

WHEN PROCESS SAFETY MANAGEMENT FAILS – THE RISKS TO CORPORATE EXECUTIVES

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When process safety efforts fail to avoid accidents or mishaps, operating facilities are often called upon to participate with government agencies in investigations designed to determine the root cause and/or factors contributing to the adverse event. In the United States, numerous government agencies including the Environmental Protection Agency, National Transportation Safety Board, Occupational Safety and Health Administration (“OSHA”), Chemical Safety and Hazard Investigation Board, and others, respond to such process safety incidents. During any such governmental investigative response, chemical processing company executives and employees may be required to participate in efforts to unearth the cause of the incidents. These activities subject companies and individuals to potential regulatory, civil and even criminal exposures.

CHEMICAL PROCESSING ACCIDENTS

Accidents in the chemical processing industry often have catastrophic consequences. Massive property damage, environmental degradation, and sometimes even significant physical injuries and loss of life can result when process safety management efforts fail. Indeed, a Texas A&M University study identified more than 16,000 sudden chemical releases in 1998 that resulted in 61 deaths and 4,002 injuries. Moreover, in 1999, Dr. Paul L. Hill, chairman and chief executive officer of the Chemical Safety and Hazard Investigation Board, reported to Congress that “In 1996, chemical incidents claimed the lives of the equivalent of two fully loaded 737 passenger jets - 256 people perished. And an average of 256 people died the year before. And the year before that.”¹

Immediately following, and sometimes even coterminous with, incident response efforts, government investigations of such accidents will commence. In addition, facilities themselves may have Responsible Care, process safety management, or other independent obligations to conduct their own post incident investigations. Understanding the dynamic of such government and private party investigations can be crucial in protecting individual corporate executives from potential civil or criminal liability.

Critical incident response will often require a focus on the “responsibility” of particular individuals involved in those incidents. Responsibility for recent catastrophic events in the United States has been laid at the feet of terrorists such as Osama bin Laden and Timothy McVeigh. Other critical events ranging from Bhopal to the Exxon Valdez spill, however, have resulted in the imposition of civil and criminal liability upon corporate executives and employees. It can be anticipated that future catastrophic process safety failures will result in efforts to place the blame for those failures on the corporate executives and employees involved.

THE LIABILITY PARADIGM

It is clear that corporate entities involved in process safety incidents may be found liable for those accidents. Depending on the particular facts involved, civil or criminal liability based on negligence or strict liability may be imposed.

Absent special circumstances, individuals are not liable for the contractual obligations of their corporate employers. Individuals acting on behalf of the corporate entity, however, do not enjoy immunity from civil or criminal liability. In essence, the issue with respect to the imposition of such liability upon a corporate executive, is the level of participation that the executive had with respect to the liability creating activity.

As the New Jersey Supreme Court recently noted, a corporate officer can be held personally liable for a tort committed by the corporation when he or she is “sufficiently involved” in the commission of the tort. A predicate to liability is a finding that the corporation owed a duty of care to the victim, the duty was delegated to the officer and the officer breached the duty of care by his own conduct.² The breach of this duty of care, however, can involve either intentional or negligent conduct by the corporate executive.³ Thus, personal involvement in or knowledge of activity which creates liability for corporate entities may well create that same liability for corporate executives themselves.

CRIMINAL LIABILITY

Inevitably, when corporate entities are exposed to criminal liabilities, corporate managers will also face personal liability risks. Initially, those exposures may flow from broad based state criminal provisions such as “reckless endangerment” statutes. In that regard, chemical facility operators should be aware that, in recognition of the fact that the chemical processing industry is a prime potential target for terrorist activities, states have strengthened the criminal statutes which have traditionally been used to respond to process safety incidents. Thus, by way of illustration, in March 2002 New Jersey enacted the “September 11, 2001 Anti-Terrorism Act”. Along with numerous provisions dealing directly with the prevention and punishment of terrorist activities, this Act also modified the State’s criminal statute prohibiting “Causing Or Risking Widespread Injury Or Death” .⁴ That statute has been used extensively to respond to chemical processing and other industrial mishaps and violations. It imposes criminal liability on a party who unlawfully causes an explosion or engages in the improper storage or release of harmful substances. The Anti-Terrorism Act expanded this statute to make it a crime punishable by up to five years imprisonment for a person to create a risk of widespread injury or damage by recklessly handling or storing hazardous materials. The Act also made it a crime punishable by up to ten years imprisonment if the handling or storing of hazardous materials violated any law, rule or regulation intended to protect the public health and safety.

In addition, media specific statutes such as the Clean Air Act or Clean Water Act or activity specific statutes such as the Occupational Safety and Health Act and the Resource Conservation and Recovery Act may be used to impose criminal or civil liabilities.

Moreover, in the area of health and safety regulations, courts have been willing to use the “responsible corporate officer” doctrine to impose civil and criminal liability upon executives whose conduct would not normally give rise to the imposition of that liability.

Under that doctrine, any corporate officer who had a “responsible share” in the violation of the relevant criminal statute could have individual liability imposed upon him.⁵ Indeed, the

criminal provisions of both the Clean Water Act and Clean Air Act incorporate the concept of criminal liability for “responsible” corporate executives. The Clean Water Act³⁰ was amended in 1987 to expand the definition of parties liable for criminal violations of the Act to include “any responsible corporate officer.”⁶ In addition, under The Clean Air Act the original definition of a “person” liable for criminal violations was expanded by §7413(c)(6), which provided that, with respect to criminal penalties, “the term person includes ... any responsible corporate officer.”⁷

The U.S. Senate Committee on Environment and Public Works, in discussing the amendments to the criminal penalty provisions of The Clean Air Act, reported:

[F]or the purpose of liability for criminal penalties, the term “person” is defined to include any responsible corporate officer. This is based on a similar definition in the enforcement section of the Federal Water Pollution Control Act. The Committee intends that criminal penalties be sought against those corporate officers under whose responsibility a violation has taken place, and not just those employees directly involved in the operation of the violating source.⁸

Such liability issues need to be considered at the earliest point in critical incident response efforts. Those initial efforts - which can take hours, days or weeks - will inevitably involve efforts to control and or contain the immediate adverse consequences of the incident. During this initial response period, liability considerations *per se* are seldom paramount.

Even at this initial point, however, the decisions made at this initial point may have consequences for later stages of the incident. By way of illustration, release reporting statutes often require immediate telephone notice of an incident to emergency response authorities. These statutes obligate parties to give very specific information. If the reporting employee later attempts to deny personal knowledge of particulars of the incident, the recording of the release reporting call may make such a denial of knowledge difficult to sustain. This is true, even if the “facts” conveyed in the release reporting call were provided to the reporting executive by third-parties. As such, “liability” considerations must be addressed at the earliest possible moment following a process safety failure.

PROTECTING THE CORPORATE EXECUTIVE

There are few places on earth more lonely than the space occupied by a corporate executive who is potentially responsible for a process safety mishap resulting in significant injuries to property, the environment, and individuals. Often support for such executives at that time can be seen by governmental authorities and the public as a failure of the corporation to take responsibility for the consequences of the catastrophic incident. On the other hand, abandoning such individuals in their time of need - particularly as they are subjected to regulatory and criminal investigations and the initiation of civil lawsuits - is seldom in the best interests of the corporation.

The best time to consider these issues is long before the adverse critical incident occurs. Most state laws require indemnification of employees charged with wrongdoing during the course of their employment - as long as those employees are ultimately exonerated. In addition, however, most states permit corporate indemnity provisions which, at a minimum, provide an

ongoing defense to the corporate executive, regardless of whether that executive is ultimately found liable. Moreover, insurance policies are available to fund such D&O and other employee liabilities.

Deciding how broad to make these corporate indemnity protections and the classes of employees to which they should be extended, present significant issues for any corporation engaged in business activities with significant risks of catastrophic process safety failures. Whether to maintain flexibility in order to respond to the particulars of any individual incident or whether to decide in advance to “stand behind” (by either agreeing to defend and/or indemnify) all employees involved in such an incident is never an easy decision to make. Given the risks of such incidents to individual corporate executives and the all but inevitable fallout of those risks to their corporate employers, however, consideration of those issues before, rather than after, the critical incident is highly advisable.

GOVERNMENTAL INVESTIGATIONS

The risk of having criminal liability imposed upon individual corporation executives in the aftermath of process safety failures is increased by the fact that once the immediate process safety response activities are concluded, the “root cause” or other fault based investigations will begin.

In dealing with these investigations, corporate executives must know and appreciate the significance of what government agencies are involved in the investigative effort. All government agencies have different core constituencies, different statutory powers and different parties with direct influence over the essential character of their investigations.

In the United States chemical processing industry, Federal and State criminal authorities, EPA, OSHA and the Chemical Safety Board are the most likely to be involved in such investigations. In addition, depending on the facts of any particular incident, the National Transportation Safety Board, Food and Drug Administration and other State and Federal Regulatory Agencies may also be involved.

Often, multiple federal and state agencies are involved. In such circumstances, understanding the particulars of the relationship between these agencies can be vital. At times there are formal Memorandums of Understanding which identify the circumstances in which a particular agency will act as lead investigator, how investigative resources will be shared and other investigative protocol information.⁹ Even in the absence of a formal Memorandum of Understanding, however, appreciating the dynamic of how different investigative agencies acquire and share information is crucial to protecting the interests of corporate executives.

To effectively represent the interests of those executives, the different constituencies and statutory focus of investigative agencies must be considered. When OSHA acts as the head of the investigative agencies, labor unions’ influence on the investigation may be far different than when the National Transportation Safety Board is involved. In addition, the core competencies of the lead investigative agency can result in significant differences in substantive results. Thus, the agencies’ access to technical expertise and familiarity with the nature of the operations being investigated, will often have a significant impact on the ultimate conclusions drawn by that agency.

Often of equal significance, the enforcement powers and protocols of different investigative bodies are vastly different. Some governmental authorities are vested with direct authority to pursue criminal charges -- while others need to involve other government bodies vested with the power to bring criminal claims. The authority of some agencies to conduct investigations is circumscribed by strict time limitations¹⁰ while others are restricted only by lengthy criminal statutes of limitation. Some agencies can impose civil penalties subject to administrative appeal, while others may pursue such penalties only in highly structured judicial proceedings.

Of perhaps even greater significance than the technical expertise and enforcement powers of particular agencies, the investigative powers of those agencies vary widely. Only some can execute search warrants, issue subpoenas and compel witness testimony. Similarly, a limited number of agencies are authorized to propound written questions or to pursue testimony from witnesses outside of the regulated community.

Moreover, separate from the enforcement and investigative authorities of particular agencies, is the issue of the investigative preferences which the agencies use to exercise that authority. Thus, for example, some agencies require extensive headquarters authorizations with respect to their investigative activities while others do not.

With respect to the investigation itself, different agencies follow different procedures with respect to "ambush" or noticed interviews; simultaneous interviews of multiple witnesses; recording of witness interviews; preparation of interview reports or summaries; provisional warnings as to witnesses' constitutional rights; permission for participation by non-legal representatives; and sharing witness information with other government agencies. Moreover, the rules governing contact with witnesses represented by counsel and the confidentiality promises given to witnesses, vary from agency to agency.

Finally, the fallout from the investigation of different government agencies can be dramatically different. Different agencies follow different media disclosures policies. In addition, those agencies have different procedures with respect to the disclosure of tentative and final investigative conclusions; the peer review and internal vetting of those reports; protection of individuals and the release of investigative reports; the sharing of information across agency lines; and participation of the investigators in subsequent civil proceedings. Finally, those agencies have different abilities to impact the operations of target parties on the basis of failure to fully cooperate with the agencies' investigative effort.

All of these factors effect corporate executives' need to protect themselves in the aftermath of significant process safety incidents. An executive who is being investigated by an agency that may search his home or office without notice at any moment, or who may be confronted by investigators who will secretly record his responses to "ambush" interviews -- needs to be advised of the fact that such events are likely to occur. This is particularly true if the executive believes himself to be immune for personal liability because "he was only acting for the benefit of his corporate employer."

Moreover, warning employees of their constitutional rights and their ability to decline to participate in such governmental investigations, becomes far more important when a company is faced with a regulatory authority that conducts ambush interviews; executes search warrants; bans non legal advisors; and refuses to record the interview process than

would be true in circumstances where a company was faced with a more orderly investigative process.

INTERNAL CORPORATE INVESTIGATIONS

Complicating the civil and criminal exposures of corporate executives can be pre-existing corporate policies requiring investigations (and sometimes disclosure) of the circumstances surrounding all process mishaps.

Such policies may parallel OSHA's process safety management regulations which require employers to investigate every incident that results in, or reasonably could have resulted in, a catastrophic release of highly hazardous chemicals in the workplace¹¹. Similarly, any chemical company subscribing to "responsible care" standards is obligated to investigate significant process safety failures.

Though such policies are clearly well intentioned, they can seriously compromise post incident efforts to protect corporations and their executives from potential criminal and civil liability. Thus, at every stage of these internal investigations all parties must be aware that information uncovered during this process may be used to impose civil or criminal liabilities upon individual corporate executives.

THE ATTORNEY CLIENT ISSUE

With respect to both governmental and private investigations, the role of counsel for the corporation or for the individual executive can be crucial. When counsel conducts an investigation to provide legal advice to the Board of Directors and top management on an issue confronting the corporation, such as a pending lawsuit, there is substantial support for the proposition that the attorney/client privilege and/or work product doctrine protects the confidentiality of the investigation. Given the importance of the purpose of the investigation (*i.e.*, to allow for the provision of legal advice), the documentation of those purposes through Board resolutions authorizing the investigation, designating the parties authorized to conduct the investigation, setting forth explicit confidentiality requirements and the obligation of corporate employees to cooperate with that investigation, is crucial.¹²

DETERMINING WHOSE COMMUNICATIONS ARE PRIVILEGED

The "scope" of corporate attorney/client privilege also needs to be considered in connection with the conduct of internal investigations. Clearly, all corporations consist of, and function through, individual directors, officers, employees, and other agents. Different states have different rules, however, as to the extent to which communication between counsel and particular individuals associated with the corporation are protected by the attorney/client privilege. Some states limit that privilege to communications with corporate "control group" members,¹³ while other states expand the protections of the privilege to communications with all corporate employees involved in the "subject matter" of particular litigation events.¹⁴ As such, counsel must be particularly careful to ensure that they know whether their communications with particular individuals will ultimately be covered by the attorney/client privilege under the applicable law.

FAIRNESS TO NON-CLIENTS

Of particular concern with respect to any internal corporate investigation is the obligation of counsel to ensure that those who are interviewed by, or at the direction of, counsel are fully aware of their client or non-client status. The American Bar Association's Model Rule of Professional Conduct 1.13(d) requires that "in dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." As such, notwithstanding in-house counsel's often close relationship with particular corporate employees, counsel must be careful to inform those employees that he or she does not represent them individually and that the disclosures of those employees may ultimately be revealed to third parties without their consent. This is a particularly important issue in circumstances where the investigation raises potential criminal concerns.

INCENTIVES FOR CORPORATE WAIVER OF THE PRIVILEGE

The potential for such disclosures of corporate employee communications increased dramatically in the Summer of 1999 when the Department of Justice issued new "Guidance On Prosecutions Of Corporations." That Guidance, in addressing the corporation's willingness to cooperate with the government's investigation as a factor in determining whether to charge a corporation with a crime, specifically states that:

one factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances.

Thus, corporate clients have a strong incentive to waive their attorney/client privilege in circumstances involving potential criminal violations. As such, basic fairness requires individual employees be informed of their inability to prevent the ultimate disclosure of their confidential communications to in-house counsel.¹⁵

CONCLUSION

Dealing with the risks to corporate executives inherent in the aftermath of significant process safety failures requires an early and concentrated focus. That focus must include consideration of possible individual exposure before the issue is raised by the investigating authorities as well as consideration of appropriate executive corporate indemnification¹⁶ and insurance¹⁷ protections. It must also include immediate efforts to ensure that the interests of corporate executives are not damaged by the destruction or loss of crucial evidence relating to the critical incident.¹⁸

In addition, liability issues should be considered at the time that critical incidents are reported to regulatory authorities and at the time that spokesmen are selected to make disclosures to the public with respect to the incident.

Moreover, protection of the interests of both the corporation and its executives through the use of joint defense agreements should be considered. In addition, steps should be taken to maximize the protections afforded by the attorney client privilege throughout all governmental and internal investigations and executives should be prepared to respond to investigative techniques such as the execution of search warrants.¹⁹

Finally, every critical incident creates the possibility that key adversaries will surface who will attempt to increase the exposure of the corporation and/or its executives to regulatory, civil and criminal liabilities. Every step in the critical incident response effort presents the danger of creating such adversaries. For example, following a catastrophic explosion, promising the local community that the plant will never be reopened, may eliminate the danger that the local community will organize an effort to proceed criminally against an “offending” company - but that very announcement may ensure that union employees concerned about their future job prospects will organize to attempt to impose just such liability upon a corporation or its executives. Every critical incident will present different dangers. In all such circumstances, however, a recognition of who the company’s key adversaries are, and a plan for dealing with those adversaries is essential.²⁰

Finally, when process safety efforts fail and executives are exposed to the dangers outlined in this article, it will be all but impossible to get those executives to properly focus on these exposures. For that reason, consideration of these issues and the appropriate education and training of corporate executives must take place before - not after - the process safety failure has occurred.

REFERENCE

1. See, Guides to Chemical Risk Management, New Ways to Prevent Chemical Incidents, National Safety Council’s Environmental Health Center (1999).
2. *Saltiel v. G.S.I. Consultants, Inc.*, 170 N.J. 297 (2002); see generally, Pachman, Does the Corporate Shield Protect the Corporate Officer from Personal Liability? Yes, No and Maybe, New Jersey Lawyer 16 (August 2002)
3. See e.g., *Wicks v. Milzoco Builders, Inc.*, 470 A. 2^d 86 (Pa. 1983).
4. N.J.S.A. 2C:17-2
5. Commentators have questioned how the responsible corporate officer doctrine is, and should be applied. See, Dore and Ramsay, Limiting the Designated Felon Rule: the Proper Role of the Responsible Corporate Officer Doctrine In the Criminal Enforcement of New Jersey’s Environmental laws, 53 Rutgers L. Rev. 181, 197 (2000) (“Thus, federal court decisions from *Dotterweich* to *Iverson* have disagreed as to whether the responsible corporate officer doctrine should be used to (1) determine who is a “person” subject to the criminal provisions of a substantive environmental statute; (2) impose vicarious liability on corporate officials on the basis of the conduct of others; (3) impose vicarious liability on corporate officials by virtue of the imputation of the mental state of others; (4) permit (or require) a fact finder to use the status and

authority of a defendant to determine that corporate officers are liable for the environmental violations of other corporate employees; (5) permit a fact finder to use the status and authority of a defendant to impose an evidentiary presumption (or a burden to disprove) that corporate officials are liable for the environmental violations of other corporate employees; (6) permit a fact finder to use the status and authority of a defendant as a factor in determining that corporate officials acted with the mental state necessary to impose liability for particular environmental offenses; (7) permit a fact finder to use the status and authority of a defendant as the exclusive basis for determining that certain corporate officials possessed the mental state necessary to give rise to liability; or (8) permit a fact finder to use the status and authority of a defendant to as the exclusive basis for determining that certain corporate officials engaged in the conduct necessary to give rise to liability.”)

6. *See*, Note, Corporate Noncompliance with the Clean Water and Clean Air Acts: Theories to Hold a Director Personally Liable, 13 Va. Env'tl. L.J. 99 (1993).
7. *See generally*, Barone, The 1990 Clean Air Act Amendments and Implications of the Self-Incrimination Clause: Are Environmental Managers Risking Criminal Liability? 5 Seton Hall Constitutional Law J. 967 (1995).
8. S. Rep. No. 94-717, 94th Cong., 2d Sess. 40 (1976), reprinted in 6A Legislature History of The Clean Air Act Amendments of 1977, No. 95-16, 4701, 4741 (1978).
9. *See*, e.g., Memorandum of Understanding between The United States Department of Labor Occupational Safety and Health Administration and The United States Chemical Safety And Hazard Investigation Board on Chemical Incident Investigations
10. *See*, 29 CFR 1903.14(a) (OSHA citation must issue within 6 months of accident)
11. 29 CFR 1910.119(m)(1)
12. For examples of forms which can be used for these purposes, *see*, Brewer, The Ethics Of Internal Investigations In Kentucky And Ohio, 27 N. Ky. L. Rev. 721 (2000); Martin, Conducting A Successful Internal Environmental Investigation, 6 Env'tl. Law. 673 (2000).
13. *See e.g.*, Alaska R. Evid. 503(a)(2) (utilizing control group test); *see generally*, Hamilton, Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege, 1997 Ann. Sur. Am. L. 629; Note, Attorney-Client Privilege For Corporate Clients: The Control Group Test, 84 Harv. L. Rev. 424 (1970); *see generally*, Mr. Dore, Law of Toxic Torts: Litigation - Defense - Insurance §24 (West Group 2002)
14. Annot, Determination Of Whether A Communication Is From A Corporate Client For Purposes Of The Attorney-Client Privilege - - Modern Cases, 26 A.L.R. 5th 628 (2000); Gergacz, Attorney-Corporate Client Privilege: Cases Applying Upjohn, Waiver, Crime-Fraud Exception, And Related Issues, 38 Bus. Law. 1653 (1983); Waldman, Beyond Upjohn: The Attorney-Client Privilege In The Corporate Context, 28 Wm. & Mary L. Rev. 473 (1987)
15. Gallagher, Legal And Professional Responsibility Of Corporate Counsel To Employees During An Internal Investigation For Corporate Misconduct, 6 Corp. L. Rev. 3 (1983); Jonas, Who Is The Client?: The Corporate Lawyer's Dilemma, 39 Hastings L.J. 617 (1988); *see*, *United States v. Keplinger*, 776 F.2d 678 (7th Cir. 1985) (interviews with

- corporate employees used in criminal proceedings against those employees). *But see*, *Dalrymple v. National Bank & Trust Co.*, 615 F. Supp. 979 (W.D. Mich. 1985); *Professional Serv. Indus., Inc. v. Kimbrell*, 758 F. Supp. 676 (D. Kan. 1991); *See generally*, Gallagher, Legal and Professional Responsibility of Corporate Counsel to Employees during an Internal Investigation for Corporate Misconduct, 6 Corp. L. Rev. 3, 23 (1983).
16. *See generally*, Monteleone and Conca, Directors and Officers Indemnification and Liability Insurance: An Overview of Legal and Practical Issues 51 Bus. Law. 573 (1996).
 17. Robert A. Bregman, International Risk Management Institutes' Executive Liability Insurance Guide (IRMA 1998).
 18. Palaez, Alfred S. 1995. *Caveat Spoliator*. Second Annual Conference on Defending Against and Mitigating Incidents Involving Injury or Property Damage in the Natural and LP Gas Industries, Oct. 16-18. Houston, TX: Institute of Gas Technology.
 19. Kowal, When Unexpected Government Agents Drop In: Responding To Requests For Immediate Interviews, 54 Food Drug L.J.93 (1999); Davenport, Environmental Search Warrants: How To Prepare And How To Respond, Env'tl. Counselor 15 (August 15, 1993);
 20. In that regard, counsel for executives should be particularly alert to issues relating to the examination of computers. *See*, Federal Guidelines for Searching and Seizing Computers (U.S. Department of Justice Website).
 21. *See, generally*, Michael Dore, *Be Ready to Respond To Critical Incidents*, 165 N.J.L.J. 852 (Sept. 3, 2001).