officer is in "a position of responsibility and influence from which he could have prevented the corporation from engaging in the [prohibited] conduct." *Ventres v. Goodspeed*, 275 Conn. 105, 144 (2005).

In *Ventres*—discussed here last year—the court had noted *in dicta* that the responsible corporate officer doctrine applied to *all* "strict liability public welfare offenses committed by the corporation." *Celentano* transformed that *dicta* into the explicit law of the land. Because "public welfare offenses" is not a self-evident category, Justice David M. Borden, writing for the court, explained that such offenses share three things: "First, they protect the public health, safety or welfare. Second, they protect the public from harms from which the public cannot protect themselves. Third, public welfare statutes have either a reduced *mens rea* requirement or require none at all."



Both *Celentano* and *Ventres* involved environmental statutes, and the applicability of the doctrine to other statutes will likely be a hotly contested issue in subsequent appellate cases.

The *Celentano* case involved a dam. Vincent Celentano controlled a company that owned property containing a dam, and the Department of Environmental Protection, determining that the dam had become unsafe, held Celentano personally responsible for its repair. Because his own personal acts or omissions had not led to the dam's hazardous condition, Celentano argued that application of the responsible corporate officer doctrine to him would effectively raze the corporate veil, threatening businesses throughout the state.

The Supreme Court disagreed. Because Celentano "failed to influence" his company's corporate policy, and because the company's obligation to keep the dam in good repair was based on a strict liability statute, Celentano was liable. In the end, the court feared the real flood waters more than the metaphorical ones: any burden the responsible corporate officer doctrine imposed on businesses, it held, was outweighed by the good it did in ensuring the public welfare. Corporate officers beware: failure to use your influence to prevent your company from committing a "public welfare offense" can lead to personal liability.

Direct Participation

In *Weber v. U.S. Sterling Securities Inc.*, the Supreme Court turned to another source of liability for corporate officers and directors: the "direct participation" principle. Under that doctrine, officers or directors can be held individually liable for the tortious acts that they commit, ratify or approve—even if the tort is committed in their official, not individual, capacities. Unlike the responsible corporate officer doctrine, the direct participation principle seemingly applies to *all* torts, not just the narrower category of "public welfare offenses."

Weber involved a class action brought against a Delaware LLC for violation of the federal law prohibiting unsolicited fax advertisements—the ancestor of spam. The trial court granted summary judgment on

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the ground that the individual defendants' membership in an LLC precluded their personal liability, but the Supreme Court disagreed. It noted that, while the directors and officers of corporations are shielded from automatic responsibility for the entity's debts and liabilities, that protection does not extend to their own direct participation in wrongdoing.

While the Supreme Court had reiterated Connecticut's common law "direct participation" principle in *Ventres, Weber* goes a step further, holding that Delaware law, like Connecticut law, exposes officers and directors to personal liability for directly participating in—i.e., committing, ratifying or approving—a tortious act, even if the participation occurs solely in the officer or director's official capacity.

Because Delaware has remained a favorite site for the incorporation of businesses owned by Connecticut residents, the decision could have significant practical effects. The Delaware Supreme Court has never squarely addressed this issue, and until it does, *Weber* is the final authority on the liability of Delaware companies sued in Connecticut.

The two corporate doctrines reinforced by the Supreme Court this summer overlap to some degree, but they are distinct. The responsible corporate officer doctrine makes executives responsible even for their omissions, but applies only to public welfare offenses. The direct participation doctrine makes executives responsible for their individual actions, and applies to the full range of torts. Together, the decisions make clear that the corporate veil stretches only so far in Connecticut.

Boardrooms Take Note?

That's worth remembering. Though the Connecticut Supreme Court handed down decisions over the past year addressing an unusually large number of issues of interest to the business community—including decisions making it easier to sue retailers for negligence, finding liability releases invalid as against public policy, and holding that the state constitution, like the federal constitution, requires little scrutiny of economic regulation—the decisions on the limits of the corporate veil may attract the widest attention in the state's corporate suites and boardrooms. ■