
Interestingly, in a recent informal memorandum, the ICC staff acknowledged that "broader grants" of operating authority to be issued under the revised Motor Carrier Act "may require a redefinition of how we prescribe the common carrier obligation." To similar effect is the decision of the U.S. Court of Appeals (D.C. Circuit) in no. 78-2163, National Small Shipments Conference, et al. v. C.A.B. (1980), upholding the decision to exempt air carriers from the statutory duty to serve as consistent with the Airline Deregulation Act of 1978. See also, 45 P.R. 86800 (December 31, 1980), indicating that the ICC will initiate a separate proceeding to "more fully" set forth its views on this issue.

In my opinion, it is of little consequence whether or not the duty to serve has survived regulatory reform or, in fact, has ever existed in more than a theoretical sense. As a practical matter, such a duty is unenforceable except in unusual circumstances, and the incentive to enforce it is absent where reasonable alternative transportation is available. With the recent relaxation of entry and rate controls, it seems more likely than in the past that the operation of free market and competitive forces will produce a proper balance of service and cost, given sufficient time.

Accordingly, it would appear unnecessary to retain any statutory obligation to serve except, of course, in those cases where effective competition does not exist and cannot be made available. Conceivably, the imposition of excessive regulatory burdens, including unreasonable safety or insurance requirements, may tend to discourage competition to such an extent as to compel reexamination of common carrier obligations.

25. For a more thorough discussion of the subject, see Posser, op. cit., § 36, citing Osborne v. McMasters, 41 N.W. 543 (1889), and other cases. See also, Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317 (1914); and Morris, Criminal Statutes and Tort Liability, 46 Harv. L.R. 453 (1933). For a discussion of the subject in relation to product liability litigation, see § 108(B) of the Model Uniform Liability Act proposed by the U.S. Department of Commerce, 44 F.R. 62731 (1979).
26. For a case holding compliance to be a defense, see Bruce v. Martin Marietta Corp., CCH Prod. Liab. Rep. 87770 (U.S. Ct. App., 10th Cir., 1976). Several states, including North Dakota, Utah, and Colorado, have enacted legislation to like effect.
30. A similar, though unrelated, problem resulting from the mobile nature of transportation is the unpredictable character of liability or the amount of recoverable damages since, under our federal system, such matters may vary with the territorial jurisdiction in which a particular incident happens to occur.

Criminal Sanctions and Regulating Corporate Behavior in Transportation of Hazardous Materials

H. Arvid Johnson

The purpose of this paper is to explore the issues of regulation of corporate behavior through the imposition of criminal sanctions for enforcing compliance with laws and regulations that affect the transportation of hazardous materials, substances, and waste. The paper will present (a) a brief historical perspective and review of current trends in the application and use of criminal sanctions; (b) the overall issues involved; (c) the basic rationale of regulatory crime, including the various theories of liability for corporations and individuals, particularly as to prosecuting senior executives; (d) the current statutory approach; and (e) in light of the issues presented, questions for consideration and resolution.

HISTORICAL PERSPECTIVE AND CURRENT TRENDS

Little use has been made of criminal sanctions in the enforcement of the laws affecting the transportation of hazardous materials, much less the broader areas of health, safety, and environmental laws. To this day, there have been no reported criminal convictions of corporate officers under the Hazardous Materials Transportation Act (hereafter referred to as the Act), the Consumer Product Safety Act, the

31. See Sindell v. Abott Labs., 163 Cal. Rptr. 132 (1980), where recovery was permitted from a group of drug manufacturers in the absence of proof as to the fault of any.
32. 49 CFR, Parts 171-199.

ADDITIONAL SOURCES

Section 301(e) of the superfund legislation requires the submission to Congress, by December 1981, of a study "to determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances".

The study is to be conducted with the assistance of the American Bar Association and other law organizations. It is required to evaluate, among other things, the evidentiary burdens placed on a plaintiff in proving harm, particularly in light of the scientific "uncertainty" over causation with respect to carcinogens and similar materials and the health effects of exposure over long periods of time. It is possible, perhaps, to interpret that requirement as a suggestion to the study group that the law be revised to create at least a rebuttable presumption of causation notwithstanding such uncertainty with respect thereto.

The report must be submitted to Congress along with recommendations that must address (a) the need for revisions in existing statutory and common law and (b) the form of such revisions as either federal statute or recommendations to the states for adoption.

It is interesting to note that there is no suggestion that any existing regulatory requirements be displaced by revision of the law pertaining to liability.
Occupational Safety and Health Act, the Toxic Substances Control Act, and the Solid Waste Disposal Act. Until 1979, there were no reported criminal convictions under the Water Pollution Control Act.

The only significant criminal proceedings in the transportation of hazardous materials that I am aware of are the indictments returned against Pan American, four other companies, and one individual in connection with November 1973 crash of a Pan American Boeing 707 at Logan Airport in Boston, which killed the three-man crew and which was caused by improper packaging and shipment of nitric acid.

Criminal convictions were entered for violation of the old federal law governing hazardous materials transportation against Pan American and three of the companies after no-contest pleas. In a related incident, indictments were also returned against four other companies arising out of a shipment of sulfuric acid aboard a Trans World Airlines flight from Los Angeles to New York, which acid was subsequently shipped on the Pan American flight, but which was not a causal factor in the crash.

Based on pleas of the three companies, convictions were also entered and fines levied under the old law. Similarly, the use of criminal sanctions against corporations and corporate executives in the hazardous materials area and the broader areas of safety, health, and environmental laws has many explanations, one very real problem is related to pinpointing the blame for serious violations. Giant corporations with multiple layers of management responsibility have significantly complicated the critical process of fairly pinpointing such blame.

Yet, notwithstanding the difficulty of penetrating corporate management structures, there is clear evidence that the legal and academic communities are seriously focusing on corporate and white-collar crime. Congress, which in the past has been concerned with "crime in the streets" is now giving increased attention to "crime in the suites". Even the business press has directed its attention to the new trends and concern about corporate crime.

The application of criminal sanctions has begun in the broad areas of safety, health, and environmental laws. Twenty cases have been referred to the U.S. Department of Justice for possible criminal prosecution under 517(e) of OSHA, 16 of them in fiscal 1979. The EPA expects as many as 50 prosecutions per year, beginning in fiscal 1980, as the result of accelerated investigations by the EPA and the Justice Department into hazardous waste materials violations.

The Justice Department recently unveiled new priorities for investigating and processing white-collar crime. In releasing a 50-page report that identifies targeted crime, the U.S. Attorney General stated: "We intend to zero in on the kinds of white-collar crime that most affect the people of this country." Of the seven major categories of white-collar offenses listed in the report, two directly affect safety, health, and environmental concerns. They are (a) crimes against employees, including life-endangering health and safety violations and corruption by union officials and (b) crimes affecting the health and safety of the general public, including the illegal discharge of toxic, hazardous, or carcinogenic waste and life-endangering violations of health and safety regulations.

The proposed new Federal Criminal Code would add the business crimes of consumer fraud and a new felony called endangerment. It considered a form of assault and would be present according to the proposed law "...where an individual's conduct manifests an extreme indifference or an unjustified disregard for human life". Endangerment would be associated with federal environmental, OSHA, and similar safety laws. Quite apart from this general approach, Congress has already adopted a crime of "knowing endangerment" as part of its reauthorization of the Federal Solid Waste Disposal Act.

Why the sudden but determined aim at corporations, and particularly at business executives? The answer is obviously complicated, but one simple fact emerges. Government agency personnel and prosecutors believe that business people pay more attention to laws, rules, and regulations when there is a known risk of indictments, personal fines, and jail sentences than when a simple fine is meted out to their corporations.

ISSUES

While the frustration in enforcing current laws and regulations against business increases, the support for accelerated use of criminal sanctions will grow. Before a discussion of the basic rationale for regulatory crimes and the current law, it is helpful to keep in mind the fundamental issue and related options on the subject of regulating corporate behavior in the transportation of hazardous materials through criminal sanctions.

In this area, the fundamental issue is simply whether the area is appropriate for the imposition of criminal sanctions. This issue can be broken down into several options:

1. Should criminal sanctions be imposed at all, or should civil remedies of fines and injunctions be relied on as the sole remedies available?
2. Should criminal sanctions be generally employed, but only as a supplement to the general pattern of civil regulations—that is, used only as a last resort to punish particularly recalcitrant or egregious corporate behavior; or
3. Should the deterrent effect of criminal sanctions be aggressively employed to shape corporate action and enforce compliance?

RATIONALE OF REGULATORY CRIME

The traditional rationale for imposition of criminal sanctions in U.S. jurisprudence has normally considered four factors: (a) deterrence, (b) retribution, (c) incapacitation, and (d) rehabilitation. In punishing illicit corporate personal fines, the primary rationale appears to be deterrence. However, elements of retribution are also present because of the introduction of the elements of moral culpability in statutory and regulatory models. Such words as "willful", "knowingly", "with knowledge", and "intent to injure" reflect elements of moral culpability in that they require a criminal state of mind and a culpable mental state or mens rea.

In this regard, judicial interpretation continues to support a moral culpability standard, and the courts have tended to read some form of intent into the law if the legislative purpose if vague or uncertain [see U.S. v. United States Gypsum, 438 U.S. 422, (1978)]. Generally, the remaining two elements of incapacitation and rehabilitation have played no part in the thinking behind statutory and regulatory regulation of corporate behavior.

STANDARDS OF LIABILITY—CORPORATE LIABILITY

In looking at the corporation, as opposed to individuals within the corporation, the question of liability must be evaluated in light of the dual rational for regulation of corporate conduct, e.g., deterrence and retribution. While commentators are...
divided, most contend that there is little support for the proposition that criminal fines deter corporate crime. Moreover, such fines are even less likely to satisfy the call for retribution and the two rationales often conflict. For example, a corporation in a criminal proceeding may or may not deter the type of conduct prohibited, but the fine may be passed on as a cost of doing business and indirectly, therefore, retribution is visited on innocent stockholders and customers instead of on the individuals within the corporation who are responsible.

It has long been held that corporations may be subject to criminal sanctions. The theory of criminal liability for a corporation is known as the doctrine of respondent superior. Under this doctrine, a corporation is liable in a criminal sense for the acts of its agents or employees, if the agent or employee (a) commits a crime, (b) within the scope of his or her employment, (c) with the intent to benefit the corporation. While sometimes there may be questions as to whether the employee was acting within the scope of his or her employment, generally the doctrine is easy to met when there is a clear job description. It is no defense for the corporation to argue that the employee violated company policies or directives in committing the criminal act.

STANDARDS OF LIABILITY--INDIVIDUAL EMPLOYEES

In the imposition of criminal sanctions, real difficulties occur within giant corporations with multiple layers of management responsibility. It is often difficult to focus on the primary employee responsible, much less determine who "caused" the commission of the crime. In this context, it is essential to look at two types of individuals. These break down into (a) direct actors, those lower-level corporate employees charged with carrying out the day-to-day activities of the corporation; and (b) indirect actors, those supervising, managing, or executive employees charged with supervision and policymaking responsibilities.

Direct Actors--The Corporate Employee

There is no particular difficulty in establishing criminal liability of a direct actor—that is, the truck driver, shipping dock foreman, or other such individual who physically performs a criminal act, such as leaving a truck of explosives unattended or packing a shipment in the wrong container. Since normally this is a lower-level employee, prosecution of such an employee usually achieves much less deterrence than prosecution of a more senior officer of the company who has management responsibility and can affect the policy and procedures of the corporation.

Typically, in pursuing a direct actor, the prosecution must meet the applicable intent standard of the statute or regulation that is violated. The direct actor must be shown to have acted with a "willful" or "knowing" state of mind. In other words, the direct actor must have had a state of mind or an intent to commit the violation and the act complained of and not just be guilty of ordinary negligence. As a practical matter, proving a state of mind is difficult, and many times circumstantial evidence must be reduced to show reckless disregard, willful conduct, or similar states of mind to satisfy the statutory requirement.

It is no defense to individual prosecution for an employee to claim that he or she acted in the name of or for the benefit of the corporation. Also, an employee does not have a defense from prosecution if he or she claims a superior ordered or authorized the employee to commit the crime. While a prosecutor may seek to prosecute the superior who authorized the crime, he or she is not obligated to do so and still may proceed only against the direct actor or lower-level employee.

Indirect Actors--The Corporate Executive

The difficult area in imposing criminal sanctions arises in the area of liability for indirect actors—i.e., those employees who command, authorize, fail to prevent, acquiesce in, or recklessly supervise the activities of others. Indirect actors are themselves liable for crimes as principals. Although sometimes standards of liability have been spelled out for indirect actors in statutory or regulatory models [see the Clean Air Act, Section III(d)(3)], most statutes are silent on indirect-actor liability.

Generally, the standards for conviction of indirect actors are the same as direct actors. The main difference is that the activity, i.e., management supervision, is distanced from the direct actor. In this case, proof of responsibility is critical. In coping with these problems, several standards of liability have been created, including strict liability, specific intent, and, as recently proposed, negligent supervision or reckless supervision.

Strict Liability

Under the theory of strict liability, there is no requirement of intent. A mere violation of the law is enough to convict. This shortcuts the burden-of-proof requirements in that the prosecutor does not have to prove the state of mind for the indirect actor. No federal statute explicitly adopts a strict liability standard, but by court interpretation, the Food, Drug, and Cosmetic Act and the Refuse Act of 1899, which do not set forth a requirement of culpable mental state or mens rea, i.e., that the violations be "willful" or "knowing", have been interpreted to impose a strict liability standard [see U.S. v. Dotterweich, 320 U.S. 277 (1943); U.S. v. Park, 421 U.S. 658 (1975); U.S. v. U.S. Steel Corp., 328 F. Supp. 354 (N.D. Indiana 1970), aff'd., 482 F.2d 439 (7th Cir.), cert. denied, 414 U.S. 909 (1973)].

In the Park case, the president of a food company was convicted of allowing food to be stored in rat-infested company-owned warehouses. While the president was technically in charge of all employees, the warehouses were assigned to different individuals with staffs and departments under their supervision, and he had been informed by the responsible persons reporting to him that corrective action had been taken in cleaning up the warehouses. In upholding the president's conviction, the U.S. Supreme Court stated that for an indirect actor or supervisor to be found liable under the theory of strict liability, he must (a) occupy a position of responsibility and authority with regard to the act that constitutes the crime and (b) must have had the power to prevent it through the highest standards of foresight and vigilance.

In essence, for indirect actors, the standard of behavior becomes one of extraordinary care. In part, this was justified by the Supreme Court because of the various health aspects of the FDA regulations. In this light, Congress has considered and rejected a bill to relax the duty of care imposed by the Supreme Court under the Federal Food, Drug, and Cosmetic Act.

While strict liability may achieve maximum deterrence, it can over-deter socially beneficial conduct,
inhibit technological and management innovation, and conflict with the basic principles of moral blame
worthiness that underlies our entire system of criminal law. It is fair to state that the Park case represents the outer limits of ascribing blame on indirect actors.

Specific Intent

Under both statutory and common law principles, an executive, as an indirect actor, can be found guilty of a specific intent crime. An overt command or a specific authorization by an executive to violate a law is enough to satisfy a specific intent require-
ment, even though the executive, as an indirect actor, was not directly involved in the actual criminal act.

The requirement of specific intent may also be satisfied when an indirect actor (a) implicitly authorizes a violation of the law or (b) knows of a crime to be committed in his or her specific area of responsibility, but fails to act or acquiesces in the performance of the crime. Thus, an executive who orders hazardous materials to be shipped immedi-
ately, even though aware that it will take two days to obtain proper containers, may be argued to have implicitly authorized a violation of the law if, in fact, the chemicals are shipped without complying with the regulations. Similarly, an executive may know that employees are planning on shipping chemi-
cals without using the appropriate containers and not do anything about it. Even though he or she has not directly violated the law, knowledge that a violation of the law will occur, coupled with no action on his or her part, would satisfy the specific intent requirement. The lower-level em-
ployees, who actually made the decision to violate the law, can also be prosecuted, but the prosecutor may elect to seek to prosecute the more senior official in order to achieve maximum deterrence. It should be noted that a corporate official or executive can be liable for acquiescing in crimes of subordinates only when he or she has the power and the obligation to control their behavior. Thus, the head of the research and development department of a corporation, if he or she suspects a violation in the shipping department, cannot be held liable for a failure to act, because the department head had no power or control over these lower-level employees.

Contrasted with the strict liability doctrine, specific intent statutes reflect traditional notions of moral blameworthiness and do not overdeter legitimate entrepreneurial behavior. However, the difficulty of proving that an executive or supervisor possessed actual knowledge of a crime substantially weakens the ability to convict and the deterrent effect of the statutes.

Other Standards

In light of difficulties with both specific intent and strict liability theories, certain commentators have recognized the need for new legislative stan-
dards for executives, which are more firmly rooted in moral culpability than the strict liability doctrine but are also capable of providing greater incentives for effective supervision than specific intent statutes, so as to complement existing crimi-
inal statutes. In this regard, two intermediate standards have been proposed: negligent supervision and reckless supervision.

The negligent supervision standard would hold a superior criminally liable whenever he or she knew or should have known that there was a substantial risk that an illegal act was occurring or would occur within his or her realm of authority and failed to take reasonable steps to prevent the offense. The difficulty with this standard is the reduction of actual culpable mental state to a lesser negligent standard of "should have known".

Recently, a proposed revision of the Federal Criminal Code incorporated the standard of reckless supervision. This standard makes it a misdemeanor for a "person responsible for supervising particular activities on behalf of an organization" to permit or contribute to the commission of an offense "by his reckless failure to supervise adequately those activities".

Reckless supervision differs from negligent supervision in that it requires actual knowledge (instead of the negligent standard of "should have known") of a substantial risk of illegal activity within his or her realm of authority. Reckless supervision, which is a more severe test than negligent supervision, does reflect a degree of moral blameworthiness to which the criminal law has traditionally attached liability, while still meeting some of the difficulties with specific intent statutes and the weakness of proving specific intent.

PROCEDURAL DIFFICULTIES—CRIMINAL SANCTIONS

In the application of criminal sanctions to any type of behavior, but particularly that of corporate violations of regulatory and statutory models, there are some procedural difficulties that must be overcome in order to secure a conviction. While some procedural safeguards are present in both civil and criminal investigations, e.g., the attorney-client privilege, some procedural aspects are unique to criminal cases. These procedural safeguards, which are the foundation of our criminal system, have grown in complexity and scope in the past years. It is not the purpose of this paper to discuss whether the procedural safeguards have gone too far, but they are available to an individual who is prose-
cuted for a criminal violation of regulatory or statutory corporate crimes just as they are available to hardened criminals.

Burden of Proof

One distinct procedural difficulty in prosecuting for a criminal violation of a regulation is that the government is required to prove its case "beyond a reasonable doubt". This is a much higher standard of proof than required in a civil case.

Fourth and Fifth Amendment Rights

An individual, but not a corporation, has the right to the constitutional prohibitions against self-in-
icrimination, as embodied in the Fifth Amendment. While OSHA has taken the position that in a criminal investigation of an OSHA violation it does not have to issue a Fifth Amendment (Miranda) warning, it would appear that OSHA's position is not well-founded and that Miranda-type warnings must be given by their investigators. Another constitutional protection for both corporations and individuals is the Fourth Amendment prohibition against unreasonable searches and seizures. This requires that a regulatory authority secure subpoenas for documents and physical access to the premise in the course of a criminal investigation.

Right to Trial by Jury

With a criminal prosecution of regulatory crime, there is a right to a trial by jury. A jury trial often favors a defendant in a regulatory crime because of the complexity of the case, the abstract-
ness of the "crime", and the general reluctance of a jury to equate the prohibitions encompassed by regulatory, public welfare, or strict liability offenses, with the more traditional common law or statutory crimes, such as murder, assault, rape, etc.

Constitutionally Vague Resolutions

Vague, ambiguous, or complex regulations may not be enforceable by criminal sanctions. As previously noted, some specific intent to violate a statute or regulation must be shown to secure a criminal conviction. If the regulation by its own construction is vague, ambiguous, or subject to more than one interpretation, prosecutors may elect not to prosecute or the case may not be subject to constitutional attack on grounds of vagueness. Simply stated, it would be difficult or impossible to prove the requisite culpable mental state. If criminal sanctions are to have a deterrent effect, the regulations must be clear and subject to understanding by those who are regulated, otherwise prosecutors, juries, and judges will have very little sympathy with the regulatory agency. Accordingly, prosecution will be most difficult and cases will be dismissed and/or will never be brought, therefore, limiting the deterrent value of the criminal sanctions.

Concurrent Civil and Criminal Proceedings

Proceeding with both civil and criminal investigations at the same time or beginning with a civil investigation (where Fifth and Fourth Amendment prohibitions may not apply) and then commencing a criminal investigation can present problems. Misrepresentations by investigators and the scope of their investigations and their failure to warn of the possibility of criminal investigations can be raised as defenses. Defendants may be able to argue that they have been prejudiced by the civil investigation and have the criminal indictments or case dismissed. Whether defendants can gain access to grand jury information and the area of grants of immunity and promises not to prosecute are related problems.

Double Jeopardy

Bringing a criminal action may also raise constitutional questions or double jeopardy. For example, can the same defendant be criminally prosecuted in the same jurisdiction or in different jurisdictions for several accidents involving different containers of the same type manufactured in the same production batch?

The scope of this paper does not permit a detailed discussion of all the problems associated with proceeding in criminal cases and cases against a corporation and its employees, particularly where civil actions are also brought. Many of these questions have been raised in recent antitrust cases. It is enough to say that the area presents many complex problems for both defendants and prosecutors.

EXISTING STATUTORY LAW

Current federal criminal law pertaining to culpability is hopelessly confused; there are more than 75 different terms used to describe the mental elements of the criminal statutes. The courts have been left to construe the many terms used to describe mens rea, and more inconsistency and conflicting meanings have been generated.

The Hazardous Materials Transportation Act provides that a person is guilty of an offense under the Act if he or she "willfully violates the Act or a regulation issued under the Act". There is a fine of $25,000 or imprisonment for a term not to exceed 5 years, or both. Examples of other statutory terms used in the related safety, health, and environmental areas are "willfully" or "negligently" (Federal Water Pollution Control Act), "knowingly" (Clean Air Act), "knowingly" or "willful" (Toxic Substances Control Act), and "willfully and the violation caused death" (OSHA).

It has been suggested that, notwithstanding the specific requirements of statutes in the health, safety, and environmental areas, imaginative prosecutors could use several other federal criminal statues as a method to get around certain difficult questions of proof of intent. The use of the federal statute on aiding and abetting would be one way. The purpose of this statute is to permit prosecution of those who aid or assist others in the commission of an offense and also those who cause others to perform direct illegal acts, but refrain from doing so themselves. The federal crime of conspiracy, meaning a combination of persons to accomplish an unlawful purpose, may also be useful to prosecutors. There is a broad federal statute governing the filing of false reports. After an investigation of an incident has begun, prosecutors have the criminal charges of obstruction of justice, concealment, and making false statements to fall back on. For example, the PMC Corporation recently pleaded guilty to criminal charges of filing false information, concealing information, and obstructing the EPA. As part of the plea bargaining, two PMC employees, who were charged with conspiracy, fraudulent concealment, and obstruction, had charges against them dropped.

ISSUES AND QUESTIONS

In the area of hazardous materials transportation, as previously stated, the three options to be considered are:

1. Should criminal sanctions be imposed at all, or should civil remedies of fines and injunctions be relied on as the sole remedies available?
2. Should criminal sanctions be generally employed, but only as a supplement to the general pattern of civil regulations, that is, as a last resort to punish particularly recalcitrant or egregious corporate behavior; or
3. Should the full effect of criminal sanctions be aggressively employed to shape corporate action and enforce compliance?

In consideration of the use of criminal sanctions under the Act, the following highlights some of the fundamental policy questions that must be addressed in order to formulate an intelligent and meaningful policy concerning the intelligent use of such sanctions as an aid for enforcement.

1. Are the regulations clear and capable of being understood? Vague, ambiguous, and meaningless standards can and will be constitutionally attacked as being void and unenforceable, particularly in a criminal proceeding.
2. In pressing criminal sanctions, should they be imposed only against corporations, given the debatable position that criminal sanctions deter corporate behavior, or should they also be employed against individuals?
3. If criminal sanctions are brought against individuals, should they be employed only as a means of catching the direct actor, that is, the mental or
lower-level employee, or should the aim be at the "executive" level in order to achieve maximum deterrent effect?

4. If criminal sanctions are brought against directors and officers, is it desirable to stigmatize and perhaps even punish all of the employees of a large corporation for the conduct of, for example, one truck driver or one engineer, who—in contravention of clear corporate policy—ignored a hazardous materials safety problem?

5. Should the requirement be added that for culpable mental state or state of mind? That is, delete the word "willfully" in order to bring the Act in line with the strict liability of the Federal Food, Drug, and Cosmetic Act. This law, as previously indicated, permits the imposition of strict criminal liability on corporations and individuals who violate the law or FDA regulations. In this regard, it must be questioned whether the transportation of hazardous materials rises to the same degree of concern for the public health and welfare as does the Federal Food, Drug, and Cosmetic Act.

6. Is it desirable to employ criminal sanctions to deter when it may be difficult to assure any semblance of proportionality between the crime and the punishment? For example, not complying with container test requirements could be a criminal offense, even though the product may be adequate in every way.

7. If individual employees are to be prosecuted, particularly in an aggressive fashion, will the threat of such prosecutions invoke a response of self-serving, self-protective internal memoranda by fearful employees?

9. Will intra-company communications offering creative but unproven ideas, cease being written for fear such communications will be subpoenaed to show criminal intent? Will intra-company communications offering creative but unproven ideas, cease being written for fear such communications will be subpoenaed to show criminal intent?

10. Will an inordinate amount of employee effort be diverted to miniscule risk reductions and away from other areas of concern, such as solving quality control and product liability problems, enhancing the durability of products and efficiency of transportation, and maximizing the efficient use of scarce resources and increased means of productivity?

11. Will engineers and managers become unwilling to pioneer or approve new design concepts?

12. In light of the ability to second-guess cost/benefit analyses in the safety area, should managers seek all available data and make the most accurate analyses possible or should they make only intuitive gut judgments not reduced in writing? The former makes rational sense, but because it is easily subpoenaable in a criminal prosecution, there are obvious risks.

13. Since the mere transportation, shipping, and manufacturing of containers to contain hazardous materials and the marketing of such containers inevitably create some safety risks, what risk level should a corporation determine not to exceed and at what cost? Must a standard of "zero risk" be met in order to be "safe" from criminal prosecution?

14. Is it really fair to prosecute a corporation in situations where no single corporate representative possessed all of the knowledge necessary to render the corporation's conduct culpable? For example, an engineer may conceive a design improvement for a tank car, but reject it because it might create a minor safety problem. Another engineer working on a different aspect of the tank car—if informed of the first engineer's idea—would have seen that it would greatly reduce different safety risks involved in the tank car's use. Can the company be prosecuted for having marketed products that it knew, in a substantive sense, could have been made safer on a net basis?

15. What rationale should be used and what criteria adopted so as to achieve an element of fairness in prosecution, assuming both civil and criminal sanctions will be used? Should the agency adopt a memorandum, to be made public, explaining its rationale for seeking criminal sanctions—for example, a document explaining the type of case and violation in which corporations, or corporations and individuals, would be subject to criminal prosecution?

CONCLUSION

In light of the substantive and procedural difficulties in the use of criminal sanctions and in consideration of a uniform, effective, and fair enforcement policy, it would appear that the preferred use of formal sanctions in the enforcement of hazardous materials transportation regulations would be reserved for exception cases and not for day-to-day policing of the regulations. The latter can much more readily be left to aggressive inspection, monitoring, and enforcement with civil actions, fines, injunctions, and, possibly, private treble damage actions of a nature now found under the antitrust laws.

In using criminal sanctions in exceptional cases, concentration should be aimed to deterrence and punishment of particularly recalcitrant or egregious corporate behavior. Primary targets of enforcement should be willful, intentional, or repeat offenders, who violate important and substantive regulations. Prosecution of individual corporate officers should be attempted only where the evidence demonstrates that an intentional corporate noncompliance with the law is a direct result of an informed policy decision made by such corporate officials. Further, criminal sanctions should be employed only when knowing or willful violations can readily be proven. To bring a marginal criminal case in which the proof is weak, particularly against individual officers or employees of a corporation, will have little deterrent value if the agency is unsuccessful. On the other hand, it can have a devastating effect on careers and the general reputation of the individuals involved.

Finally, it is submitted that a comprehensive enforcement policy statement should be adopted and made public. The publishing of such an enforcement policy would ensure that organizations and individuals subject to the provisions of the Act are aware of the types of violations under which the agency will seek criminal sanctions. Once such a rationale is made public, it has an essential element of fairness that will go far in blunting any criticism of the agency's approach of preferring criminal instead of civil charges. It will eliminate the element of surprise, which should not be present in the choice of remedies by the agency, and further the preferred approach of a uniform, effective, and fair enforcement policy.

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Preemption: How Do We Deal with Interjurisdictional Conflicts with Law?

J. Kevin Healy

DEFINING THE PROBLEM

Incidents that have occurred over the course of the last decade have increasingly made known to the general public the dangers presented by the motor vehicles, trains, and vessels that carry hazardous materials through our nation's communities. In light of these incidents and of the increased public concern they have generated, officials on the federal, state, and local levels have for the past few years been actively seeking to expand and strengthen their regulatory control over such activities.

As DOT is improving its regulations under the mandates of the Hazardous Materials Transportation Act (HMTA) (1), an ever-increasing number of state and local jurisdictions are imposing more or less restrictive operating controls, routing requirements, and equipment standards on carriers transporting hazardous materials through their areas.

DOT and the transportation industry view this proliferation of differing state and local requirements with concern, fearing that the regulatory pattern in the hazardous materials field is in danger of falling into chaos. Because state and local officials, on the other hand, believe that the specific concerns of their communities are not being adequately addressed by the federal authorities, they feel that they have an obligation to act themselves.

Thus, the stage is set for a classic interjurisdictional conflict, with the state and local authorities on one side, exercising their police power to protect their constituent public from what they perceive to be an imminent danger, and with the federal authority on the other, feeling an obligation to bring consistency to the field.

Clearly, a prime objective of Congress in passing the HMTA was to avoid a multiplicity of differing and conflicting regulations (2). It, therefore, consolidated federal authority over hazardous materials transport into DOT (3), and set some very specific criteria for permissible state and local action (4).

Congress did not, however, absolutely preempt non-federal activity in the HMTA (5), apparently recognizing that state and local authorities must continue to play some role in the effort to "protect the nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce" (6).

JUDICIAL DECISIONS HAVE ESTABLISHED GENERAL RULES ON PREEMPTION

As in all cases that present issues of interjurisdictional conflict involving state and local regulation of interstate commerce, the courts will measure the validity of a non-federal action to regulate hazardous materials transport against the Commerce Clause (2) and the Supremacy Clause (8) of the U.S. Constitution.

A host of decisions dealing with similar issues have led to the development of some relatively clear principles that are considered in the application of the doctrine of federal preemption. The courts begin with an assumption that a requirement promulgated by a state and local jurisdiction in the proper exercise of its police power is valid, and this is especially true when the regulation involved relates to highway safety (2).