Corporate Criminal Liability: A Treatise on the Criminal Liability of Corporations, Their Officers and Agents by Kathleen F. Brickey

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Book Review


Having taught criminal law for more than fifteen years, I have tried regularly to introduce my students to the concept of corporate criminal liability. I vividly recall searching for materials to provide the students with an understanding of the mere basics of this important area of the law. After reading Corporate Criminal Liability, I easily understand why I was never completely satisfied with the fruits of my labor. I need search no further for materials on this interesting subject.

In the preface to this fine treatise, the author provides an excuse for my failures and an explanation of the forces that motivated her to undertake such an imposing project. Prior to the political scandals of the 1970's, she explains, legal scholars had done little to document or outline the relationship between corporate crime and legal principles. "No systematic treatment of the application of general principles of criminal law to corporations and their officers had yet been undertaken." Professor Brickey has superbly remedied this shortcoming.

Published in late 1984, Corporate Criminal Liability is a well written, fully documented, readable and comprehensive treatment of criminal law in the corporate context. Divided into two major parts, the treatise first develops the general principles of criminal law applicable to the corporate entity and its officers and agents. The second half contains detailed discussion of significant federal statutes implicating corporations and their employees in criminal liability. Law students and teachers will find great value in the first part of the treatise, while judges and lawyers working daily in the trenches of criminal law will benefit enormously from the careful analysis of statutory provisions in part two.

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The first two chapters are introductory, but offer some of the most interesting reading in the whole treatise. Opening with a brief portrayal of some well-known illegal corporate activity of the 1970's, the author provides in chapter one a general description of the nature of corporate criminal liability. Chapter two provides historical context and tracks the development of corporate criminal liability through the law of nuisance, malfeasance, and nonfeasance, and into the ultimate realm of crimes involving intent.

Chapters three and four deal with the subject of imputing criminal liability to a corporation on the basis of acts done by its officers and agents. Chapter three focuses on imputing liability where only the conduct, and not the state of mind, of corporate personnel need be imputed to the corporation because the crime involved is one without an element of intent. Professor Brickey deals with the question of liability for acts committed by agents and employees who are not a part of top management, provides a good description of the differences between the Model Penal Code and the federal law on this point, and follows this with a discussion of liability for acts committed contrary to express instructions of high level corporate officials. Chapter four builds on this discussion while treating a corporation's imputed liability when criminal intent is an element of the crime. The key to liability—"intent to benefit the corporation"—is described in the first part of the chapter and developed more completely in later sections.

The exposure of corporate managers and supervisors to criminal liability is the subject of chapter five. Traditionally, an agent who commits criminal acts while acting on a corporation's behalf is no less personally responsible for his crimes than one who has acted on his own behalf. More recently, however, the law has imputed criminal liability to corporate managers for acts done by others in the corporation. The author focuses most of her attention on this latter subject in this important chapter.

She provides some excellent historical background for this type of liability, traces its origin to the doctrine of respondeat superior, and applies the common law doctrine of parties to corporate managers who participate indirectly in criminal acts. She concludes the discussion with a comprehensive treatment of the exposure of corporate managers and officers to the risk of criminal conviction under an expanding list of strict liability
statutes. In this chapter, which concludes the general part of the treatise, there is a wealth of materials that every lawyer who counsels corporate officials and managers as to their obligations under the law ought to read.

Conspiracy, one of criminal law's most complex and fascinating concepts, is the subject of chapter six. The discussion centers on federal law, the general conspiracy statute, and the Sherman Act, but the author's discussion and analysis of the fundamentals of conspiracy extend far beyond the parameters of the federal law. There is comprehensive treatment of the important components of a criminal conspiracy: "agreement," "intent to promote the underlying offense," "overt act," "withdrawal," etc. Vicarious liability of conspirators for offenses committed pursuant to a conspiracy is covered fully, and there is an excellent discussion of the Wharton Rule and its role in modern conspiracy law. In all of these areas, the author does a good job of identifying the cases deserving special attention, and she continues to document her analysis impressively. This is particularly true with respect to the treatment of "intra-enterprise conspiracies" under section 1 of the Sherman Act, a matter that has frequently caught the eye of the Supreme Court. Professor Brickey commences her discussion of this issue with United States v. General Motors Corporation, \(^2\) a case in which the Seventh Circuit held that parent and subsidiary corporations can conspire with each other for purposes of the Sherman Act. She then reviews the important Supreme Court opinions rendered since this early decision, and ends the chapter with a discussion of the possibility of Sherman Act liability for conspiracy between a corporation and its unincorporated divisions or its own officers and agents. Chapter six is a good effort, clearly one of the author's best.

Chapter seven exclusively covers the Racketeer Influenced and Corrupt Organizations Act (RICO), the federal law's response to the infiltration of business by members of organized crime. Professor Brickey devotes in excess of 125 pages of her treatise to this statute—a fair indication of RICO's complexity and importance. In so doing, Professor Brickey makes a valuable

\(^2\) 121 F.2d 376 (7th Cir.), cert. denied, 314 U.S. 618 (1941).
contribution to an area continuing to suffer from a lack of scholarly development.

It is very difficult to provide a simple description of the principal offense defined by RICO. But essentially, the statute makes it unlawful for anyone associated with an enterprise affecting interstate commerce to conduct or participate in the affairs of that enterprise through a pattern of racketeering activity. The "enterprise" requirement has generated difficult issues for the federal courts. Must it be shown that the racketeering activity proscribed by RICO advances the affairs of the "enterprise" or is some lesser nexus sufficient for conviction? May an entity simultaneously be both a RICO "enterprise" and a RICO defendant? Does the statute apply when the "enterprise" is a purely illegitimate entity, a public entity, or an association of corporations? The treatment of this complex element of RICO is very comprehensive, well documented, and well done. The requirement of pattern, in "pattern of racketeering activity," is a concept new to the criminal law. It too is given considerable attention in chapter seven.

Chapter eight covers criminal violations of the federal securities law and mail fraud. There is a lot in this chapter for the practitioner—an overview of the federal securities law that is brief, precise, and easy to follow; a complete description of how courts have used the term "willfulness" in securities cases; a good analysis of the difference between "deliberate avoidance of knowledge" and "negligent failure to know"; and some treatment of Section 17(a) of the 1933 Securities Act and Rule 10b-5 of the 1934 Securities Act. In the securities law discussion, there is treatment of all of the major cases and an identification of the issues still to be resolved by the courts. In the section on mail fraud, the author describes in detail the elements of the offense that federal prosecutors use most frequently to reach fraudulent schemes. Whether looking for a basic understanding of the offense, or a list of authorities to support a position, a lawyer with a mail fraud case would find the materials in this chapter helpful.

Chapters nine and ten deal with federal statutes not confronted often by the typical criminal law practitioner. The Foreign Corrupt Practices Act, which has not been the subject of analysis in a single reported case, is treated in chapter nine. The author carefully analyzes the elements of the statute and attaches
as appendices some materials crucial to the statute’s application. Sensitive domestic payments, principally those made in violation of the Federal Election Campaign Act, are the subject of consideration in chapter ten.

A significant part of chapter eleven is devoted to the major tax crimes. The author extensively treats “willfullness,” the key element of tax offenses. The offense of attempt to evade or defeat a tax is considered and distinguished from common law criminal attempt, and there is a very helpful discussion of the various methods prosecutors use to prove tax fraud. In separate parts of chapter eleven, the author deals with bribes, kickbacks, other illegal payments, and The Bank Secrecy Act. Chapter twelve provides a comprehensive discussion of the obstruction of justice statute designed to protect the integrity of judicial proceedings, treats a parallel statute that applies to other types of governmental proceedings, and concludes with a description of the Victim and Witness Protection Act of 1982. The last chapter in the book covers the federal statutes on perjury and false statements.

Perhaps only by writing a book can one come truly to appreciate the kind of effort needed to complete a treatise of the magnitude and quality of Corporate Criminal Liability. No doubt there are some important issues and topics not addressed in Professor Brickey’s three volumes. But it is difficult to imagine a lawyer with a corporate criminal law problem turning to the treatise for help and coming up empty, for the coverage of Corporate Criminal Liability is very impressive.

The greatest usefulness of the treatise is to the practitioner. From beginning to end, the author’s scholarship is comprehensive, informative, and well documented, all characteristic of the best volumes found in the working-lawyer’s library. At the same time, however, the analytical, incisive, reflective, and stimulating nature of the work extends its usefulness beyond the practice of law and into the classroom. Professor Brickey has made a contribution to the literature on criminal law worthy of the attention of anyone having an interest in corporate criminal liability.

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