



**RESPONSIBLE CORPORATE OFFICER DOCTRINE - CAN SERBIA LEARN FROM
THE EXPERIENCE OF THE UNITED STATES?**

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Abstract

In general, this thesis focuses on strict criminal liability of high corporate executives, established under principles of responsible corporate officer doctrine (RCO doctrine) in US legal system. More specifically, through comparative method, it examines grounds for, and possible benefits of application of the doctrine, in Serbian legal system. Under US law, corporate criminal liability is based on the *respondeat superior* doctrine, meaning that it will be liable for criminal actions of its employees and agents, undertaken for benefits of corporation and within the scope of their employment.¹ As an exception to this general rule, the RCO doctrine justifies imposing criminal liability to the corporate officers even not personally participated in wrongful transaction or aware of the wrongdoing, simply holding them liable on the basis of their responsible position in legal entity, and power to prevent wrongdoing. On the other hand, Serbian law establishes criminal liability of legal entities exclusively on culpability of their responsible persons. This means that corporation will be held liable if, on one hand, responsible person actively participates in criminal activity or, on another, omits to exercise due supervision over his subordinates. Having in mind open grounds for abuses, and unjustified consequences of impossibility to hold corporation liable if omission of supervision has not been proved, but actions were still committed for the benefit of corporation, this thesis aims to show that in order to prevent all negative consequences that this scenario could cause, introducing of strict criminal liability for corporate officer under RCO doctrine, would be – an appropriate solution.

¹ Doctrine of *respondeat superior* is stipulated in Restatement Third of Agency § 2.04 (2006), For criminal liability of corporations under *respondeat superior* see *United States v. One Parcel of Land*, 965 f.2d 311 (7th Cir. 1992)

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List of Abbreviations

CAA	Clean Air Act
CWA	Clean Water Act
DOJ	Department of Justice
FDA	Food and Drug Administration
FDCA	Food, Drugs and Cosmetics Act
OIG	Office of Inspector General
RCO	Responsible Corporate Officer

Introduction

Traditionally, corporate business forms tend to limit individual liability. Namely, under basic principles of criminal law, the main requirement for existence of criminal liability assumes existence of *mens rea* (guilty mind)². However, in recent years, in US, it has been doing just the opposite for some corporate executives. They have been liable without having actual knowledge of the corporate wrongdoing. The approach which, on one hand, departs from traditional criminal law, and at same time, from criminal liability of corporations, is in US legal system established under principles of – responsible corporate officer doctrine.

Being a unique creation of US law, which has not been recognized under legal systems of most other countries, the doctrine of responsible corporate officer deserves special attention. Namely, under RCO doctrine, a corporate officer is liable for the wrongful actions of his subordinates, even not personally involved, or aware of an unlawful action. This is due to the fact that corporate officers “standing in responsible relation to a public danger”³ and since they “had, by reason of [their] position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, but ... failed to do so.”⁴ In other words, under RCO doctrine, if the corporation is involved in wrongful action, an individual who is in position of authorization⁵, could be subject to prosecution for misconduct of others, even when there is no evidence that the corporate officer has any knowledge about the action at stake. Therefore, the liability of the officer is based solely on his position⁶ in the company, regardless of his intention,

² A state of mind reflecting an intent of a person to commit a criminal act

³ *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).

⁴ *United States v. Park*, 420 U.S. 658, 673-674 (1975).

⁵ Joseph E. Cole, *Environmental Criminal Liability: What Federal Officials Know (Or Should Know) Can Hurt Them*, 54 A.F. L. Rev. 1, 1 (2004)

⁶ Clark E. Michael, *The Responsible Corporate Officer Doctrine, A Re-emergent Threat to General Counsel and Corporate Officers*, 14 J. Healthcare Compliance 5, 5 (2012)

knowledge or personal involvement.⁷ Although the doctrine has been extended to civil liability⁸, this thesis is specifically devoted to criminal liability under it.

From its early beginnings the doctrine has been controversial. The first question which arose was connected to nature and scope of the doctrine. Most authors argue⁹ that the doctrine represents a type of vicarious liability, or strict liability that arises under agency principles of common law's doctrine of *respondeat superior*, meaning that a superior is responsible for the actions of his subordinates. Under US law, the doctrine of *respondeat superior* is defined in the Restatement Third of Agency as "employer liability for the acts of its employees which fall under the scope of employment or in furtherance of the employer's interest".¹⁰

On the other hand, there are authors who advocate the opposite attitude. Namely, they claim that RCO doctrine should not be viewed as vicarious liability, but rather as affirmative duty of corporate officers to prevent employees of the company to commit violation.¹¹ In other words, the proponents of this attitude see RCO as an alternative theory – theory of negligent retention or supervision which also may allow a plaintiff to file a claim against an employer.¹² Those arguments start from viewpoint that holding individual liable for criminal action of another is

⁷ Kathleen F. Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses-Another View*, 35 Vand. L. Rev. 1337, 1363 (1984)

⁸ Daniel R. Levinson, Inspector General Of The Department Of Health & Human Services, Office Of Inspector Gen., Highlights Of The Keynote Address, At The Healthcare Compliance Association Annual Compliance Institute (2010) available at <https://oig.hhs.gov/testimony/docs/2010/HCCAIGKeynoteSummary.pdf> (accessed on 22 March 2018)

⁹ Nicholas T. Schnell, *Beyond All Bounds of Civility: An Analysis of Administrative Sanctions Against Responsible Corporate Officers*, 42 J.Corp.L 711, 718

¹⁰ Restatement (Third) of Agency, *supra* note 1

¹¹ Aagard, *A Fresh Look at the Responsible Relation Doctrine*, 96 J. Crim. L. and Criminology 1245 (2006); Martin Petrin, *Circumscribing the "Prosecutor's Ticket to Tag the Elite"—A Critique of the Responsible Corporate Officer Doctrine*, 84 Temple L. Rev. 283, 305 (2012); *United States v. DeCoster*, 828 F.3d 626 (2016)

¹² Erin M. Davis, *The Doctrine of Respondeat Superior: An Application to Employers' Liability for the Computer or Internet Crimes Committed by Their Employees*, 12 Alb. L.J. Sci. & Tech. 683, 714 (2002)

“inconsistent with retributive blame”¹³, unless it is himself to some extent personally liable for actions.

However, this thesis argues that this distinction seems irrelevant and that the RCO doctrine goes somewhere in between the two approaches. Simply put, the doctrine could be viewed as liability of responsible corporate executive for his own omissions and failures, but as type of strict liability for omissions and failures, meaning that any criminal activity of corporation directly assumes liability of manager who stands in responsible relation to action, i.e. directly assumes his omissions and failures.

The RCO doctrine arose in US case law in first half of twentieth century. Namely, the Supreme Court of United States in its decisions in two landmark cases, *United States v Dotterweich*¹⁴ and *United States v Park*¹⁵ established strict liability for corporate officers of a corporation, in certain limited cases. The practical importance of the doctrine has increased over the years and it seems that its growth will continue in future. In 2016, Supreme Court denied petition for writ of certiorari in case of *United States v DeCoster*¹⁶, where the defendants asked the Court to review the issue of imprisonment of supervisory officer on the basis of strict liability due to constitutional violations of due process. The Court rejected the argument, holding that RCO represents strict liability not for the actions of others, but for its own failure to be aware of any wrongful activity and consequently to prevent violation.

Being a useful device, the RCO doctrine is mostly used in public welfare crimes when justifying that the public has a right to expect higher responsibility and stricter liability from those who

¹³ Kenneth W. Simons, *When is Strict Criminal Liability Just*, 87 J. Crim. L. & Criminology 1075, 1088 (1996-1997)

¹⁴ *United States v. Dotterweich*, *supra* note 3

¹⁵ *United States v. Park*, *supra* note 4

¹⁶ *United States v. DeCoster*, 828 F.3d 626 (2016)

voluntarily takes authority position in the corporation. It resolves a deadlock in holding corporation liable when there is no identifiable culpable individual, by imposing liability on corporate executives.¹⁷ Hence, the main purpose of this thesis is to examine RCO justifications, and to determine possible benefits of its application. Moreover, through a comparative method it focuses on the question of what Serbia could possibly learn from US experience and what positive changes application of the doctrine could bring.

This is particularly important since the main differences between two legal systems come from the fact that under US law, corporate officer, for instance, in pharmaceutical company will be held liable if drugs distributed by his subordinates do not meet the required conditions under the respective law, even if he does not have any knowledge that illegal action was committed and did not participate in the wrongful action. On the other hand, in order to be criminally liable under Serbian law, the corporate officer in the company has to commit the crime personally or to be explicitly proven that he omitted supervision of the actions for which he is authorized to. Basically, there has to exist and to be proved *mens rea*. This means that, in general, under US law, if there are grounds for RCO doctrine to be applied, the corporate officer, as a responsible person of the company A will be held liable for the exhibited behavior of his company, while in Serbia, director of the company A will be prosecuted only under conditions of existence of his personal involvement in the wrongful action, or awareness of wrongful action, but still failure to exercise due supervision over his subordinates.

¹⁷ James D. Cox & Thomas Lee Hazen, *Treatise on the Law of Corporations*, Harvard Law Review 8, 22 (2014).

The first chapter provides an overview on background and basic principles of RCO doctrine in the US. More precisely, the thesis focuses on nature of the doctrine, its origins, development and scope of application towards individuals. Finally, it examines RCO justifications. The second chapter aims to provide the reader with the broader picture of the application of the RCO doctrine in special industries, focusing on area connected with public welfare, in particular to healthcare and environmental law. Moreover, it is analyzing whether there is possibility for doctrine to be extended further, in particular, outside public welfare offenses. The third chapter examines the corporate criminal liability under Serbian law, his nature, understanding and specifically, position, responsibility and liability of the company's directors and other officers as responsible persons. Lastly, the fourth chapter presents a comparative analysis of the two jurisdictions and investigate whether there are grounds for Serbia to recognize the doctrine, in which way it should be done, and how possibly business of the corporation in Serbia could prosper from the said.

CHAPTER I- Background of RCO doctrine under US law

Principles of criminal corporate liability in the United States, under which corporation is liable for actions of its employees performed for corporation's benefit,¹⁸ appear to lead to impossibility to respond properly to a corporate crime. Holding liable only employees who perform some criminal activity, even though corporation will be formally liable, seems to create situation that particular wrongdoing cannot at all be viewed as wrongful action of corporation. The RCO doctrine recognizes necessity to hold corporate officer directly liable for every corporation crime connected to public welfare. It seems reasonable to, on the basis of corporate officer position, as well his as ability to monitor actions of his subordinates and therefore prevent any possible illegal activity - hold him liable.

Therefore, in order to understand nature, scope and sole purpose of RCO doctrine, it should be started from its early beginnings, evaluating basic principles on which it is established, its origins and subsequent development. Moreover, analyzing its main feature and tendencies to be further expanded in the upcoming years, this thesis emphasizes its rationale and justifications on which basis it could further be transplanted to legal system of another country.

1.1. What is understand by RCO doctrine

Despite some differences between federal and state law regarding criminal liability of corporation, in the US, corporation is criminally liable for an offense "its employees or agents commit in its

¹⁸ *Restatement (Third) of Agency, supra note 1*

interest”.¹⁹ Generally speaking, under US law when corporation is held liable for actions of its employees while they are acting under the scope of their employment and on behalf of corporations as their principals, these actions will not invoke liability of the corporate officer as long as he does not personally participate in the criminal act. In other words, when there is personal implied or express authorization, there cannot be any defense or denial that officer committed crime in the name of the corporation. Under traditional law, the director, manager or other corporate officer will be personally liable if there is sort of individual involvement, direction or permission of the act constituting actions that lead to criminal offense. The aforementioned specifically emphasis the fundamentality of agency relations: the officer as principal can only be held liable for criminal actions of his subordinate who was acting as his agent.²⁰

The RCO doctrine departs from basic principles of tort and criminal law. It could be said that doctrine does not rely on the principles of the traditional liability, but rather build its own theory of liability. As the opposite of the traditional view of establishing personal, individual liability under criminal and tort law, under RCO, there is no need for corporate officer to be personally involved or to instruct and authorize wrongful actions. Being viewed as the “crime of doing nothing”²¹, since it is in particular based on person’s position in an entity, the doctrine is a fruitful ground for imposing liability, no matter the fact whether corporate officer directly participated in action, had any culpable intent, or was in any sense aware of wrongful activity.²² Hence, certainly, the doctrine is by itself very unusual. First, in broader sense, it abolishes requirement of connection

¹⁹Charles Doyle, *Corporate Criminal Liability: An Overview of Federal Law*, available at <https://fas.org/sgp/crs/misc/R43293.pdf> (accessed 02 April 2018)

²⁰ Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689, 702-708 (1930)

²¹ 42 U.S.C. §132

²²Clark E. Michael, *The Responsible Corporate Officer Doctrine, A Re-emergent Threat to General Counsel and Corporate Officers*, 14 J. Healthcare Compliance 5,5 (2012)

between individual intention and wrongdoing. Therefore, RCO doctrine is used to, beside individuals who participated in action, prosecute ones who did not. This is justified on the basis that corporate officer had authority to prevent crime, but fail to do so.

Even though the doctrine resembles of general liability under tort law for omission and failure, the RCO appears to be much stricter. Namely, doctrine omits requirements of culpability and causality, permitting for stricter liability, to some extent jeopardizing the delegation of tasks through employees on different levels in the company. In some situation it may lead to an illogical situation that corporate officers do not have delegable authorities. When it comes to directions of superior to its subordinates, it has to be mentioned that it is highly difficult to prove that officer gave any authorization to the wrongful acts of act of a subordinate, given the fact that it is highly unlikely that there are documents proving such authorization. It is very often that corporate officer who has powerful position in the company falsely creates situation that he did not give any instruction and that he was not aware of any wrongdoing of the agents of the corporations.

There are of course, cases where knowing authorization could be inferred from circumstances of business operation of the corporation. Those cases, are connected with small and closely held corporations where the authorization of all actions of corporations is almost always present.²³ Namely, in this kind of corporations, corporate officer usually supervises and is aware of all actions of the corporation, i.e. corporations' employees. Thus, there is strong justification that the criminal act has been conducted under permission of the authorized person or his knowledge.

For instance, in *United States v. Andreadis*, corporate officer who held dominate position in closely-held corporation was prosecuted on the basis of mail and wire crime which was connected

²³ Amiad Kushner, *Applying the Responsible Corporate Officer Doctrine outside the Public Welfare Context*, 93 Journal of Criminal Law and Criminology 2, 681-712 at 686 (2003)

to fraudulent weight loss pills selling on the market.²⁴ The fact was that pills advertisement had “extravagant and scientifically false claims”.²⁵ of which corporate officer was aware that are not accurate, due to the constantly protestations by the government and others officials. However, there was not sufficient proof for prosecution that the corporate officer made any instructions to the advertising agency to dispel the false claims. Nevertheless, the Court allowed the interference of intended authorization by the corporate officer, due to the fact that he approved advertising strategy, and even did the interviews with customers who claimed the weight loss by using pills. Hence, the prevailing factor in this decision was that officer actually had control over the marketing plan which was not in accordance with law, notwithstanding the fact that independent agency made alone all advertisements.

Therefore, generally speaking, in small and closely-held corporation it is generally easy to prove that there is officer authorization of any act, due to the fact that officers are involved in almost every decision of the company. Contrary, in large corporation this situation is almost impossible, since there is a big number of officers who have authority over particular activity, there for some of them could be immune to liability. The advantage of RCO doctrine is however, that is “far less limited by the size of the corporation and the fact whether officer has more or less close supervisory role”.²⁶ RCO doctrine allows the courts to find corporate officer liable for the acts of his subordinate, despite the lack of the evidence of the officer’s personal involvement in the action. This is because RCO recognizes that evidence of such participation may “be unavailable or insufficient”²⁷. Hence, when there is a RCO applied, the liability will be assigned to the corporate

²⁴ *United States v. Andreadis*, 366 F.2d 423, 277 (1996);

²⁵ *Id.* at 427

²⁶ Charles R. Nesson, *Developments in the Law--Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, at 1249-50 (1979)

²⁷ Kushner, *supra* note 23 at 690

officer, notwithstanding the fact that there is no proof of his personal involvement in such actions or any knowledge that action has been taken.

1.2.Origins of RCO doctrine

The first roots of the fundamental principles on which RCO doctrine rests could be found even in 1922, in *United States v. Balint case*²⁸, decided by Supreme Court of United States. Namely, in this case, the corporate officers were held liable for selling drug derivatives which had not been followed with proper form required under this procedure. The defendants claimed that indictment was defective since there was no any evidence that they had any actual knowledge of the facts which had led to violation. The Court confirmed the conviction on the basis of regulatory penalties and on the notion that “social betterment cannot be treated as real criminal penalties which punish real immoral conduct”.²⁹ In other words, the Court held that imposition of strict liability was not violation of the due process clauses because public health and welfare prevail over the injustice of innocent seller of narcotic.

However, the RCO doctrine has been finally established by the Supreme Court of the United States in two landmark cases: *United States v Dotterweich*³⁰ and *United States v Park*³¹, which are elaborated and discuss further below. Basically, the beginning of the RCO doctrine started with interpretation of FDCA³² from 1938 and public welfare crimes in the given cases. The FDCA prohibits individuals and corporations from introducing mislabeled and contaminated food or drugs into interstate trade.³³

²⁸ *United States v. Balint*, 258 U.S. 250, 2000 (1922)

²⁹ *Id.*

³⁰ *United States v. Dotterweich*, *supra* note 3

³¹ *United States v. Park*, *supra* note 3

³² Food Drugs and Cosmetics Act, 21. U.S.C. (2015)

³³ 21 U.S.C. §301.

1.2.1. Dotterweich

In *United States v. Dotterweich*, the Supreme Court of the United States held a pharmaceutical company's president liable for the introduction of mislabeled drugs into interstate commerce.³⁴ The Court found that the defendant, as at that time president of the company, was "standing in responsible relation to a public danger."³⁵ The Court in this case found, that while a corporation may violate the FDCA, it is also a person who shares responsibility that may be prosecuted and held liable under this statute. Court further argued that acts of corporation can be viewed only through acts of individuals, hence, it is appropriate to hold individuals liable together with corporation. Regarding particular bond between individual and corporation which need to be present, in order for individual to be held liable for corporation's act, the Court reasoned that it should be left to courts in every particular case to determine. Moreover, the Court stated that it would be unreasonable to set out any formula for this since "the good sense of the prosecutors, the wise guidance of trial judges, and the ultimate judgment of the juries must be trusted."³⁶

In other words, the Court held Dotterweich liable, despite the lack of evidence that he had any knowledge or that he was at any way aware of the mislabeling. The Court in this case strongly argued that FDCA has been enacted to protect the public from certain health hazards, or simply put public welfare protection outweighed the need to find a direct connection between this executive's actions and the corporation's transgressions. The Court concluded: "Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing".³⁷

³⁴ *United States v. Dotterweich*, *supra* note 3

³⁵ *Id.* at 285

³⁶ *Id.*

³⁷ *Id.* at 280-281

Therefore, in this case, *Dotterweich* was prosecuted on the basis on strict liability, meaning that Court found defendant liable even he did not participate in the illegal transaction, and did not have knowledge that drugs were mislabeled. Nevertheless, the Court justified this result by explaining that the "circumstances of modern industrialism could endanger the health and well-being of defenseless consumers"³⁸, and therefore, justified criminal liability of "otherwise innocent corporate officers in responsible positions."³⁹ Importantly, absence of knowledge is nevertheless sufficient for liability under statute connected with public welfare. Hence, RCO doctrine is by this reasoning connected with rationale of public welfare, whereby protection of public health and negative consequences that innocent people could face justified imposing strict liability, or departing from usual principles of liability.⁴⁰

1.2.2. Park

Following three decades later, in 1975, the case which factual background resembles on the *Dotterweich* case, was argued before the Supreme Court of the United States. This case also included violations of FDCA, under which the corporation operating food supply and its high corporation officer were liable for storing foods under the unsafe conditions.

However, the charges and allegations against those two corporate officials were different. Namely, while *Dotterweich* did not contaminate the drugs that was under care of his company, in Park case prosecutors claimed that Park was aware and that he actually permitted prosecutors to be infected with animals and allow contamination of stored food.⁴¹ Actually, he was aware of unsafe conditions that could cause harm, but he did not do necessary to cure defect. Here, he chose not to

³⁸ *Id.*

³⁹ *Id.* (citing *Balint case*, see *supra* note 28)

⁴⁰ Kushner, *supra* note 23 at 692

⁴¹ *United States v Park*, *supra* note 3

personally undertake any action to eliminate harmful consequences, but he assigned his responsibility to his subordinate, the manager who was in charge for that particular warehouse.

Here, the majority argued that government did not need to prove any evidence that Park as corporate officer had any knowledge as long as the person who was prosecuted “by reason of his position in corporation he had responsibility and authority to prevent, in first instance, or promptly to correct, the violation complained of... and failed to do so”⁴² In its reasoning, Fifth Circuit Court held that trial court had made erroneous mistakes in its decision and this court found “to hold Park criminally liable for the wrongful actions of each and every one of these employees, by merely showing his position with the corporation is manifestly unjust, unfair and beyond the realm of reasonableness.”⁴³ However, the Supreme Court again confirmed the holding of the trial court, saying that “duty of responsible corporate officers is to exercise the highest standard of foresight and vigilance,”⁴⁴ and in case of breaching this duty, it leads to natural consequences of “blameworthiness, guilt and culpability.”⁴⁵

Therefore, the Supreme Court of the US revisited the RCO doctrine in *Park* by strongly pointed out the that personal liability of corporate executive could be based almost in its entirety on his or her position as responsible corporate officer. The Courts extended RCO’s scope arguing that instead “standing in responsible relation to a public danger,”⁴⁶ RCO should refer to personal liability to every officer who have “responsibility and authority either to prevent. . . or promptly to correct, the violation complained of.”⁴⁷ Moreover, in cases after *Park*, the RCO doctrine has

⁴² *Id.* at 673-674

⁴³ *United States v. John R. Park*, 499 F.2d 839, par 6 (4th Cir. 1974)

⁴⁴ *United States v. Park* *supra* note 4 at 673

⁴⁵ *Id.*

⁴⁶ *Id.* at 280-281

⁴⁷ *Id.* at 421

been viewed as principle on which basis executives can be punished, if they have authority and power to stop violation but they simply chose not to. This is generally, because the main duty of corporate officer is to properly run corporation, which main aim should not be pursuing the profit above everything, but compliance with standards of public welfare.

What also needs to be mentioned, is that *Park case* introduced significant limitation of the application of RCO doctrine – the defense of impossibility. The Court emphasized that undertaking of corporate executives “does not require which is objectively impossible”.⁴⁸ Moreover, the Court remarked that culpability of corporate officer could not be based only on his position in the company, but rather prosecution must prove that he had “responsible relation to the situation.”⁴⁹ In other words, high corporate manager will not be penalized for actions of any employee of the corporation, which was not under his control or supervision. He will be held liable only if corporate position, and relation to act at stake, allow him to affect the operation and prevent harmful effects.

1.3.Expansions of the RCO doctrine

From the decision in *Dotterweich* case, the doctrine has significantly grown. For instance, in the period prior to *Park*, the RCO doctrine was applied to cases connected to public welfare not including environmental cases. Following the success of the RCO doctrine in US case law, legislatures added principles of RCO doctrine into the liability provisions of environmental statutes, both on federal and state level, as it further elaborated in section 2.1.1. below. For instance, on the federal level, Clean Water Act⁵⁰ and the Clean Air Act⁵¹ in their amendments

⁴⁸ *Id.* at 674

⁴⁹ *Id.*

⁵⁰ Clean Water Act, 33 U.S.C (1977)

⁵¹ Clean Air Act, 42 U.S.C. (1963)

when regulating criminal penalties include "any responsible corporate officer[s]" as to define who can be prosecuted under those.

Beside environmental law, the most significant area for application of the doctrine is in healthcare and pharmaceuticals industry, where defendants are pleaded guilty for violations under FDCA. The RCO doctrine is viewed as useful tool for noncompliance in fraud healthcare area. The main argument of prosecutors is that imposing this strict liability on corporate officers will increase compliance with federal healthcare law. Importantly, FDCA sets strict liability in way that the only fact that matters is that in moment when wrongful activity occurred defendant was responsible corporate officer.⁵²

Importantly, it should be stated that RCO doctrine is applied to different types of both state and federal statutes. The key element is that those statutes are welfare oriented.⁵³ Following the years of *Dotterweich* and *Park*, the courts permitted expansion of RCO doctrine to other public welfare laws, such as sales tax violations⁵⁴ and liability under the Sarbanes-Oxley Act⁵⁵ and others.⁵⁶ Thus, in those years, the courts gradually accepted the strict liability of the responsible persons in the company, they actually "adopted the idea of liability based on a determination of a corporate officer's responsible share in or responsible relation to a statutory violation".⁵⁷ Even though the Supreme Court of the United States has never used the term responsible corporate officer doctrine,

⁵² Michael W. Peregrine, *The "Responsible Corporate Officer Doctrine" Survives to Perplex Corporate Boards* (2017) available at <https://corpgov.law.harvard.edu/2017/07/05/the-responsible-corporate-officer-doctrine-survives-to-perplex-corporate-boards/> (accessed on 10 Decemeber 2017)

⁵³ *United States v. Wise*, 370 U.S. 405 (1962); *Sec. Exch. Comm'n v. Brookstreet Sec. Corp.*, 584 Fed.Appx. 689 (2014); *United States v. Iverson*, 162 F.3d 1015 (1998); *People v. Roscoe*, *supra* note 57

⁵⁴ *State v. Longstreet*, 536 S.W.2d 185, 188–89 (1976).

⁵⁵ *SEC v. Jenkins*, 718 F. Supp. 2d 1070 (D. Ariz. 2010)

⁵⁶ For further analysis and compilation of relevant case law see Randy J. Sutton, *Annotation Responsible Corporate Officer" Doctrine or "Responsible Relationship" of Corporate Officer to Corporate Violation of Law*, 119 A.L.R. 5th 205 (2004).

⁵⁷ Petrin, *supra* note 11 at 289

the courts and the scholars developed the concept of strict liability of the responsible person under this term.

Following trends of modern industrialism, today, as this thesis aimed to show, there are justified grounds for expansion of RCO doctrine beyond public welfare crimes, in more different areas, especially the one relating to mortgage fraud⁵⁸.

Moreover, even that is not particularly subject of this thesis, courts started to apply the doctrine, not only to criminal but also civil liability. As it explained "the rationale for holding corporate officers responsible for acts of the corporation, is even more persuasive where only civil liability is involved, which at most would result in a monetary penalty,"⁵⁹ while others argue that, for the purpose of application of the RCO doctrine, the differentiation between criminal and civil liability is "irrelevant."⁶⁰ In recent times, there is also evolution in the penalties under the RCO doctrine. The few recent cases show that there is severe growth of the penalties. For instance, in *Synthes, Inc. v. Emerge Medical, Inc.*⁶¹, directors of the healthcare company were the first who faced the jail time after accepting guilty pleas.⁶²

⁵⁸ See section 2.2.1. below

⁵⁹ *Hodges X-Ray*, 759 F.2d 557 (1985); See also Valorie Cogswell, *Catching the Rabbit: The Past, Present, and Future of California's Approach to Finding Corporate Officers Civilly Liable under the Responsible Corporate Officer Doctrine*, 33 *Environ. L. & Pol'y J.* 343 (2010)

⁶⁰ *People v. Roscoe*, 87 Cal.Rptr.3d 187 (2008)

⁶¹ *Synthes, Inc. v. Emerge Medical, Inc.*, 25 F.Supp.3d 617 (2014)

⁶² For further details on this case please see section 2.1.2. below

1.4. The fundamental elements of the doctrine

Generally speaking, representing strict liability for the corporate officers, the doctrine adds them to possible defendants for statutory violations, beside legal entities who should be charged for the actions. Therefore, as departing not only from corporate criminal liability, but from fundamental principles of criminal law, which for existence of criminal offense, beside criminal activity (*actus reus*) requires mental state relating to guilty mind (*mens rea*), the doctrine has been widely criticized and impugned. In spite the fact that basic elements of doctrine are interpreted with great diversity, it often leads to its misuse and misunderstood. Therefore, it is of a particular importance to inspect under which circumstances it arose, meaning what conditions need to be fulfilled for its proper application.

1.4.1. Main conditions for application of the doctrine

As it is stated in previous paragraph, even being widely used, the precise conditions for applying the doctrine cannot not be easily defined and it is still difficult to find clear and consistent definition of those. Nevertheless, the basic test for the existence of the doctrine was established by the Court in *Re Dougherty* case.⁶³ Namely, the Court in *Dougherty* determined three basic elements which reflect the RCO doctrine:

“[t]he individual must be in a position of responsibility which allows the person to influence corporate policies or activities; (2) there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; and (3) the individual's actions or inactions facilitated the violations.”⁶⁴

⁶³ *In re Dougherty*, 563 Fed.Appx. 96 (2014)

⁶⁴ *Id.*

The first condition specifically states that the person who can be prosecuted and charged must have special position in the company, meaning that it stands in relation of responsible person towards the company. However, since there is no specifically established definition of employees, the doctrine leaves open floors to question who may be prosecuted under the doctrine. As *Dotterweich* Court recognized, “it would be inappropriate to define or even to indicate by way of illustration the class of employees which stand in such responsible relation. To attempt formula, it would be mischievous futility”.⁶⁵ Neither *Dotterweich* nor *Park* sets explicitly persons with specific positions in the company who can be prosecuted under the FDCA. However, what is important, that those cases certainly show that officers who hold the highest positions or persons who are at policy-making level in corporation “will be ultimately responsible for any violations during their watch, no matter whether they are involved in the violations in question or not”.⁶⁶ Other courts, as Court in *Dougherty*, for instance, argue that RCO can be applied to actors other than corporate officers, for example low-level employees.

Based on the above said, in examining who can be prosecuted under the RCO, it seems that there is no precise answer to this question. Therefore, it could be said that the RCO doctrine may refer to any employee having managing position in the entity. A managing employee is defined as every individual in corporation who holds a position of general manager, an executive, or a director, a business manager and every officer who conducts role of operational control or managerial control over the company or who in any manner perform any the day-to-day tasks of the same.⁶⁷ In 2013,

⁶⁵ *United States v Dotterweich* supra note 3 at 285

⁶⁶ Lautenbach, Elizabeth, *Is It Worth Saving? The Implications Of The Responsible Corporate Officer Doctrine Beyond Park*, *Law School Student Scholarship. Paper 813*, 9 (2015)

⁶⁷ Officer Inspector General, Guidance for Implementing Permissive Exclusion Authority Under Section 1128(b)(15) of the Social Security Act available at https://oig.hhs.gov/fraud/exclusions/files/permissive_excl_under_1128b15_10192010.pdf (accessed on 15 December 2017)

the FDA expanded how far the RCO doctrine can go to include third-party contractors (distributors) who are responsible for the manufacturers conduct.⁶⁸ Therefore, the RCO doctrine seems to be very widely present today.

Following the first requirement, the second requirement emphasizes corporate officer's position in the corporation, meaning that individual due to his authoritative position has possibility and obligations to influence and inspect all the decision and actions undertaken by the corporations, and hence, prevent possible harmful actions. In other words, high position in corporate structure puts officer closer to sources of risk of criminal activity. Lastly, in order for RCO to be recognized, there should be evidence that if there was corporate officer's proper reaction, negative consequences would never occur.

1.4.2. Mens rea?

As it is already mentioned, the RCO doctrine is generally assumed to be doctrine which includes a strict criminal liability criminal (up to one year in prison), which departs from the criminal requirements for existence of the *mens rea* for the defendants. Again, culpable knowledge and intent which are present in every criminal statute as unseparated part of criminal liability, do not seem to appear under the doctrine of RCO. It seems that RCO allows prosecutors to bypass requirement of *mens rea* by setting that defendant no need to have any actual knowledge.⁶⁹ Actually, from the establishment and early developments, there is no clear and precise definition of what *mens rea* should assume in order to impose liability under RCO doctrine. Basically, it

⁶⁸ Jane Kim, *Staying Responsible within the Healthcare Industry in the Era of the Responsible Corporate Officer Doctrine*, 14 Ind. Health L. Rev. 129, 161 (2017)

⁶⁹ Ronald M. Broudy, *RCRA and the Responsible Corporate Officer Doctrine: Getting Tough on Corporate Offenders by Sidestepping the Mens Rea Requirement*, 80 Ky. L.J. 1055, 1056 (1991)

arises from the uncertainty of the decision of the Supreme Court regarding requirements of the RCO.

Namely, the Supreme Court first applied the doctrine as a strict liability, omitting to clarify the relationship between RCO and requirements connected to defendant state of mind. This certainly, lead to confusion, creating a loopholes and left possibility for commentators to interpret the case law differently. Until today those requirements have remained unclear and there are still divergent opinions. What creates the greatest confusion is the extent to which RCO could evade existence of *mens rea*.

According to one standpoint the corporate officer's position in the company is sufficient to hold him liable for the for a felony conviction.⁷⁰ The prosecutors who investigate whether there is possibility for RCO application, acknowledge that the offense "requires no proof of intent or actual knowledge of the violations by the corporate officials to establish their guilt for the misdemeanor offense."⁷¹ In other words, turning a blind eye does not make any exceptions under the RCO, since even passive management will fall under the scope of the doctrine. On contrary, some scholars argue that RCO does not influence what is needed to incur liability.⁷² However, it seems that it is the most appropriate to see the doctrine as an exception from *mens rea* establishment. As Court in *State v. Markowitz emphasized*, the doctrine is "primarily focused on corporate officers position in the company, and only secondary on their culpable conduct"⁷³

⁷⁰ Norman Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses—A Comment on Dotterweich and Park*, 28 UCLA L. Rev. 463, 477 (1981)

⁷¹ *United States v. Dotterweich*, *supra* note 3 at 138

⁷² Todd S. Aagaard, *A Fresh Look at the Responsible Relation Doctrine*, 96 J. Crim. L. & Criminology 1245, 1245 (2006);

⁷³ *State v. Markowitz*, 710 N.Y.S.2d 407(App. Div. 2000).

1.5.The RCO justifications

Even though it is widely recognized today, and its practical benefits has with time becoming more obvious, due to the facts that it departures from traditional criminal law and that it is sometimes misused and misunderstood, there is still an open question of RCO justifications. The doctrine has been frequently criticized due to the effect of *mens rea* element, meaning that it could led to situation that under RCO doctrine and potential scope of defendants, its application would lead to discriminatory effect. Those arguments do not take into consideration that liability is not imposed only on the officer's title, conversely, it is estimated and based on the officer's responsibility in relation to the criminal violation.⁷⁴ Therefore, main justifications of the RCO doctrine and its potential negative effects, could be viewed at least for two main reasons. At first place it is viewed on the basis of notion of public welfare risk allocation to individual who is in better position to avoid and prevent harm, and on the other hand RCO assumes deterrence from potential criminal penalties.

1.5.1. Risk Allocation

One of the fundamental principles on which RCO has rested, is viewed in sense that risk of the liability is on party a who is, although innocent, still in greater juxtaposition to the source of detrimental activity. For instance, *Dotterweich* Court, emphasized a strong relationship between notions of holding corporate officer strictly liable and intent of legislatures to put "the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."⁷⁵ What follows from this approach, is that corporate officers, even there is a lack of

⁷⁴ *United States v. Ming Hong*, 242 F.3d 528, 531 (2001).

⁷⁵ *Nat'l Convenience Stores, Inc. v. Fantauzzi*, 584 P.2d 689, 691 (1978).

negligence, are in better position to prevent any harm arising out of a risk of corporate actions. Basically, the vicarious liability is based on principal undertaking responsibility to prevent losses.⁷⁶

However, there are opposite opinions. As Petrin argues, when risk allocation is determined under the theory that liable is a person who is not guilty, but closer to the source of the harmful activity, is important, but however, not a decisive factor for liability allocation.⁷⁷

However, stated argument cannot be followed, since the essence of the doctrine emphasizes that it is “crime of doing nothing”⁷⁸, in a sense that main rationale under doctrine is that corporate officer was in a position to better monitor operation of its employees, but simply did not do it. The RCO doctrine strongly points out a responsible position of an individual in the company, and therefore, higher standard of his duties and liabilities. In other words, corporate officer has to exercise due care not only as a fiduciary duty towards its corporation, but also towards any third party on a behalf of corporation. This higher standard of the duties of the corporate officer certainly covered allocation of the risk, in spite the fact that main duty of the corporate officer, at first place should be proper operation of company’s business. Simply put, officer’s position in corporate structure puts him in a position to be aware of every potential risk and consequently prevent it.

⁷⁶ *Id.* (Basically vicarious liability is viewed as principal's control over its agents). *See also*, Alan Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231, 1246 (1984)

⁷⁷ *Id.* at 308

⁷⁸ Clark, *supra* note 22 at 5

1.5.2. Deterrence

The second significant factor in justification of the doctrine is deterrence from criminal activity, in a sense that even sole possibility of personally facing any negative effect, would automatically restrain corporate officer from turning a blind eye and create his willingness to extra cautiously monitor corporation's operation.

Namely, the main idea is that fear of legal sanctions will force the corporate officials to comply with relevant laws and regulations. Basically, putting into the trial, public judgement or a requirement to paid a fine are undoubtedly negative consequences which most individuals tend to avoid. Deterrence from violating statutes and committing is the fundamental reason and purpose of existing of the criminal prosecutions and penalties. Actually, criminal sanctions are assumed as the most effective way of deterrence, due to the fact that court has a power to impose serious penalties, meaning that defendant can even face the jail time. Since corporate businesses have potential to avoid civil penalties, in a way that large corporation's income is much higher than monetary fines that are imposed, criminal punishments for violations connecting to public welfare reflects "society's unwillingness"⁷⁹ to tolerate this kind of behavior. Again, it shows society's wish to ensure that businesses cannot simply transfer the costs of violations to the public.⁸⁰

In other words, the sole threat from criminal penalties leads to a significant personal motivation for the corporate officer to through complying with law avoid criminal punishments. Usually, company protects officers and employees from personal liability. Hence, imposition criminal

⁷⁹ *Id.*

⁸⁰ Nancy Mullikin, *Holding The "Responsible Corporate Officer" Responsible: Addressing The Need For Expansion Of Criminal Liability For Corporate Environmental Violators*, Golden Gate University Environmental Law Journal 395, 396 (2010)

sanctions represent efficient means of deterrence, since here corporate officers are not protected from liability.⁸¹

Therefore, RCO doctrine could be used as valuable device in society betterment, globally. Urbanization, globalization and accelerated technological development could seriously jeopardize human well-being. In preventing those, layman and ordinary citizen cannot be viewed in a same way as CEO of multinational corporation. Authority entrusted to them by shareholders of company, as well as possessing control and power to control company's conduct, put those persons in significantly better position to affect and prevent from which everyone could suffer. Imposing RCO doctrine would certainly increase cautiousness and lead to better organization and business functioning. Therefore, position of corporate executives justifies holding high managers responsible even not with culpable intent or wrongdoing. Finally, what is fair to be asked, is whether it is appropriate that innocent individuals suffer from harmful consequences caused by corporate illegal activities, but not the person who even not actively, but certainly passively contributed to those.

⁸¹ *Id.*

CHAPTER II- Application of the RCO doctrine

In order to inspect rationale of RCO doctrine, it is significant to see in which areas is the doctrine the most applicable, or in other words, which industries are highly affected by it. In its beginning, the doctrine was established as special principles relating to public welfare offenses, mostly as violation of principles under FDCA, as it is presented above in RCO's landmark cases⁸². Lately, the doctrine was recognized to be applicable to other criminal offenses relating to welfare, mostly in environmental law and further violations in healthcare and pharmaceuticals industry. However, having in mind that punishments of corporate officers should represent proper reaction to business development, applying RCO exclusively to public welfare crimes seems - outdated. More specifically, at this point, there are reasonable grounds for doctrine's imposition in a relation to mortgage fraud. Some authors argue⁸³ that there is a possibility of application of RCO to anti-trust law, however, at least at his moment, RCO in its real nature, would be hardly applicable in this area.

2.1. Industries most affected by RCO doctrine

As it mentioned in previous paragraph, corporate executives have been at first place prosecuted under RCO doctrine for offenses relating to public welfare, mostly in connection to environmental crimes and health care. Logically, negative effects that criminal activity connected to environment or health care could have, and utmost importance of public welfare protection, warrant imposing strict liability to someone who could protect it.

⁸² *United States v. Dotterweich*, *supra* note 3; See also *United States v Park*, *supra* note 4

⁸³ See section 2.2.2 below

Important question relating to those two areas is further extension of doctrine's application. This question environmental law is connected with controversy of whether is appropriate to extend criminal liability in environmental law. Here RCO certainly finds its place for further extension due to court's reaction to significance of environment protection. Additionally, arguments pro this attitude could be drawn from Congress intention of explicit adding corporate officials to CWA and CAA as subjects of criminal penalties. Moreover, healthcare industry appears to be the most affected by RCO doctrine and beside that, recent court's decisions show the most stringent penalties imposed in this industry.

2.1.1. RCO in environmental law

Individual criminal liability in environmental law is not a new phenomenon, however application of RCO doctrine to environmental law started few decades ago and what is undoubtedly true to say, it shows accelerate expansion in today's world. Criminal prosecutions and punishments are essential to ensure this protection. As Mullikin argues, it seems obvious that imposing civil liability would be insufficient and appropriate due to the fact that individuals as corporate officers could hide behind corporations and avoid liability.⁸⁴ It could be said that criminal sanctions are appropriate punishments for violation of the environmental statutes. This is mainly because imposing of criminal liability has advantages over civil liability, mainly through deterrence, remediation or public safety.⁸⁵ Deterrence is of particular importance because some violation of environmental norms lead to irreversible consequences.⁸⁶ Furthermore, remediation by criminal

⁸⁴Mullikin, *supra* note 80 at 396 (2010)

⁸⁵ Ethan H. Jessup, *Environmental Crimes and Corporate Liability: The Evolution of the Prosecution of "Green " Crimes by Corporate Entities*, 33 New Eng. L. Rev. 721, 730 (1999)

⁸⁶ Kathleen F. Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 Tul. L. Rev. 487, 506 (1996-97)

sanctions is “more effective in its timeliness”⁸⁷. Lastly, criminal punishments are necessary because they can better ensure public safety, since there is a danger of widespread harm.⁸⁸

Early application of RCO doctrine could be find in case *United States v. Frezzo Bros*, where two brothers were charged as corporate officers and owners of Frezzo Bros Inc. which was diluting pollutants into water without permit and with that violated provisions under CWA.⁸⁹ The Court supported application of RCO doctrine to CWA, similarly as to application under FDCA in *Doterweich* and *Park* case.

Moreover, in *United States v Brittain*⁹⁰, Court allowed expanding the application of RCO doctrine. In this case defendant was charged under CWA for unlawful discharges in navigable water. Here the defendant was prosecuted based on fact that responsible corporate officer was expressly included in CWA as a person who can be prosecuted under this act. The defendant was director of the company and “had general supervisory authority over the operation of the city's wastewater treatment plant.”⁹¹ As it was proven in the case, Brittain was told that pollutants that were discharged, violated city permit. The defendant here raised a counter claim that there is no any evidence that he personally caused unlawful discharge since his only connection to the activity is his position within discharging entity. ⁹²He further contended that he could only be held liable if there was an evidence that individual had held position of responsible corporate officer. The Court disagreed, holding that the Congress intention was to interpret responsible corporate officer as expansion of liability under CWA. Based on this, in order to be criminally liable individuals does

⁸⁷ Mullikin, *supra* note 80 at 401

⁸⁸ Jessup, *supra* note 85, at 731

⁸⁹ *United States v. Frezzo Bros.*, 602 F.2d 1123 (1979).

⁹⁰ *United States v Brittain*, 931 F.2d, 1415 (1991)

⁹¹ *Id.* at 1415

⁹² *Id.* at 1420

not have to act “willfully or negligently”⁹³. On contrary, this willfulness or negligence should be presumed on the basis of position in corporation.

Moreover, in same year the Court decided the case of *United States v Ming Hong*⁹⁴. This was a case included prosecution against owner of the wastewater treatment facility. He was held as responsible corporate officer who violated some of pretreatment conditions. The defendant claimed that he cannot be held liable since he had not been formally appointed as corporate officer and thus did not have sufficient control or responsible position in the company. However, Court rejected those claims. Namely, Court started from *Dotterweich*, which it summarized as “all who had a responsible share in the criminal conduct could be held accountable for corporate violations of the law”.⁹⁵ Moreover, the Court supported holding of *Park* which had argued that defendant may be held criminally liable even if he did not personally participated in the act if “the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so”⁹⁶.

Therefore, the Court in this case argued that:

“[the gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof; rather, the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA.”⁹⁷

In reviewing Court’s arguments above, it could be said that Court’s intention and interpretation of the RCO doctrine was to extend liability of the corporate officer which held responsible positions in corporations. However, this case to some extent represents limitation of RCO doctrine since

⁹³ *Id.* at 1419

⁹⁴ *United States v. Ming Hong*, 242 F.3d 528 (2001).

⁹⁵ *United States v. Dotterweich*, *supra* note 3 at 531

⁹⁶ *United States v. Park*, *supra* note 4 at 673-674

⁹⁷ *United State v. Ming Hong*, *supra* note 92, at 531

defendant is held criminally liable under CWA for “negligent discharges, not for knowing violations”⁹⁸

As Monroe argued, application RCO in environmental law could be viewed as a “tool to fill gap between actual involvement of responsible corporate officer in crime and ability of prosecutors to actually convict corporate officers for their involvement.”⁹⁹ As it is mentioned in the preceding paragraphs, the most important feature of the RCO doctrine is the, unlike traditional understanding of responsibility of corporate officers, that they can be held liable only if the agents act under their direction, the RCO doctrine overcome challenges of holding “appropriate actors responsible for corporate environmental crimes.”¹⁰⁰

2.1.2. RCO doctrine in healthcare

As originated in connection with violations of the FDCA, in particular in a relation to misbranding drugs by pharmaceutical company, in recent years the doctrine has been resurrected in those areas. Due to its importance, apart from environmental violations, healthcare industry certainly represents the most fruitful ground for the doctrine to exist and grow. Investigations by OIG show skyrocketing increase of abuses and fraud in healthcare where even allocating significant amount of funds¹⁰¹ and all invasive measures that Government takes to combat those frauds – seems not enough insufficient. That established grounds for OIG and DOJ to impose their strict reforms.¹⁰²

As Daniel R. Levinson, Inspector General of the Department of Health and Human Services stated

⁹⁸ Mullikin, *supra* note 80 at 418

⁹⁹ John Monroe, *Applying the Responsible Corporate Officer and Conscious Avoidance Doctrines in the Context of the Abu Ghraib Prison Scandal*, 91 Iowa L. Rev. 1367, 1383 (2006)

¹⁰⁰ Todd W. Grant, *The Responsible Relationship Doctrine of United States v. Park: A Tool for Prosecution of Corporate Officers Under Federal and State Environmental Laws*, 11 Temp. Envtl. L. & Tech. J. 203, 204 (1992)

¹⁰¹ Jane, *supra* note 68 at 130

¹⁰² Kathleen M. Boozang, *Responsible Corporate Officer Doctrine: When Is Falling Down On The Job A Crime?* available at http://law.slu.edu/sites/default/files/Journals/boozang_article.pdf (accessed on 29 March 2018)

"OIG is focused on holding Responsible Corporate Officials accountable for healthcare fraud"¹⁰³, arguing further that in preventing those crimes it is important to have "individual accountability".¹⁰⁴ The best use of doctrine and severance of penalties that officers could face is best shown in recent cases presented below.

In 2007, similarly to *Dotterweich* case, the Prudue Frederick Company, and its corporate executives were prosecuted by DOJ for mislabeling of the produced OxyContine¹⁰⁵. In this case, beside the corporation, three corporate officers were held liable on the basis of their responsible position in the company, despite the fact that they did not have any personal involvement in the particular action and did not possess any knowledge regarding that. Defendants were sentenced with monetary fine in order not to face jail time. Subsequently, OIG excluded the defendants from participation in healthcare programs in first instance for 20 years, which was on appeal proceedings reduced to 12 years.

Moreover, two years following the above described case, DOJ filed a claim against *Synthes Inc*¹⁰⁶ and its executives for testing bone cement without required FDA permission necessary for this procedure. Those four executives were charged in period from five to nine months on the basis of their position as responsible corporate officer of an entity which wholly owned subsidiary was involved in illegal transaction.

¹⁰³ Keynote of Office Of Inspector Gen., *supra* note 8

¹⁰⁴ *Id.*

¹⁰⁵ OxyContine is medicine mainly used for relieve of severe pains

¹⁰⁶ *Synthes, Inc. v. Emerge Medical, Inc.*, *supra* note 61

In 2011, K.V Pharmaceuticals Co. and its corporate executive of was prosecuted for illegal drugs production. On the basis of his responsible relation, corporate executive was prosecuted and found guilty for producing oversized morphine tablets that could be detrimental for the patients.¹⁰⁷

Basically, the RCO doctrine allows Government to combat against healthcare fraud by imposing individual liability. The main aim of imposing the RCO doctrine is to prevent widespread abuses and increase compliance with healthcare regulations. In other words, in order to avoid personal charges every officer holding responsible position should ensure that his company has compliance program sufficient to early detect and prevent wrongdoing. For now, the RCO doctrine is a strong tool for punishing responsible corporate executives in healthcare industry.¹⁰⁸

2.2. Applying the RCO outside the welfare context

Even though the doctrine arose under US case law in relation to punishments of criminal offenses regarding violations of FDCA, and is in its later expansion mostly has been welfare oriented, nowadays it seems obsolete. The main conditions under which doctrine could be applied have not indicated necessity of imposing this liability to corporate officers only in connection to public welfare. Having in mind that essence of the RCO indicates that corporate executive should bear responsibility for crime committed for the benefit of corporation, in the same way he gains benefits for corporate success, the RCO doctrine is a useful tool for controlling corporate crimes and its executive's liability.

2.2.1. General overview

¹⁰⁷ Robert H Road & Brian M. Castro *Healthcare Executives In The Crosshairs: Navigating The Emerging Threat Of Prosecution And Exclusion Under The Responsible Corporate Officer Doctrine*, 5 ABA Healthcare Selection 24, 6 (2012)

¹⁰⁸ Katherine Chau, A Recent Revival of the Responsible Corporate Officer Doctrine to Target Health Care Executives, 6 Health L. & Pol'y Brief 14, 143 (2012)

The traditional public welfare doctrine was viewed as way of justification the policy regulation which do not assume *mens rea* requirement. The primary aim was to determine whether it can be justified since the lack of *mens rea* requirement harms the basic notion of criminal law. Maybe the best description of this problem is given in *United States v Balint case* ¹⁰⁹ where the defendants were prosecuted on the basis of selling drugs without filling the proper form. They claimed that they did not know that these drugs needed to be followed by the registration forms. The Court found defendants liable on the basis of justification of strict liability due to the course of social worth and benefit. Following arguments of this Court, it could be said that similar rationale could be applicable to extension of public welfare doctrine. Since interest of protection of public health, moral and safety justify application of RCO doctrine, they should not be limited only to public welfare offenses. In other industries, imposition of RCO could prevent potential harms.

Even though some authors view expansion of RCO as extension of public welfare doctrine ¹¹⁰, this could not be acceptable. According to Kushner, the RCO doctrine is imprudently taken to be applied only to welfare statuses and offenses and that could prevent proper application of the doctrine.¹¹¹ This is because the main aim of the doctrine "does not lie in the *activity* sought to be regulated, but in the elusiveness of the *defendant* sought to be prosecuted".¹¹² Therefore, it could be pointed out that alteration of the RCO doctrine is crucial for following current developments. In other words, it should not be viewed restricted but rather "as general theory of executive criminal liability".¹¹³

¹⁰⁹ *United States v. Balint*, *supra* note 28

¹¹⁰ Cynthia H. Finn, Comment, *The Responsible Corporate Officer, Criminal Liability, and Mens Rea: Limitations on the RCO Doctrine*, 46 Am. U. L. Rev 543, 545-46

¹¹¹ Kushner, *supra* note 23, at 683

¹¹² *Id.*

¹¹³ *Id.*

Moreover, in situations when the courts determine that statute does not fall under the public welfare offense they are ready not to apply the RCO doctrine. However, this could be pretty artificial and inappropriate since there is a lack of clear definition of the public welfare law, and what can be potential detriment to public welfare.¹¹⁴ This lead to various manipulation and abuses of a judicial point of view. Certainly the most fundamental objection to RCO doctrine is that it does not take into account the “factual context of corporate crime”¹¹⁵. This is because access to facts which amounts to violation are essential to constitute main feature of the liability.¹¹⁶

The another point that Kushner emphasized as application of the RCO doctrine strictly in connection with public welfare, is question of dividing liability between potential defendants.¹¹⁷ It should be said that traditional welfare cases relate to small corporations where as a defendant mostly shows individual or owner of the closely held corporations. Here, the division of the liability is not the issue. However, in big corporations, number of managers may be connected with the wrongful action, thus, the liability distribution comes into the picture as an important question. Again, the traditional view of public welfare doctrine is not proper to solve the problem and it must be amended to correspond current circumstances. One possibility of application of the RCO doctrine outside the public welfare in traditional sense, is described in paragraph that follows. Moreover, it is also showed whether there are reasonable grounds for doctrine do be applied to anti-trust crimes.

2.2.2. Possible extension of the doctrine application to the mortgage fraud

¹¹⁴ Steven Zipperman, *Park Doctrine - Application of Strict Criminal Liability to Corporate Individuals for Violation of Environmental Crimes*, 10 Ucla J. Envntl. L. & Pol'y 123, 129 (1991)

¹¹⁵ Kushner, *supra* note 23 at 704

¹¹⁶ *Staples v. United States*, 511 U.S. 600, 612-13 (1994)

¹¹⁷ Kushner, *supra* note 23 at 703

If we accept the argument that RCO doctrine is applicable outside traditionally understood public welfare offenses, then question that could be asked is whether this doctrine could be applicable to mortgage fraud. Having in mind, far reaching consequences of billions dollars of losses ¹¹⁸ and significance of preventing mortgage fraud for stability of economy and general prosperity of society, this thesis advocates affirmative answer.

The FBI defines mortgage fraud as: "the intentional misstatement, misrepresentation, or omission by an applicant or other interested parties, relied on by a lender or underwriter to provide funding for, to purchase, or to insure a mortgage loan". The main problem with mortgage fraud is who should be prosecuted and held liable. First in line come lending institutions themselves. As it earlier pointed out, corporation is criminally liable if the employee's acts within the scope of employment and for benefit of corporations.¹¹⁹ Even it seems that the conditions for holding corporation criminally liable are easy to be achieved, in practice there are not many cases of liability of corporation for mortgage frauds. That approach could be accepted, since prosecuting those corporations bearing in mind their prevailing business activity, would produce unfair negative consequences, mostly because, harsh effect would not be produced only for the corporation but for shareholder, customers or taxpayers.¹²⁰ Hence, the most appropriate solution would be to penalized mortgage professionals. Again, the function of RCO doctrine is not to prosecute one who commit the crime but individual who "fail to discover correct problem on the basis of capacity of control"¹²¹

¹¹⁸ Fbi.gov, Just the Facts: The Latest Mortgage Fraud Statistics available at http://www.fbi.gov/hq/mortgage_fraud.htm (accessed on 31 March 2018)

¹¹⁹ See supra note 1

¹²⁰ Christina M. Schuck, *A New Use For The Responsible Corporate Officer Doctrine: Prosecuting Industry Insiders For Mortgage Fraud*, 14 *Lewis & Clark L. Rev.* 372,379 (2010)

¹²¹ Julie R. O'sullivan, *Federal White Collar Crime Cases And Materials* 41-42, 231 (3rd ed. 2007)

What should be emphasized is that *Dotterweich* Court acknowledged that RCO doctrine puts potential hardship and burden on corporate executives, but nevertheless when public danger is at stake, Court acknowledged that it is not justified and reasonable that negative consequences be borne by "innocent public who are wholly helpless."¹²² On contrary, it should be imposed on one "who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers . . . "¹²³

Having in mind all above stated, in spite of the fact that many investigations which need to be performed under mortgage fraud, the Government decided not to pursue individual borrowers. On contrary, main aim of government is reaching mortgage professionals who omitted to prevent mortgage frauds and at same time benefited from it.¹²⁴ In other words, mortgage fraud does not represent the problem of public welfare, but certainly represents issue which can jeopardize public well-being. In order to prevent mortgage fraud, Government has to determine persons who will be prosecuted. Since prosecuting corporations may not lead to prevention of further losses, perhaps what would create better effects is to prosecute individual who was in position to prevent mortgage frauds, but still decide not to. As Court in *Dotterweich* remarked, the RCO refers to a person "standing in responsible relationship to a public danger"¹²⁵ Based on that, the highest responsible relation with public danger is reflected through mortgage professional's position.

2.2.3. The possibility of application of RCO to anti-trust crimes?

Notwithstanding the fact that economic crimes have been important part of global society for centuries, those specifically draw attention in past decades. The specificity of economic crimes is

¹²² *United States v Doterweich*, *supra* note 3 at 285

¹²³ *Id.*

¹²⁴ Schuck, *supra* note 120 at 372

¹²⁵ *United States v Doterweich*, *supra* note 3 at 285

that subject of protections that are different than under usual principles criminal law. Namely, standards under economic criminal offenses are aimed to protect public goods which are imminent to every human in society, rather than personal legal rights. Certainly, the incidence of those crimes is not at same level as for other crimes, but when amount of damage is taken into consideration mostly in anti-trust, bribery and financial crimes, it could be easily viewed that those are in inverse proportion.¹²⁶ Moreover, those crimes are closely connected with crimes against public health, environmental crimes and they are in particular center of the attention, since can invoke public anger to bravery of corporate officer at the highest positions in the company.¹²⁷ The importance of prevention those crimes justifies the question of RCO applications to those.

Basically, as Kushner¹²⁸ argues, the doctrine has never had application to antitrust violations, even though there are grounds for the contrary. However, arguments of this author does not seem reasonable and appropriate if there is a proper understanding of the doctrine.

As he claimed hen there is price-fixing involved, the main aim is to prove that corporate officer has been involved in illegal transaction. Therefore, having in mind that price fixing is inherently unlawful¹²⁹, evidencing that defendant wanted to participate in illegal contract is sufficient, notwithstanding intention to restrain the trade¹³⁰. In other words, “if there is intention of fixing prices, he automatically intends to restrain trade.”¹³¹ However, it is extremely difficult to prove that officer was involved in wrongful arrangement. It is common that senior officer organizes and plans price fixing conspiracy, but to leave execution to his subordinates. On the other hand,

¹²⁶ Vanja Serjevic, *Economic Criminal Law: Comparative Overview*, Law and Politics, 15 at 25 (2017)

¹²⁷ *Id.*

¹²⁸ Kushner, *supra* note 23 at 708

¹²⁹ *Broad. Music, Inc. v. Columbia Broad.*, 441 U.S. 1, 20-24 (1979)

¹³⁰ Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. Cal. L. Rev. 657, 667 (2001)

¹³¹ *Id.*

requirement that manager could only be held liable if there is a proof that he participated in the action at stake is highly burden. As it already discussed, proving that there was authorization of wrongful actions undertaken by subordinates is very often highly demandable and very often impossible.

In fact, there has to be hard evidence which allows interfering of whether the officer had intention or not to participate in such conspiracy, for instance that he was present at the meeting where the conspiracy was discussed and agreed. That is in practice, highly difficult to prove. The majority argue that there has to exist proof that officer consented conspiracy and that his culpability cannot be based on “purely passive behavior”,¹³² however, as court in *United States v. Gillen*¹³³ stated, president or other chief executive cannot evade responsibility, if his subordinates were involved in conspiracy. Therefore, the key lies in a connection between corporate officer and his subordinates, in a sense of an issue whether their involvement in conspiracy can be attached to the senior officer. However, it should be said that the application of RCO doctrine would here be limited, there has to exist at least some knowledge of senior officer. Therefore, if courts continue to require, even basic knowledge about the conspiracy, RCO doctrine with its characteristics of not requiring any knowledge, at least for now, would be hardly applicable.

¹³² *United States v. Brown*, 936 F.2d 1042, 1048 (9th Cir. 1990).

¹³³ *United States v. Gillen* 599 F.2d 541, 547 (1979)

Chapter III- Liability of corporation and responsible persons in Serbia

In order to properly examine possibilities of RCO application in Serbian law, firstly, it should be started from evaluating approaches of liability of actions of others in two legal systems. Moreover, basic notions of corporate criminal liability as well as its nature of Serbian corporate criminal law which differs from American approach should be clearly understood. Lastly, this chapter focuses on liability of responsible corporate officers as being the main precondition to hold company criminally liable.

3.1. General overview of liability under respondeat superior doctrine

Speaking of liability under doctrine of *respondeat superior*, and generally speaking about liability of corporations and responsible persons in two systems that have been compared in this thesis, it should be emphasized that those are set completely differently. Firstly, unlike in US, where under the RCO doctrine, in certain cases, corporate officer may, for actions of his subordinates, be held liable both civilly and criminally, the liability for actions of others, is in Serbian law, explicitly reflected solely through liability of corporation.

Even though, as it is already mentioned, civil liability is not subject of this thesis, it should be mentioned that under Serbian law corporate officer cannot be prosecuted for damages that employees caused. In other words, only corporation could be responsible for the damages that their employers caused at moment of employment and within its scope.¹³⁴ In other words in Serbian

¹³⁴ Acts on Obligations [Zakon o obligacionim odnosima] (Official Gazette SFRJ", nos. 29/78, 39/85, 45/89 – decision of USJ and 57/89, "Official Gazette of FRJ", no. 31/93 and "Official Gazette SCG", no. 1/2003 – Constitutional Charter) (1978), art. 171

law, civil liability is set under doctrine of *respondeat superior*. This liability for the action of the employees could be estimated under two criteria. First it could be viewed from subjective, it is usually explained that the one who is liable for action of others is fault for wrong choice of employee (*culpa in eligendo*), omitting to undertake proper supervision on the employer (*culpa in custodiendo*) or because employer as subordinate failed to give proper instructions to employee how to act.¹³⁵ Furthermore, it is not only that managers cannot be held liable for actions of employees, but also for the damage they cause to third persons in course of their employment, the corporation will be held liable. Simply put, it is not liability of corporation for acts of other persons, but rather for its own. Normally, corporate officers will be held liable for the wrongdoing they committed in performing actions on behalf of corporation, for the damage they cause to corporation. In that case they are responsible towards corporation itself. Therefore, corporate executives in Serbian legal system could be held liable solely for his own actions, or omissions.

Fundamentally, and having in mind topic of this thesis, criminal liability of corporation and its corporate officers significantly differ in two systems. US law recognizes company's criminal liability for action of its employees, meaning that it could be held liable not only for actions of individuals on policy making level, but also for the lower employers as well, while Serbian perceives criminal liability of legal entities on the basis of culpability of responsible persons.¹³⁶

Additionally, previous chapters which examines criminal liability of corporations and existence of doctrine of responsible corporate officer under US law, explicitly show that to some extent US law abandons classical criminal liability of individual, by imposing strict liability to high corporate officer, even in case he neither personally involved in wrongful action, nor aware of the action at

¹³⁵ Stanisic Slobodan, *Objektivna odgovornost za stetnu*, 328 (2012)

¹³⁶ See section 3.2. below

stake. Serbian legal system recognizes different approach. Namely, in accordance with basic principles of criminal law¹³⁷ under Serbian law, director or other high manager, as individual who holds responsible position in corporation can be prosecuted and held liable only for his own actions. More precisely, in order for director to face penalties from illegal transaction in which legal entity has been involved, he has to personally participated in wrongful action, to have culpable intent, or to be aware of the wrongdoing.

In order to make comparative analysis and possible application of RCO doctrine in Serbian law, this chapter will first generally examine criminal liability of corporation and its responsible persons.

3.2. Corporate criminal liability

3.2.1. Basic notions of corporate criminal liability

Basically, criminal liability of corporations is to US legal system introduced much earlier than to Serbian. Namely, in US, in 1909, the US Supreme Court, for the first time in history, held that a corporation could be held criminally liable for the acts, omissions or wrongdoing of an agent, when that agent is acting within the scope of his or her employment.¹³⁸ Court's reasoning was based on notion that corporations are surely legal entities, hence, they cannot actually act or have any intention towards action or omission for action. For this reason, the Court had to turn to employees of the corporation as a "means of imputing intent, or *mens rea*",¹³⁹ as well as the "guilty act, or

¹³⁷ Criminal Code of the Republic of Serbia [Krivicni zakonik Republike Srbije], (Official Gazette of RS", no. 85/2005, 88/2005 – amendments 107/2005 – amendments, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016) (2016)

¹³⁸ *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 495 (1909)

¹³⁹ *Id.* at 493

actus reus, to the corporation”.¹⁴⁰ On the other hand, in Serbia, criminal liability of corporation is finally established with adoption of the Act on responsibility of legal entities for criminal offenses¹⁴¹, in 2008. Until then it had been possible to prosecute companies only for the commercial offenses¹⁴² or misdemeanors.

As in every other country today, in Serbia, responsibility of legal persons for criminal offenses has become significant part of business in general. Due to development of economy in past decades, it is demandable for this area of law to be established and regulated in manner that, on one hand, sufficiently protects rights of individuals and on the other, supports further growth of the economy. In modern world, the liability of corporations, especially criminal liability has drawn significant attention. This question deserves attention not only of the scholars, but also of a judicial practice, since there is a shift from previous, traditional understanding, that legal entities cannot be criminally liable, to introducing criminal liability of corporation, mostly in accordance with the doctrine of *respondeat superior*, in various types. In Serbia, issue of attributing *mens rea* to corporation over past decades had been representing a controversial issue. Finally, with enacting the Act on liability of legal entities for criminal offenses, the view prevailed is that legal entities as well as human beings possess not only obligations and rights but also intent and consciousness and could be view as a subject of criminal liability.¹⁴³ However, this approach means that legal entity does not exist physically, thus, it is vicariously liable for actions or omissions of individuals.¹⁴⁴ Here, the intent and individual culpability or *mens rea* is attributed to corporation.

¹⁴⁰ *Id.* at 494

¹⁴¹ Act on criminal liability of legal entities for criminal offenses [Zakon o odgovornosti pravnih lica za krivicna dela], (official Gazette of Republic of Serbia no. 97/2008) (2008)

¹⁴² Commercial offenses still exist in Serbian law even there are opinions that introducing of criminal offenses that they should be abandoned

¹⁴³ Miroslav Djordjevic, “Krivicna odgovornost pravnih lica”, (master rad, master thesis, Faculty of Law, Belgrade, 1, 1968), 202

¹⁴⁴ Milos Biberdzic, “Krivicna odgovornost pravnih lica” (master rad, master thesis, Faculty of Law, Belgrade, 2010),6

Serbian law sets criminal liability of corporation as a derivative criminal liability. That means that liability of legal persons for criminal offenses is based exclusively only the culpability of responsible persons in corporation. Under Act on responsibility of legal entities for criminal offenses, there are two principles under which legal entity could be liable for criminal offense. First, legal person will be held liable if the criminal activity is committed by the responsible person in the corporation in course of his employment and in order to obtain benefit for the company.¹⁴⁵ Second, corporation could be held criminally liable if employee of the corporation committed criminal offense within the scope of the employment and for the benefit of corporation and if that criminal activity is performed due to failure of responsible person to exercise supervision over employees who are under his control.¹⁴⁶ Therefore, it is notable that under Serbian law, company is not directly liable for actions of employees, but indirectly through responsible person in corporation.¹⁴⁷

3.2.2. Nature of criminal liability of corporations

For proper answer to a question of application of the doctrine in Serbian legal system, the first issue that has to be raised, is on one side, nature and understanding of criminal liability of legal persons and liability of responsible persons as individuals holding the highest position in entity, and on another, relation between those individuals and legal person. Traditionally, criminal law lays on a personal culpability. It is embedded with notions of guilty, blame and harmful effects. Therefore, since unusual concept of attributing corporation 'human features', criminal liability of the corporation could be viewed through different perspectives.¹⁴⁸ Those perspectives in general

¹⁴⁵ Act on criminal liability of legal entities for criminal offenses, *supra* note 141 art. 5 (1)

¹⁴⁶ *Id.* art. 5 (2)

¹⁴⁷ See section 3.2.3 below

¹⁴⁸ Miodrag Bukarica, *Odgovornost pravnih lica za krivična dela :materijalni aspekti*, 78 (2015)

reflect relation between corporation and individuals who actually undertakes action in corporation, and generally could be seen as three sets of theories.

First perspective looks into issue of whether legal entity is liable for its own action or for the actions of individuals. This theory divides liability of corporations as autonomous or indirect liability. Autonomous or direct liability assumes corporation responsibility for its own acts, without determining responsibility of individuals as a precondition for existence of a criminal liability of corporations¹⁴⁹. This basically means that corporation has its own intention and consciousness separable from intention and consciousness of individuals that compose corporation.¹⁵⁰ On the other hand, indirect liability represents traditional and the most present theory, according which existence of culpability of individual is necessary for having corporation criminally liable. Simply put, liability of individuals is attributed to corporation. However, main condition that individual has to act in the name and on behalf of corporation and within scope of his employment has to be fulfilled.¹⁵¹ Perhaps the main critique of this theory rests on the fact that it could be applicable only in small corporations where it is easily to determine who exactly is the authorized to act in the name of legal entity.¹⁵² This theory starts from the perception of alter ego, meaning that here, director or other responsible person in the entity is viewed as an alter ego of corporation, performing actions as corporation itself. On contrary, vicarious liability has been introduced to expand group of individuals for which corporation could be liable. Under this

¹⁴⁹ Zoran Đurdjević, *Kazeneno pravna odgovornost i pravni postupak prema pravnim licima u Republici Hrvatskoj*, 741 (2003)

¹⁵⁰ Djordjevic, *supra* note 143 at 35

¹⁵¹ Djurdjevic, *supra* note 149 at 739-740

¹⁵² Marinka Cetinic, *Zakon o odgovornosti pravnih lica za krivicna dela, jos jedan korak Srbije ka Evropskoj uniji*, *Arhiv za pravne i drustvene nauke* 3-4, 310 (2005)

liability, as for instance in US, corporation can be held liable for actions of employees on different levels of corporate structure.

Second perspective observes whether criminal liability requires subjective, mental relation between perpetrator and crime, or objective element whether simple existence of an action which caused a wrongdoing is sufficient to create liability.

The last group makes differentiation between subsidiary and cumulative responsibility. The main distinctive criterion of this theory is imposition of liability on one side, to either corporation or corporate officer, and on another to both collectively. In other words, the main line of differentiation is whether liability of corporation excludes liability of individual and *vice versa*, or they could be mutually held liable. Subsidiary liability formulates corporate liability in a sense that if liability of individual is proved, there is no need for corporation to be held liable. Today, most criminal laws exclude opposite situation. Importantly, if he personally participated, individual cannot be allowed to evade responsibility, requiring that only legal entity be held liable for wrongful activity. Cumulative or mutual responsibility, on the other hand, assumes that for the same criminal activity both legal entity and individual are liable. Here liability of one subject does not exclude liability of other person, However, sometimes only one subject can be liable, especially on the basis of fact that in large corporations it could happen that individual who committed and participated in illegal activity cannot be identified.¹⁵³

Based on the above mentioned analysis and formulation of criminal liability of corporation under Act on responsibility of legal entities for criminal offenses, it is clear that Serbian law accepts

¹⁵³ Biberdzic, *supra* note 144 at 27

derivative, subjective and cumulative responsibility. Conversely, US law accepts autonomous, objective and subsidiary responsibility of corporation.

3.2.3. Criminal liability of the corporate officers

Under US principles of criminal corporate liability, one set of defendants are normally ones who participated in crimes on behalf of corporation. However, strict liability which could be imposed on corporate officers in certain cases, expanded group of individuals which may appear as defendants in criminal cases. In other words, under RCO doctrine, the corporate officers, despite the fact of not having any “consciousness wrongdoing”¹⁵⁴, may be prosecuted based on the fact that they still have a “responsible share in furtherance of the transaction which statute outlaws.”¹⁵⁵ This means that corporate officer who holds responsible position in corporation can be responsible for criminal offenses of corporation even he did not participate in the wrongdoing, nor failed to prevent it culpably.

As it stipulated in previous paragraphs, according to Serbian Act on liability of legal entities for criminal offenses, the liability of corporation is exclusively based on culpability of responsible persons. That means that in order for legal entity to be liable, individual as responsible persons in corporation has to undertake particular criminal activity for benefit of corporation and under scope of his authorizations.¹⁵⁶ Moreover, legal entity is liable if employee, other than responsible person, undertakes action for benefit of corporation and in scope of his employment, and if the wrongful

¹⁵⁴ Amy J. Sepinwall, Responsible Shares and Shared Responsibility: In Defense of Responsible Corporate Officer Liability, 2014 Colum. Bus. L. Rev. 371 (2014)

¹⁵⁵ *Id.*

¹⁵⁶ Act on criminal liability of legal entities for criminal offenses, *supra* note 141

action is committed because the responsible person fail to exercise due supervision and to prevent illegal activity.

A responsible person shall be understood as natural person who, in terms of law or actually, is entrusted with specific set of tasks within the legal entity, as well as a person authorized, and/or the one for whom it may be deemed to be authorized, to act on behalf of the legal entity.¹⁵⁷ It seems that Act on criminal liability of legal entities for criminal offenses sets pretty wide group of people who can be deemed as a responsible person within the company. Firstly, those are persons who are entitled to act on behalf of corporation, mostly directors, as company's legal representative. This is logical in spite the fact that he is obliged to work for benefit of corporation who authorized him. In other words, director is firstly responsible towards corporation which appointed him, but also he is obliged to comply with imperative provisions of laws of Republic of Serbia. However, beside the first sets of possible responsible persons, Act criminal liability of legal entities for criminal offenses is further expanding understanding of responsible persons, stipulating that this could be every person who is entrusted with some tasks within the corporation.

¹⁵⁷Act on criminal liability of legal entities for criminal offenses, *supra* note 141

CHAPTER IV Comparative analysis of two legal systems: Lessons for Serbia

Previous analysis of criminal liability of both corporations and corporate executives shows that generally, regarding this issue, Serbia and US have different standards. By once again stating the main differences, this chapter continues with striking the most important problem in Serbian law. At the and using the RCO as panacea, it provides two possible solutions for overcoming this issue.

4.1. General overview

Analyzing criminal liability of corporations in previous chapters, it is clearly visible that criminal liability of corporations and responsible persons in corporation has been settled completely different in two legal systems. First of all, under both legal systems, the accepted approach is that legal persons, same as natural persons, can be held criminally liable.

Criminal liability of corporations in US law, based on principles of strict, vicarious liability where both *actus reus* and *mens rea* of the individual who acts in the name and on behalf of company are automatically deemed as act of corporation. Hence, if an employee or agent of corporation commits the wrongful activity or omission while acting within scope of the employment and for benefit of corporation, corporation is directly criminally liable.¹⁵⁸ This particularly leads to an effect, that even the act of the employee on the lowest position in corporation, notwithstanding high compliance program that company perform or directions and instructions that it impose, will lead

¹⁵⁸ *United States v. One Parcel of Land*, 965 f.2d 311 (1992)

to criminal liability of corporation. In other words, under US approach, especially in corporation with complicated corporate structure, it is sometimes not clear to whom particular action has to be attributed, meaning that it is difficult to identify particular perpetrator. Hence, in order to punish criminal activities, criminal liability of corporations reasonably follows.

Conversely, Serbian law has different fundamental principles of corporate criminal liability. It could be noticed that criminal liability of legal person under Serbian law is also to some extent based on the doctrine of *respondeat superior*, since according to Act on criminal liability of legal entities for criminal offenses, company is liable for criminal actions individual commits within the scope of employment and for benefit of corporation. However, this doctrine is certainly limited. Namely, as it explained in chapter III, criminal liability of companies in Serbian legal system rests exclusively on liability of corporations for acts of responsible persons in corporation. In other words, criminal liability of corporation will exist only in case of culpability of responsible persons, not every individual in the company.

4.2. Identifying the problem

Act on responsibility of legal entities for criminal offenses stipulates two scenarios for imposing corporate criminal liability. Under first, criminal liability of legal persons exists if there is a criminal activity of the responsible persons in legal entity, undertaken within the scope of his authorizations and for benefit of corporation. Secondly, corporation is criminally liable if criminal offense is committed by an employee in legal entity, within the scope of his employment and for the benefit of corporation, but if the particular criminal action is undertaken on the basis of failure of responsible person to exercise supervision over employees under his control.

Formulation of the second principle seems unclear and certainly leaves open room for various interpretations. What makes great confusion is the potential outcome in case when there is an act committed by the company's employee, for its benefit, but without existence of omission of supervision. The reasonable question that could be raised is whether it would lead to impossibility of company's criminal actions.

The first interpretation of the provision would lead to the conclusion that criminal liability of corporation is still possible, meaning that liability of responsible person is automatically assumed. In other words, responsible person would nonetheless be liable for every action of his subordinates. Basically, that would mean that there is a strict criminal liability of corporate officer, meaning that he will be held automatically criminally liable even in case there is not participation, or awareness of the wrongdoing. It seems that that was not legislator's intention. Another, more accurate interpretation of the particular provision could be viewed as that there is no assumption of strict liability since the Act explicitly states "if due to the omission of supervision"¹⁵⁹, specifically leaves space for contrary. Even in majority of cases, either director or other corporate executive in charge for employees, is highly obliged to exercise due supervision by monitoring operation of every action, which consequently lead to conclusion that appearance of criminal action is directly connected with supervision failure, contrary is still possible.

Generally speaking, provision of the Act¹⁶⁰ leaves wide space for manipulation and abuses by higher corporate executives in the company. Namely, in Serbia especially in small corporation director is person who is deemed to be responsible to monitor, but also to impact every operation and action within the company. In other words, directors are authorized by shareholders with

¹⁵⁹ Act on criminal liability of legal entities for criminal offenses, *supra* note 141

¹⁶⁰ Act on criminal liability of legal entities for criminal offenses, *supra* note 141

ultimate liability for proper operations of the company. Being a powerful, decision-making authority who keeps the most important information in legal entity, the director, as well as other high manager could impact actions of the employees. As result of, the lower employee could be influenced by the higher executive to undertake some actions for benefit of corporation. Due to the fear that he can jeopardize his work position or even lose his job, employee may undertake some criminal action for benefit of corporation which may be followed with benefit for corporate executive, where neither proof that responsible executive actually influenced his subordinates, nor evidence that responsible person failed to exercise his supervision is found.¹⁶¹ Simply put, directors can falsely create situation that it was beyond their power to affect action of the employee and prevent criminal offence.

On the other hand, in large companies, it is often difficult to determine precisely what is the exact role and position of individual as corporate officer. This is mainly because it is hard to differentiate the functions and competencies in the company. Here decisions are not enacted, and control is not vested only in one single person. On contrary, there are number of corporate executives which perform different kind of duties and can be assumed as responsible persons in corporation, in various sectors. This structure and corporate organization forms is so called “structural lack of individual responsibility”¹⁶² Legislators and courts in European countries reacted differently to this phenomenon. For instance, under German law, liability of managers is expanded through extending liability for “omissions or loosing notions of proximate cause”.¹⁶³ This approach shifted understanding of criminal liability of corporation in a sense that it always requires personal

¹⁶¹ Gunter Heine, *New Developments in Corporate Criminal Liability in Europe: Can Europeans Learn from the American Experience - or Vice Versa*, St. Louis-Warsaw Transatlantic L.J. 173, 176 (1998)

¹⁶² Bernd Schonemann, *Unternehmenskriminalität Und Strafrecht* 34-40 (1979);

¹⁶³ Gunter Heine, *Von Individueller Zu Kollektiver Verantwortlichkeit: Einige Grundfragen Der Aktuellen Kriminalpolitik*, Grenzüberschreitungen - Beiträge Zum 60 Geburtstag von Albin Eser 51, 57-67 (1995)

wrongdoing. Formulation of the Act which sets out wide group of individuals who is deemed as responsible person for purposes of the Act, support this notion. Namely, under Act, as a responsible person is assumed not only person who act on behalf of, but also every person who is legally or factually entrusted with tasks within the corporation. It could create confusion who is actually responsible for particular actions and impossibility of holding corporation liable.

Moreover, beside responsible executive's personal participation in creating false situation that despite all due care and supervision, he could not possibly be aware of the employee's wrongdoing, there are certainly situation when he was not actually aware of an illegal action, meaning that due supervision was not omitted but the criminal activity still arose.

In other words, potential negative effects under the controversial provision of the Act¹⁶⁴ could be drawn from formulation that failure of due supervision by responsible person lead to criminal act of an "employee which performs under control and supervision of responsible person"¹⁶⁵. This could also leave space for abuse of other highly positioned managers who are not by law directly liable for action of perpetrator. Basically, they could also affect employee's actions providing him with the instructions hidden under veil of his high position and causing situation that directly responsible person actually, could not by any chance be aware of the illegal action of his subordinate.

Moreover, shareholders who directly benefits from the illegal actions could also impact both corporate executives and employees to undertake some criminal action toward third persons for the benefit of corporation. If the supervision has never been proved, company would not be held criminally liable and they will be in a position to obtain themselves benefit from the particular

¹⁶⁴ Act on criminal liability of legal entities for criminal offenses, *supra* note 141

¹⁶⁵ *Id.*

criminal activity. In these cases, fundamental question that need to be raised is whether it is justified to strictly follow provisions of the act and not impose criminal liability of corporations.

Therefore, the provision could strikingly unjustified consequences of impossibility of holding companies liable, based on the fact that there has been criminal act undertaken for benefit of corporation, but without proven omission of supervision. Having in mind what consequences criminal activity of corporation in every legal system and globally could cause, and how important is for every legal system to properly sanction criminal activities of corporation and recognize criminal liability, this seems at least – unreasonable. This is of a particular importance when it comes to companies who are involved in risky operations which could produce serious injuries or other harsh effects to public safety, health and welfare in general.

4.3. Possible solutions

On the basis of the said, in order to prevent detrimental consequences, experience of US could offer to Serbia two solutions, both viewed as imposing strict liability of corporate officer on the basis of notions of RCO doctrine, and collectively liability of corporation.

4.3.1. First solution

As some authors argue provision of the Act on responsibility of legal entities for criminal offenses leaves room for acceptance of autonomous responsibility of legal entities, as in US law.¹⁶⁶ This is further supported with Recommendation of the Committee of Ministers of Council of Europe.¹⁶⁷ This act recommends imposing criminal liability of corporations, even though in certain limited

¹⁶⁶ Goran Ilic, *Zakon o odgovornosti pravnih lica za krivicna dela*, Sluzbeni glasnik Republike Srbije, 30 (2009)

¹⁶⁷ Council of Europe, *Recommendation of Committee of Ministers* doc.no. (88) 18 (1988), art. 102 (2)

cases, although there is no individual culpability determined. This notion holds company directly liable on the basis that it failed to prevent criminal offense. Therefore, the first solution would, at first place be, acceptance of the theory of criminal liability of corporation as it existed under US law. In other words, that would assume acceptance of the liability which is not based on culpability of responsible officers, but liability for criminal act of every employee undertaken for company's benefit. This solution would prevent possibility of not holding corporation liable if the failure of exercising supervision by the responsible person has not been proved. Additionally, due to practical importance that the RCO doctrine has in US, this solution would assume recognizing and imposing this type of strict liability for corporate officer. Even though process of radical changes in Serbian law would be slow, it is still possible.

4.3.2. Second solution

The second solution, which would probably be more effective, would require slight changes of corporate criminal law. That means that under conditions and limitations of the RCO doctrine, corporate officer having responsibility relation to criminal action and position which allows him to prevent harms, would be criminally liable for actions of his subordinates, without proving his awareness of the wrongdoing.

Therefore, having in mind all the above stated, the RCO doctrine under principles established in US law, seems as an attractive solution. Even though critics of strict criminal liability usually argue that holding defendants liable under the strict criminal liability is not in accordance with main standards of criminal law and is contrary to the understanding of criminal culpability which is predominant in community,¹⁶⁸ these arguments cannot be accepted. They basically rely on the fact

¹⁶⁸ Jerome Hall, General principles of criminal law 304-205 (1947); Hart, *The Aims of Criminal Law*, 23 Law & Contemp. Prob. 401, 422-25 (1958).

that the person cannot be deter if he does not know that that his action or omission will in any manner violate the law. As Hall stated, strict liability is not more deterrent than ordinary criminal liability and does not produce positive effects, at first place, as he claimed because it is not convicting to suppose that strict criminal liability will produce more deterrent than ordinary criminal liability having *mens rea* included.¹⁶⁹

However, as Wasserstrom argues, the above presented arguments could be challenged at least for two following reasons.¹⁷⁰ It could be said that person, especially responsible person for operation of whole corporation will be more cautious knowing that activity is governed by strict liability statute, and on the other hand, that he will be punished with stricter sanctions.¹⁷¹ In other words, person will certainly be more careful when engaging in some actions, or when he is obliged to perform supervision on the actions of another person, when there is possibility of imposing higher criminal sanctions. Those would lead to better monitoring of company's action by responsible persons and subsequently to better functioning of company's operation and to at first place prevention of detrimental consequences and second, prosperity of business in general. Introducing RCO doctrine to Serbian legal system would have the same effects.

Having in mind total impact of corporation activities to society and humanity, especially one involved in business which directly affected public health, safety or other collective goods, it is reasonable to say that someone has to be held liable. The most appropriate approach would be to impose collective liability of corporation and corporate executive, under whose control the employee who undertook action was, and who was responsible to better monitor corporate action and consequently prevent negative consequences. Therefore, application of RCO doctrine would

¹⁶⁹ Hall, *supra* note 163 at 302

¹⁷⁰ Richard A. Wasserstrom, Strict Liability in the Criminal Law, 12 Stanford Law Review, 4, 731-745 (1960),

¹⁷¹ *Id.*

on one hand prevent impossibility of imposing corporate criminal liability, and on another, lead to business prosperity by raising cautiousness of person who can face serious penalties.

Conclusion

Holding responsible corporate officer liable for corporation's illegal conduct without proving his culpable intent or awareness of wrongdoing, strikingly departs from basics notions of criminal law and necessity of determining guilty minds in order to impose criminal punishments.

However, due to significant impact that corporate wrongful activity could cause, especially in the areas connected to public welfare regulations which focus on protection of wide public interests, such as protection of public health, increase of social betterment and stability of economy, solution of US law through principles established under RCO doctrine, has considerable significance. Treating corporate crime as a crime of responsible corporate officer on the basis of his position in a corporate hierarchy and possibility to observe operations of the company and consequently prevent criminal actions, has meaningful purpose. Moreover, due to accelerated development in modern industrial society, there are reasonable grounds for doctrine to be expanded to other criminal offenses, or in other words, to be expanded beyond the scope of traditional public welfare.

Even though Serbian corporate criminal law is *per se* established on the basis of liability of responsible persons within the legal entity, Serbian corporate criminal liability differs from US approach. However, despite the fact that under Serbian legal principles, company and responsible officers always bear liability together, this thesis aimed to show that adopting solution from US would have major significance in preventing abuses. Namely, conditions of having company criminally liable (beside responsible person's personal involvement), solely on the basis of existence of supervision failure of responsible persons, could lead to - impossibility of company's criminal prosecutions. In other words, if criminal activity for the company's benefit by its

employee has been undertaken, but no omission of supervision has been proven, legal entity will not be held liable. Having in mind necessity of to recognize criminal behavior and to impose criminal penalties to entities in modern world, this situation seems unjustified.

Therefore, in order to prevent evasion of corporate criminal responsibility, US approach under RCO doctrine seems as an appropriate remedy. Having corporate officers strictly liable under the RCO doctrine for corporate misconduct in accordance with conditions determined in US law, would in Serbian legal system have significant benefits. It would firstly prevent evasion of corporate criminal liability and ensure protection of broad collective interests, but would also increase cautiousness of responsible individuals within the corporation, preventing abuses and lead to business prosperity in general.

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