Pace Environmental Law Review

Volume 8
Issue 2 *Spring 1991*

Article 6

April 1991

Brief for Appellant Canner: Third Annual Pace National Environmental Moot Court Competition

Western New England College School of Law

Crim. No. 90-87

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CHARLES CANNER and BERNARD BARKER,
Appellants,
- AGAINST -
UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT CANNER*

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* The winning briefs published in this issue are reprinted in their original form. No revisions have been made by the editorial staff of the *Pace Environmental Law Review*.

QUESTIONS PRESENTED

1. Whether § 6928(d)(3) of the Resources Conservation and Recovery Act was violated by Charles Canner where neither the legislative history nor the present facts demonstrate that such a result is warranted?

2. Whether a corporate officer violated the "knowing" requirement of § 6928(d)(3) when corporate policies placed the opportunity to gain any knowledge regarding environmental issues outside his corporate role?

3. Whether the district court properly denied Mr. Canner's motion for acquittal where the evidence illustrates that only Mr. Barker effectively caused the violation?

4. Assuming this court implies the Reasonable Corporate Officer Doctrine into § 6928(d)(3), whether Mr. Canner has violated the statute where only his plant manager, Barker, possessed the knowledge and authority to deal with the problem?

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FACTS

Charles Canner has been the president of Omni corporation since its founding in 1982 (R. 1). The prosperity of Omni has significantly contributed to the economic rebirth of the community of New Union City. Omni currently employs approximately 1200 workers, many of whom were formerly unemployed. Additionally, Omni's presence in New Union City has produced positive effects on the area crime rate and local property values (R. 1). Mr. Canner himself has proven to be an outstanding civic leader. His roles include serving as president of the New Union City General Hospital and Chairman of the New Union Council of Fine Arts (R. 2).

On June 26, 1989, a New Union City policeman noticed an Omni truck pull off to the side of the road near the Omni plant. The officer noted that the truck was leaking a yellow liquid in his logbook but did not investigate further (R. 2). On June 29 and 30, 1989, the EPA regional office received some citizen complaints about chemical odors from a discolored patch of ground outside the gate of the Omni plant (R. 3). Diane Durden, an EPA investigator, visited the site, took a soil sample, and sent it to the lab. The lab found that the soil contained DWE, a toxic substance.

On August 2, 1989, Inspector Durden sent a letter to Mr. Canner, stating that DWE was discovered outside the Omni plant, and asking whether Canner knew of its source (R. 3). This letter never reached Mr. Canner personally. Frank Formes, Mr. Canner's assistant, directed the letter to Mr. Barker, the plant manager (R. 3). This action was consistent with Omni's longstanding policy of forwarding environmental matters directly to Mr. Barker (R. 3).

Barker called Arnold Adams into his office after he received Inspector Durden's letter (R. 4). At the time, Arnold Adams was an inexperienced 23-year old facilities manager. Adams was responsible for maintenance and building services, including waste disposal (R. 2). Adams told Barker that one of the trucks had a leak in the cargo area reported on June 28, 1989 and that it was possible that the spill had come from that truck (R. 4). Adams did not know whether the leaking

truck carried DWE as no driver reported any spills. Furthermore, DWE is transported by other firms whose trucks pass by the area where the spill occurred. Adams offered to investigate the matter further. However, Barker instructed Adams not to, saying, "That's not our job." Barker then told Adams: "You're new to this business, and I'll give you some advice. Keep your mind on your work. We build hypercomputers. People like EPA inspectors are always asking a lot of questions. Answer their questions truthfully, but don't volunteer more than that" (R. 4).

Adams called Inspector Durden on August 9, 1989. He told her that no one at Omni knew the source of the spill. He also offered Durden the opportunity to visit the plant (R. 4). Inspector Durden wrote a memo summarizing the call from Adams. Adams then reported this conversation to Barker. Apparently approving what Adams said, Barker acknowledged Adams by nodding his head (R. 4).

Defendants Canner and Barker were convicted at trial of violating § 6928(d)(3). They appealed their convictions and the district court's ruling denying their motions for judgment of acquittal. In ruling on the motions for acquittal, the district court held that a false statement had been made by Adams (R. 5). The district court also held that Mr. Barker possessed the requisite level of knowledge (R. 6). The district court then implied the responsible corporate officer doctrine into the statute because it thought "Congress intended . . . to put a duty on corporate officials to be responsible for actions under their supervision" (R. 6). The district court then applied the responsible corporate officer doctrine to extend liability to Mr. Canner (R. 6). According to the district court, if it did not extend liability to Mr. Canner it would "be establishing [an] incentive . . . for other corporate executives to insulate themselves from knowing anything about the environmental actions of their companies" (R. 6).

SUMMARY OF THE ARGUMENT

Appellant Canner argues that his conviction mandates reversal because RCRA § 6928(d)(3) was not intended to govern

the alleged violation. The legislative history suggests that this provision was intended to govern false statements made regarding the illegal transportation of hazardous wastes. It was not intended to cover alleged false statements made during a phone conversation concerning a spill that may have occurred while legally transporting wastes to a recycler.

Appellant further contends that he cannot be convicted under the statute because his actions did not constitute a violation of § 6928(d)(3). Mr. Canner did not "knowingly omit material information or make any false material statement or representation" because he played no role in the events that led to this litigation. He did not receive the letter from Inspector Durden because it was routed to Barker pursuant to corporation policy. Therefore, appellant's conviction cannot be sustained under § 6928(d)(3).

Moreover, appellant argues that Adams' actions did not constitute a violation of the statute. Mr. Canner contends that Adams made no false statement, that the telephone conversation is not a "report" within the meaning of the statute, and that Inspector Durden did not "file, maintain or use for purposes of compliance" the information she received form Adams.

Charles Canner's conviction must also be reversed because the government has failed to prove Mr. Canner "knowingly" circumvented the statute in question. One of the criminal law's most fundamental truths declares that a law's mens rea element must be proven beyond a reasonable doubt in order to gain a conviction. The factual record does not contain a single hint of evidence which might suggest Charles Canner knew of the facts constituting the alleged violation.

Reported decisions of § 6928(d) illustrate that the statute's "knowingly" standard cannot be dispensed with under any circumstances. Each individual charged pursuant to this section must be shown to have possessed the required knowledge. Furthermore, § 6928(d) is not a strict liability statute. The physical presence of a mens rea element within the statute, coupled with relevant judicial interpretations refute any analogy to a strict liability case.

Mr. Canner's position as Omni's president is not a foun-

dation upon which knowledge of the violation may be imputed. Omni developed a policy whereby environmental compliance would be most efficiently satisfied. This procedure was not designed to insulate Mr. Canner from liability, but was instead structured to provide swift and competent response measures. Additionally, to rule that Mr. Canner deliberately avoided becoming aware of the present charge is not only legally unsound, but is also tantamount to holding that corporate officers may never delegate authority.

Contrary to several analogous environmental statutes, § 6928(d) does not expressly provide for "responsible corporate officer" liability. Consequently, under § 6928(d) corporate officials cannot be found to have violated the law merely because their duties were somehow related to the alleged violation. This Court must not act where Congress has distinctly refused to do so. The stigma of criminal liability will only serve to repress an innovative leader and quell the economic prosperity of a corporation upon which the future of a community relies. Conceding the importance of environmental regulations, it is nonetheless equally imperative to recognize that certain situations do not warrant punishment. Mr. Canner's predicament is such a situation.

The evidence unequivocally demonstrates that only Mr. Barker acted knowingly. The only evidence in the record regarding Mr. Canner's conduct was his act of delegating responsibility for environmental compliance to Mr. Barker. The facts demonstrate that Mr. Canner was not aware that false statements or violations of environmental laws would be practically certain to follow from his policy of delegating authority for environmental compliance to Mr. Barker.

Mr. Barker acted knowingly by inducing Mr. Adams to rely on his "advice." Mr. Adams conveyed the essence of that advice to Inspector Durden. Mr Barker acted knowingly because he must have been aware that Adams' statement to Inspector Durden was practically certain to follow from the "advice" he gave Mr. Adams.

By inducing Adams to rely on his advice, Barker effectively caused the alleged violation. There is no evidence, however, that Mr. Canner effectively caused any alleged violation.

Mr. Canner did not know about the allegedly illegal conduct. Moreover, there is no evidence suggesting Mr. Canner could not rely on his system of delegating environmental compliance to Mr. Barker. Finally, there is no evidence that Mr. Canner induced Mr. Adams to make the allegedly false statement. Consequently, Mr. Canner cannot be held to have caused the violation.

Even if this court implies the responsible corporate officer doctrine into the statute, the leading cases and authorities agree that the "knowingly" requirement cannot be read out of the statute. Under the responsible corporate officer doctrine, the government must prove that Messrs. Canner and Barker failed to exercise the proper level of vigilance and foresight to prevent the alleged violation.

Mr. Canner did not fail to exercise the proper level of vigilance because he did not know he could not rely on his system of delegating environmental compliance to Mr. Barker. If a violation did occur it is because Mr. Barker did not exercise vigilance to ensure Mr. Adams acted appropriately. Additionally, Mr. Barker failed to exercise vigilance because he did not promptly correct any allegedly false statements Mr. Adams made after Adams reported the substance of his conversation with Inspector Durden to him.

Finally, Mr. Canner did not fail to exercise the proper level of foresight to prevent the violation. Mr. Canner could not have foreseen any problems because he had no notice that he could not rely on Mr. Barker to ensure the plant operated within the boundaries of the law. If a violation is found, Mr. Barker's conduct of concealing the matter negates the possibility that Mr. Canner could have foreseen and therefore prevented the alleged violation from occurring.

ARGUMENT

I. APPELLANT CANNER'S CONVICTION MANDATES REVERSAL BECAUSE RCRA SECTION 6928(D)(3) WAS NOT INTENDED TO GOVERN THE ALLEGED VIOLATION IN THE PRESENT CASE.

Appellant Canner has been convicted of violating §

6928(d)(3) of the Resource Conservation and Recovery Act. This section imposes criminal penalties on any person who:

> knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit or other document filed, maintained or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter.

42 U.S.C. § 6928(d)(3)(1983). Appellant contends that his conviction cannot be sustained because the legislative history supports the position that § 6928(d)(3) was not intended to cover the events that occurred in the present case.

The legislative history lends insight into Congressional intentions when it drafted the criminal provisions of § 6928(d)(3). It provides in relevant part:

> This section also provides for criminal penalties for the person who knowingly transports any hazardous waste listed under this title to a facility which does not have a permit issued pursuant to section 305, or disposes of any hazardous waste without a permit under this title, or makes any false statement or representation in any application, label, manifest, report or permit filed to comply with this title. H.R. Rep. No. 94-580, 94th Cong., 2nd Sess., pt. 1 at 31 (1976).

This section of the legislative history suggests that the intent of Congress was to prosecute any person illegally transporting hazardous wastes, thereby reducing the amount of hazardous wastes that are unlawfully disposed of.

The fact that the provision for false statements is dealt with in the same sentence as the requirement of permits for dumping and transporting wastes suggests that the false statement must be made in regard to the waste that is being illegally transported or dumped. The statute mandates that a person be criminally prosecuted for making false statements in any "application, label, manifest, record, report, permit or

other document" that is needed in order to transport or dump hazardous wastes. 42 U.S.C. § 6928(d) (3) (1983). Therefore, someone who knowingly gave false information in order to obtain a permit could be criminally liable under this statute. To the contrary, this statute cannot be used to prosecute appellant Canner because the events that occurred do not involve the sort of conduct that Congress sought to prevent when it enacted § 6928(d)(3).

The government argues that Adams made false statements to Durden during a phone conversation. The government further contends that the phone conversation constitutes a "report" within the meaning of the statute. According to the legislative history, however, this "report" does not fall within the meaning of the statute. The facts of the case show that the Omni truck was legally transporting wastes to a recycler when the alleged spill occurred; there is no issue with respect to Omni's permit to dispose of the waste. No problem has arisen regarding false information given on an application, label, manifest, etc. that was utilized for the purpose of transporting hazardous wastes. The only incident that occurred was an EPA inspector talking to an Omni employee over the phone regarding a spill that occurred outside the gates of the Omni plant. Appellant asserts that he cannot be held liable under § 6928(d)(3) because his employee's telephone conversation with an E.P.A. official is not a "report" within § 6928(d)(3).

II. CANNER CANNOT BE CONVICTED UNDER SECTION 6928(D)(3) BECAUSE HIS ACTIONS DID NOT CONSTITUTE A VIOLATION OF THE STATUTE.

The first requirement of the statute is that appellant must "knowingly" omit material information or make any false material statements or representation." 42 U.S.C. § 6928(d)(3) (1983). The government contends that a false statement was made by Arnold Adams during a phone conversation with Inspector Durden. Appellant Canner, therefore, cannot be convicted under this element of the statute because he did not participate in the phone conversation between Ad-

ams and Durden. As the record points out the letter that was the basis for the phone call never reached Mr. Canner personally. Pursuant to Canner's standing instructions, all correspondences concerning the plant's environmental compliance, occupational safety and health compliance are routed to Bernard Barker, the plant manager (R. 3). Since Canner did not make any false statement and was not even aware that an Inspector from the EPA was looking into a possible DWE spill by an Omni truck, he does not meet the "knowingly" element of the statute and therefore cannot be convicted under it.

III. EVEN IF THE COURT DECIDES TO EXTEND CRIMINAL LIABILITY TO APPELLANT CANNER, HE CANNOT BE CONVICTED BECAUSE HIS EMPLOYEES' ACTIONS DID NOT CONSTITUTE A VIOLATION OF SECTION 6928(D)(3).

A. *No False Statement Was Made by Adams During His Phone Conversation With Inspector Durden.*

If the court decides to prosecute Canner because he is the president of the corporation, he nevertheless may not be convicted under § 6928(d)(3) because Adams did not knowingly make a false statement to Inspector Durden during their phone conversation. Therefore, Adams' actions did not fulfill the first element of the statute.

The record notes that a truckload of DWE did leave the plant in late June and was taken to a nearby recycler (R.2). On June 26, 1989, Edward Egger, a New Union City policeman, noticed an Omni truck leave the plant. He saw the truck pull off the road and noticed it was leaking a yellow liquid onto the grass. Officer Egger never pursued this incident (R. 2). Therefore, when Adams spoke to Inspector Durden he did not know about the incident that Officer Egger had observed. Furthermore, Adams did not know if the leaking truck or another truck had carried the DWE. Of relevance here is the fact that the DWE was not discovered on the Omni truck until after Adams phoned Inspector Durden. Also noteworthy is the fact that no driver had reported a spill, and that DWE is transported by other trucks that pass by Omni's front gates

(R.3). All these facts support the conclusion that when Adams told Durden "we do not know the source of the spill," he was not "knowingly omitting material information or making any false material statement or representation." 42 U.S.C. § 6928(d)(3) (1983). The statement he made to Durden was literally true for he had no conclusive facts to share with her. Therefore, Adams' actions did not satisfy the first element of the statute.

B. *If The Court Rules That Adams Did Knowingly Make a False Statement, Appellant Cannot be Convicted Because Adams' Phone Call to Durden Does Not Constitute a "Report" Within the Meaning of the Statute.*

Appellant next asserts that even if Adams did knowingly make a false statement, he did not do so in "any application, label, manifest, record, report, permit or other document." 42 U.S.C. § 6928(d)(3) (1983). The lower court ruled, however, that Adams' phone call was a "report" to Durden. The court reasoned that because Congress finished its examples by including "or other documents" it must have mentioned this phrase "as an admittedly inartful way to broaden what is covered, not to limit it" (R.5).

Appellant relies on a rule of statutory construction known as noscitur a sociis to point out that the District Court's ruling with respect to Mr. Canner is erroneous. *Black's Law Dictionary* defines noscitur a sociis as a rule which allows the meaning of a word to be known from the accompanying words. *Black's Law Dictionary* 1060 (6th ed., 1990). Under this doctrine the meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the meaning of other words or phrases associated with it. *Statutes and Statutory Construction* further states that where the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute. Sutherland, *Statutory Const.*, section 47.16 (4th ed. 1984). Appellant Canner contends that the

meaning of the word "report" is unclear in the statute because report could be construed as an oral statement or a written statement. Mr. Canner asserts that "report" should be interpreted as a written statement.

Appellant relies on the definitions set forth in *Black's Law Dictionary* of the words "application," "label," "manifest," "record," "report," "permit" and "document." *Black's Law Dictionary* (6th ed. 1990). An application is defined as "an appeal or petition, especially as written." *Id.* at 98-99. A label is "anything appended to a larger writing." *Id.* at 874. Manifest is defined as "evident to the senses, especially the sight;" it is also a "document used in shipping . . . containing a list of the contents." *Id.* at 962. A record is "the act or fact of recording or being recorded, reducing to writing as evidence." *Id.* at 1273. Permit is defined as "a written license or warrant. . .: *Id.* at 1140. A document is "an instrument on which is recorded, by means of letters, figures or marks, the original, official or legal form of something." *Id.* at 481.

The definitions of the above stated terms suggest that Congress intended to prosecute only those persons making a false written statement. The statute does not appear to cover those individuals giving false oral statements, because all of the words surrounding "report" imply that something must be written in order to come within the meaning of the definition.

Appellant's argument is further supported by the addition of the phrase "or other document." 42 U.S.C. § 6928(d)(3) (1983). The lower court felt that this phrase broadened the terms of the statute. Appellant, however, urges that it serves to narrow the meaning of the statute. As defined above by *Black's Law Dictionary*, a document is clearly a written instrument. This is further supported by the definition in the *Random House Dictionary*, which states that a document is "a written or printed paper furnishing information or evidence: and further defines it as "any written item." *Random House Dictionary* 578 (2nd ed., 1987). Nothing in the definition of the word suggests that it can be oral. Therefore, by using the phrase "or other document" Congress narrowed the terms of the statute because a document must be a written instrument.

The word "report" in the statute should be construed to mean a written statement. This is supported by the doctrine of noscitur a sociis and the addition of the words "or other documents" which serve to narrow the meaning of the statute. Accordingly, Adams' oral telephone conversation with Durden would not fall within the meaning of the statute.

C. *Assuming the Court Rules That the First Two Elements of the Statute are Met, Appellant Cannot be Convicted Because Nothing was Filed, Maintained or Used for Purposes of Compliance with Regulations Promulgated by the Administrator.*

Mr. Canner further contends that the subject matter of Durden's letter and Adams' response is not covered by § 6928(d)(3) because the false information must be "filed, maintained or used for purposes of compliance with regulations promulgated . . . under this subtitle."42 U.S.C. § 6928(d)(3)(1983). Appellant notes that Durden's letter made no reference to any regulatory purpose and did not even specify the reason for which the EPA wanted the information (R. 3). The lower court improperly stated that it was enough that the EPA wanted the information for its environmental programs (R. 5).

The district judge ignored the language of the statute when making its decision. The statute clearly states that the false information must be "filed, maintained or used for purposes of compliance with regulations promulgated by the Administrator." 42 U.S.C. § 6928(d)(3) (1983). Congress specifically included this language into the statute. Consequently, the courts are not at liberty to disregard the language of the statute. It therefore follows that this Court is obligated to reverse Mr. Canner's conviction because the subject matter of the letter and Adams' response is not covered by the statute.

IV. APPELLANT CANNER'S CONVICTION DEMANDS REVERSAL BECAUSE HE DID NOT POSSESS THE REQUISITE KNOWLEDGE AS IS DEMANDED BY THE STATUTE.

Mr. Charles Canner's criminal conviction is clearly erroneous and requires reversal because the Government failed to adequately demonstrate that Mr. Canner personally retained knowledge of the alleged violation. Section 6928(d)(3) of the Resource Conservation and Recovery Act expressly states that a person charged with violating the statute must "knowingly" engage in conduct sufficient to breach the statute. 42 U.S.C. § 6928(d)(3) (1983). An individual may be said to have acted with knowledge "when he is aware or believes that the unlawful result is practically certain to result from his act or omission." *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978). The record is devoid of any evidence suggesting Mr. Canner acted or failed to act so as to "knowingly" circumvent the language of any environmental statute. Accordingly, Mr. Canner's conviction must be vacated because the Government did not, and can not, prove Mr. Canner "knowingly" violated § 6928(d)(3).

A. *Analogous Criminal Proceedings Illustrate that an Individual's Knowledge Must be Proven Before a Conviction May be Properly Found.*

Several germane cases manifest the traditional concept that criminal statutes containing a mens rea element command that the particular element be proven beyond a reasonable doubt. Although considered public welfare statutes, it is nonetheless clear that most environmental statutes do not entail strict liability; rather, a predominance of the laws require knowledge or some alternative mode of volitional conduct. *See generally* Reisel, *Criminal Prosecutions and Defense of Environmental Wrongs*, 15 E.L.R. 10065 (1985) (stating, inter alia, that penal environmental statutes are not strict liability crimes.)

In a case involving illicit roadside dumping, the United States Court of Appeals for the Fourth Circuit acknowledged

that a defendant charged with violating the Toxic Waste Substance Control Act must be proven to have breached the statute's mental element. *United States v. Ward*, 676 F.2d 94 (4th Cir. 1982), *cert. denied*, 459 U.S. 835 (1982). In *Ward*, the defendant was convicted pursuant to 15 U.S.C. §§ 2605, 2614 for discharging PCB laden transformer oil along county roadways. *Id.* at 95. While defendant Ward did not personally participate in the dumping, the Court found that since he knew of the activity and yet failed to put a stop to it, Ward's guilt paralleled that of the actual violator. *Id.* at 96.

Whereas Ward was correctly reprimanded for his conduct, the same cannot be said with respect to Mr. Canner's situation. *Ward* cogently displays the fact that each particular defendant must be proven to have maintained a mental state sufficient to violate the statute at bar. The fact that an employee of Mr. Ward's, or conversely, Mr. Canner's plant manager, knew of the illegal activity is plainly not enough to sustain the employer's conviction.

Further noteworthy case law demonstrates that the mere fact that Charles Canner acted as Omni's president does not warrant placing criminal liability upon him. In *United States v. Frezzo Bros., Inc.*, the Third Circuit held that when determining criminal liability for alleged environmental crimes every defendant must be proven to have possessed the criminal mind adequate to support the conviction. *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123, 1130 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). Similarly, the United States Supreme Court has stated when a defendant is charged with violating a statute containing the element "knowing", the defendant must at least be proven to have ascertained the facts surrounding the act upon which the charge is founded. *United States v. International Minerals and Chemical Corp.*, 402 U.S. 558, 563 (1970).

There is not a single hint of evidence in the record which even remotely suggests Mr. Canner knew of any Omni vehicle leaking any substance. Indeed, it was Omni's policy to direct such matters into the hands of those most capable of handling these problems (R. 4). Thus, Mr. Canner did not know, nor did he have any reason to know of the E.P.A. inquiry in ques-

tion. Consequently, since neither the pertinent case law nor the factual background of this case supports the district court's ruling, Charles Canner's conviction must be reversed.

B. *Courts Have Strictly Adhered to the "Knowingly" Standard Found in Other Section 6928(d) Subsections.*

Reported interpretations of the various subsections of § 6928(d) indicate that courts rigidly conform to the "knowingly" element found in this statute. These decisions, albeit not binding, provide this Court with persuasive evidence of Mr. Canner's innocence. Therefore, to uphold Mr. Canner's conviction would not only be unjust, but would directly contradict the very decisions other courts, administrative agencies and corporations must rely on in attempting to enforce and comply with this environmental law.

Subsections (1) and (2)(A) of § 6928(d) both enlist the element "knowingly" in their efforts to enforce environmental compliance. In *United States v. Johnson & Towers, Inc.* the Third Circuit, when interpreting subsection (2)(A), held that the Government was required to prove the defendant possessed knowledge of the illegal action taken. *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985). The *Johnson* court stressed that individual criminal liability, irrespective of the sanctions placed on the corporate entity itself, must be predicated upon knowledge of the facts constituting the crime. *Id.* at 669. Thus, criminal liability could not extend to a corporate officer or employee absent proof that the individual defendant knew of all the facts upon which the charge was based.

Two years subsequent to the *Johnson* opinion, the Eleventh Circuit interpreted subsection (1) of § 6928(d) as being virtually identical to subsection (2)(A). The Court held that although a defendant did not have to be aware of the particular law allegedly broken, the defendant must be shown to have knowledge of the facts which made his or her conduct illegal. *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1505 (11th Cir. 1986); *See also United States v. Protex Industries*, 874

F.2d 740 (10th Cir. 1989) (interpreting the knowing endangerment requirement of § 6928 (e)). *Hayes* concludes by adding that "removing the knowing requirement from the elements would criminalize innocent conduct." *Id.* at 1504.

After considering the preceding authorities and their relevance with regard to § 6928(d)(3), the fact that Charles Canner had no knowledge of either the leaking vehicle or the E.P.A. inquiry potently militates for a reversal of his conviction. The questionable findings of the district court are entirely inconsistent with the statutory language and case law. In effect, the district court's opinion does exactly what *Hayes* warns against. It "criminalizes" inculpable behavior.

C. *Section 6928(d) is not a Strict Liability Statute.*

Any assertion that the case before this Court warrants the imposition of strict liability is unsound and erroneous. The charges against Charles Canner do not resemble an action brought pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). CERCLA is utilized to recover response costs in civil proceedings. 42 U.S.C. §§ 9601-9657 (1980). Additionally, CERCLA is essentially a strict liability statute. *See State of New York v. Shore Realty*, 759 F.2d 1032 (2d Cir. 1985). Consequently, any environmental suit under CERCLA cannot be compared, in any meaningful fashion, to the present case as § 6928(d)(3) of the Resource Conservation and Recovery Act involves *criminal* sanctions founded upon individual *knowledge*. 42 U.S.C. § 6928(d)(3), *United States v. Interstate Engineering Corp.*, 288 F.Supp. 402 (D.N.H. 1967).

There are a number of civil cases upon which the Government may contend that corporate officers may be held liable for environmental harms caused by their corporation. *See generally United States v. Conservation Chemical Corp of Ill.*, 660 F.Supp. 1236 (N.D. Ind. 1987) (corporate president liable under 42 U.S.C. § 6928(a), a civil offense); *United States v. Northeastern Pharmaceutical and Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1985), *cert. denied*, 484 U.S. 848 (1987) (imposing liability on a corporate officer in a civil ac-

tion); *State of New York v. Shore Realty*, 759 F.2d 1032 (2d Cir. 1985) (corporate president liable for CERCLA response costs); *United States v. Mottolo*, 605 F.Supp. 898 (D.N.H. 1985) (civil action under CERCLA); *United States v. Ward*, 618 F.Supp. 884 (D.N.C. 1985) (unlike criminal segment, in civil portion of the case defendant may be held strictly liable). *But see Joslyn Corp. v. T.L. James and Co., Inc.*, 696 F.Supp. 222 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990) (court would not pierce corporate veil absent a specific Congressional directive); *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976); *United States v. Moretti*, 526 F.2d 1306 (5th Cir. 1976).

Mr. Canner does not take issue with the general validity of these authorities. Rather, he refers to these authorities so as to direct the Court's attention to the fact that they are completely inapplicable to his case. Hence, any argument seeking to premise criminal liability upon the cases recited above, or those of a similar character, must be rejected as irrelevant and misleading.

The present case is similarly distinguishable from criminal actions based on the Federal Food, Drug and Cosmetic Act because that statute also imposes strict liability upon its offenders. The United States Supreme Court has held that the aforementioned Act's successful enforcement does not hinge on proof of a defendant corporate official's mens rea. *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Park*, 421 U.S. 658 (1975). In these cases, corporate officers were convicted not on the basis of their knowledge, but solely by virtue of their corporate position and relation to the problem involved. Nothing in the language of § 6928(d)(3) supports such a result with respect to Mr. Canner. Again, it is clear that § 6928(d)(3) requires that an alleged offender "knowingly" engage in illegal conduct. 42 U.S.C. § 6928(d)(3) (1983). The Government has failed to carry its burden of proving Mr. Canner's knowledge. Accordingly, the "strict liability" forced upon Appellant should be vacated as violative of § 6928(d)(3), Mr. Canner's rights, and conventional concepts of criminal liability.

V. CHARLES CANNER'S POSITION AS OMNI'S PRESIDENT IS NOT A BASIS UPON WHICH KNOWLEDGE MAY BE IMPUTED.

Criminal liability may not be extended to Mr.Canner pursuant to § 6928(d)(3) simply because his corporate office placed him in a position where he *could have* known of the E.P.A. investigation. Generally, American courts have refused to impute an employee' knowledge to a corporate officer when the criminal statute provides a mens rea element. *Gordon v. United States*, 347 U.S. 909, 910 (1954). The fact that Barker or Adams knew of the investigation, therefore, cannot sustain Charles Canner's conviction when Mr. Canner did not, to any degree, share his employees' knowledge. The doctrine of the responsible corporate officer finds no refuge in a non-strict liability, criminal atmosphere and cannot be implemented to uphold Mr. Canner's conviction.

A. *Omni's Policy with Respect to Environmental Laws is Properly Structured for Producing Prompt and Efficient Response Measures.*

Due to the various demands made upon Omni's successful corporate president, Mr. Canner, authority to deal with environmental issues was appropriately delegated to Barker, Omni's plant manager (R. 3). The corporate policy is designed to promote fleet action rather than bureaucratic sluggishness. The consent of Charles Canner was not required to direct adherence to environmental laws. Instead, this one additional step, one fraught with possible delays, was eliminated in favor of placing corporate environmental compliance in the competent hands of an experienced, well trained manager (R. 3).

The Government's assertion that Mr. Canner intentionally ignored certain issues such as environmental compliance in order to avoid personal liability is factually suspect. As was noted above, Omni's policy was to directly deal with, not leave unaddressed, environmental complaints (R. 3). Furthermore, there is no indication of any prior environmental problems Mr. Canner would possess a motive to stay isolated from. Omni Corp. has been a immense social and economic benefit

to New Union City. It's president should not be forced to incur the consequences of any employee ineptitude if and when longstanding corporate practices are not adhered to.

The common law doctrine of deliberate ignorance is equally remote in terms of reaching Mr. Canner's position because there is no evidence in the record which insinuates Charles Canner consciously removed himself from a presently existing problem. In a recent Court of Appeals decision, the Ninth Circuit held that a jury instruction of deliberate ignorance is correctly given only in extremely narrow circumstances. *United States v. Pacific Hide & Fur Depot, Inc.*, 768 F.2d 1096 (9th Cir. 1985). The *Pacific Hide* court held that the defendant's failure to receive notice of the alleged violation, coupled with a general lack of knowledge regarding the situation, did not sustain the Government's argument that the defendant purposely avoided learning the truth. *Id.* at 1098. Hence, the *Pacific Hide* opinion strongly advises that the defendant in question must, at the very least, have some indication that there is an existing problem in order for the court to instruct the jury on the doctrine of deliberate ignorance.

The record does not reflect, under any reading, the notion that Mr. Canner knew of or purposely avoided knowing of the E.P.A.'s inquiry of August 1989 (R. 3). Additionally, it is illogical to surmise that one may deliberately ignore a problem that the individual knew nothing about. Omni's policy of forwarding environmental matters directly to Barker was not an evasion by Mr. Canner of present difficulties. Rather, it is a prudently developed plan that applies to several situations without regard to the timing or severity of the problem at hand. Applying the doctrine of deliberate ignorance in the present situation is tantamount to holding that corporate officers may never delegate authority in any capacity. Such a result would hardly benefit the efficiency and productivity of American industry.

Additional case law augments the contention that Charles Canner did not purposely avoid learning of the E.P.A.'s investigation. If direct knowledge is not discovered, a charge of deliberate ignorance is warranted only where the jury could find that there are facts present to suggest a pattern of behavior

based upon knowledge of action sufficient to violate the law. *United States v. Ciampaglia*, 628 F.2d 632 (1st Cir. 1980), *cert. denied*, 449 U.S. 1038 (1980); *See also United States v. Deveau*, 734 F.2d 1023 (5th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); *United States v. Corbin Farm Service*, 444 F.Supp. 510 (E.D. Ca. 1978).

Imported to the present situation, *Ciampaglia* would only support the imposition of the doctrine of deliberate ignorance upon Mr. Canner if there were facts indicating he was purposely evading a problem he knew of, yet sought to avoid by having his conduct evince an unawareness of the situation. There are, however, no facts suggesting Mr. Canner knew of the E.P.A.'s investigation. It therefore rationally follows that he could not have been consciously avoiding an existing problem of which he had no consciousness of. The doctrine of deliberate ignorance should not be applied by this Court as it can only serve to prejudice Mr. Canner's case.

B. *Congress Did Not Intend Section 6928(d) to Reach Corporate Officers Not Possessing Knowledge of a Violation.*

Congress did not intend for criminal liability to extend to corporate officers under § 6928(d) because the language "responsible corporate officer" was not included within the statute. In similar environmental laws, Congress expressly provided that the term "person" shall specifically embrace any "responsible corporate officer." 33 U.S.C. § 1319(c)(6) (1986); 42 U.S.C. § 7413(c)(3) (1983). Under these enumerated statutes, Congress directed for the implication of criminal liability upon any corporate official whose duties bore a reasonable relation to the alleged violation.

Thus, if a corporate manager could have prevented a problem in his or her department, that individual might be found liable by virtue of his or her association with that area of the corporation. This enforcement contingency is not allowed for in the present case. The legislative history of § 6928(d)(3) does not illuminate why "responsible corporate officer" was expressly excepted. H.R. Rep. No. 94-1491, 94th

Cong., 2nd Sess., pt.1, at 30 (1976). Nevertheless, courts must not legislate in an area where Congress has refused to do so. Penal sanctions should not be impressed upon Charles Canner where Congress has not explicitly provided for such a result. To do so would frustrate the intent of Congress and would be an abuse of power by this Court.

VI. PUBLIC POLICY WILL NOT BE FURTHERED BY PLACING THE STIGMA OF CRIMINAL LIABILITY ON AN EXEMPLARY CIVIC LEADER.

Criminally reprimanding and disgracing Charles Canner will not benefit the goals of the Resource Conservation and Recovery Act or the community of New Union City. The Omni corporation has been an impeccable asset to its surroundings, employing hundreds of workers formerly unemployed, increasing local property values, and generally contributing to the decrease in the local crime rate (R. 1). Charles Canner, president and chief developer of Omni, is an active and important public figure. A member of the Board of Directors of New Union City General Hospital and the chairman of the New Union City Council on Fine Arts, Mr. Canner maintains an unblemished personal and business reputation. Given these facts, there is simply no valid purpose for enforcing a minor violation upon Mr. Canner, particularly when the liability is, at best, very dubious.

Appellant is not contending that the legitimacy and viability of environmental statutes should be sacrificed in favor of preserving reputations and civic accomplishments. However, Mr. Canner emphatically urges this Court to weigh heavily the fact that criminal sanctions would publicly embarrass and destroy all of his personal and business credentials deservedly earned. Mr. Canner properly directed environmental problems in the hands of those he felt most able to address these issues (R. 3). Thus, any proven violation should not be forced on him because of his appropriate delegation of authority. In a period of national corporate regression and economic stagnation, this Court must not punish an innovative leader whose business supports the life of a community. The threat

of a criminal stigma in Charles Canner's case serves only to quash a creative business personality upon whom the vitality of Omni corporation rests.

Environmental criminal enforcement policies must not be directed at pursuing petty, insignificant violations that arise due to simple errors rather than conscious non-compliance. The primary focus of environmental enforcement should be the intentional and continuous offenders who significantly violate environmental statutes. *See* Olds, *Thoughts on the Role of Penalties in the Enforcement of the Clean Air and Clean Water Acts*, 17 Duq. L. Rev. 1, 26 (1978-1979). Furthermore, enforcement officials have recommended that "prosecution of individual corporate officers should only be pursued where the evidence demonstrates that intentional corporate non-compliance with the law is the result of an informed policy decision made by some corporate official." *Id.* at 27, (quoting from 8 Envir. Rep. 247, 248 (1977)). The case before this Court scarcely reflects any such substantial, continuous, or intentional disregard of *any* environmental statute.

The time and expense of both the E.P.A. and environmentally conscious companies such as Omni can be better expended through non-adversarial, candid communications rather than in heated court battles. After considering this and the many preceding arguments, this Court must reverse Charles Canner's conviction. The interests of New Union City, the E.P.A., and Mr. Canner are better served by not enforcing criminal sanctions upon the appellant. His conduct is not criminal, and therefore not the sort of activity which this Court should punish. This is clear after considering all the facts, authorities, and policies which warrant a reversal of the district court's judgment.

VII. ASSUMING THE GOVERNMENT ESTABLISHED A VIOLATION OF 42 U.S.C. SECTION 6928(D)(3), THE EVIDENCE IS SUFFICIENT ONLY AGAINST MR. BARKER.

A. *The Evidence Unequivocally Demonstrates that Only Mr. Barker Possessed the Requisite Level of "Knowledge" Under the Statute.*

Defendants act knowingly if they are aware "that the result is practically certain to follow from . . . [their] conduct" *United States Gypsum Co.*, 438 U.S. at 445 (quoting W. LaFave & A. Scott, *Criminal Law*, 196 (1972)). The "result" Messrs. Canner and Barker were held liable for was the allegedly false statement (R. 5). Mr. Canner's only "conduct" is delegating environmental compliance to Mr. Barker. Consequently, for Mr. Canner's conviction to stand, the evidence must demonstrate that the allegedly false statement is practically certain to follow from Mr. Canner's delegation of responsibility for environmental matters to Mr. Barker.

Evidence of prior violations is a powerful rejoinder to the defense " 'that the act on trial was . . . inadvertent, accidental, unintentional, or without guilty knowledge.' " *United States v. Ross*, 321 F.2d 61, 67 (2d Cir. 1963) (quoting McCormick, *Evidence*, at 329 (1954)). There is no evidence demonstrating that Mr. Canner was not aware that false statements or even violations of environmental laws in general would be practically certain to follow from his policy of delegating responsibility for environmental compliance to Mr. Barker.

Moreover, it is a *non sequitur* to conclude that Mr. Canner is liable under § 6928(d)(3) for knowingly making a false statement or knowingly failing to prevent a false statement from being made, because knowledge of the EPA investigation could be imputed to Mr. Canner through Mr. Formes. There is no evidence to provide a logical link between the two events. The Government has not shown that Mr. Canner had no reason to believe Mr. Barker would not carry out his duty of ensuring that the company and its employees operated within the parameters of the environmental laws. The absence of this or other similarly competent evidence establishes that

Mr. Canner could not have acted "knowingly."

Although the evidence is insufficient to establish that Mr. Canner possessed the requisite level of culpable knowledge, the evidence is sufficient to conclude that Mr. Barker acted knowingly. Mr. Barker was aware that the comments Mr. Adams made to Inspector Durden of the EPA were practically certain to follow from his conversation with Mr. Adams.

Barker induced Adams to rely on Barker's superior knowledge and experience by telling Adams, "You're new to this business, and I'll give you some advice In this case we don't know anything for certain Now, I want you to call the EPA to answer the letter. Be careful what you say. Don't lie, but don't volunteer anything either. Say as little as possible" (R. 4). Adams called Inspector Durden and told her, "we don't know the source of the spill" (R. 4). By inducing Adams to rely on his superior position in the company, expertise and authority, Barker must have been aware that Adams' statement to Inspector Durden would be practically certain to follow from his "advice."

Viewing the record as a whole, the evidence is sufficient to establish Mr. Barker acted "knowingly." Consequently, Mr. Barker's conviction may be upheld. However, there is no evidence that Mr. Canner knew or should have known about the allegedly false statement, or that he could not rely on his system of delegating authority for compliance with environmental laws to Mr. Barker. Consequently, the district court committed reversible error in denying Mr. Canner's motion for acquittal.

B. *The Evidence Unequivocally Demonstrates that Any Alleged Violation of the Statute Was "Effectively Caused" by Mr. Barker.*

A person may be liable under 42 U.S.C. § 6928(d)(2)(A) for knowingly causing others to dispose of hazardous waste in violation of RCRA's permit requirements. *United States v. Greer*, 850 F.2d 1447 (11th Cir. 1988). In *Greer*, there was no direct evidence that Mr. Greer ordered his subordinate to dispose of the waste in violation of § 6928(d)(2)(A). *Id.* at 1451.

However, the Eleventh Circuit held that the evidence at trial was sufficient for the jury to infer that Mr. Greer effectively caused his subordinate to dispose of hazardous waste improperly. *Id.* at 1452. Similarly, there is no direct evidence that Mr. Barker told Mr. Adams what to say. However, the evidence is sufficient to infer that Mr. Barker effectively caused Mr. Adams to make the false statement.

Arthur J. Greer operated a waste transportation and recycling business in Orlando, Florida. Edward L. Fountain was Greer's plant manager and subordinate at the time of the illegal activity. At trial, Fountain testified that he once questioned Mr. Greer's wisdom about improperly dumping what Fountain thought was a particularly noxious load of waste onto the ground. Greer's reaction was to say, " 'I never had any problem out of [former plant managers]. Do I see a problem out of you?' " *Id.* at 1451.

On or about August 12, 1982, the date of the incident leading to Greer's indictment, a 1000 gallon truck was driven to Greer's facility. Greer told Fountain that the truck was needed the following day. There were no storage tanks available to unload the waste into. Fountain informed Greer of this fact. Greer responded by asking Fountain if he was having another problem, adding that he hired Fountain to handle these types of situations. Fountain resolved his dilemma by dumping the 1000 gallons of waste onto the ground. The Eleventh Circuit found this evidence sufficient to establish that Greer effectively caused Fountain to dump the waste onto the ground in violation of 42 U.S.C. § 6928(d)(2)(A). *Id.* at 1451-1452. Significantly, the Eleventh Circuit did not imply the responsible corporate officer doctrine into the statute to hold Mr. Greer liable.

As in *Greer*, this court need not engage in judicial legislation and imply the responsible corporate officer doctrine into the statute to hold the truly responsible party liable for the alleged violation. Rather, this court can use *Greer* to place the blame where it properly belongs — on Mr. Barker, the man who "effectively caused" any alleged violation of 42 U.S.C. § 6928(d)(3).

Mr. Barker supervised the entire workforce at Omni's

New Union facility (R. 2). Consequently, Barker was Adams' superior. The conversation that occurred between Barker and Adams before Adams called Inspector Durden is swollen with the implication that Adams should rely on Barker's superior position in the company, knowledge and experience and take his "advice" (R. 4).

The evidence unequivocally demonstrates that Adams relied on Barker's superior position in the company, knowledge and expertise, and took Barker's "advice." Barker told Adams, "You're new to this business, and I'll give you some advice In this case we don't know anything for certain Now, I want you to call EPA Be careful what you say. Don't lie, but don't volunteer anything either. Say as little possible" (R. 4). Thereafter, Adams called Inspector Durden and told her, "we do not know the source of the spill" (R. 4). Adams was merely passing on the substance of his conversation with Barker. Consequently, any violation of § 6928(d)(3) was effectively caused by Barker inducing Adams to rely on Barker's "advice."

Similarly, Arthur Greer was Edward Fountain's superior. The conversation between Greer and Fountain before Fountain dumped the 1000 gallons of waste onto the ground is swollen with the implication that if Fountain did not comply with Greer's wishes, Greer would find someone else to do the job. Essentially, Greer coerced Fountain into performing the illegal act by threatening Fountain's position at the company. Although Barker did not overtly coerce Adams, he offered Adams some "advice" based on Barker's superior position in the company, knowledge and expertise. As the record demonstrates, Adams took Barker's advice (R. 4). Therefore, by inducing Adams to rely on his "advice," Barker effectively caused any alleged violation as surely as Greer effectively caused Fountain to dump the 1000 gallons of waste onto the ground. Moreover, Adams subsequently reported his conversation with Inspector Durden to Mr. Barker, who nodded in approval (R. 4). Consequently, Barker not only effectively caused but also failed to remedy any alleged wrongdoing, an act for which he can be held liable. Comment, *The Criminal Responsibility of Corporate Officials for Pollution of the En-*

vironment, 37 Alb. L. Rev. 61, 70 (1972).

There is no evidence that Mr. Canner "effectively caused" the alleged violation. Unlike Mr. Greer or Mr. Barker, Mr. Canner did not exercise any affirmative influence on anyone. Mr. Canner did not coerce or induce anyone to rely on his representations. If Mr. Canner directed Barker or any other subordinate to perform the allegedly illegal act, there would be a basis for holding Mr. Canner liable. *Id.* Similarly, if Mr. Canner knew of the allegedly illegal conduct but failed to remedy it, he could be held criminally liable. *Id.* However, there is no evidence establishing that Mr. Canner knew of the alleged violation yet failed to act. Moreover, there is no evidence suggesting that Mr. Canner knew or should have known that he could not rely on his policy of delegating environmental compliance to Mr. Barker. Finally, there is no evidence that Mr. Canner coerced or induced Mr. Adams into making the allegedly false statement. Consequently, Mr. Canner cannot be held to have "effectively caused" the violation.

VIII. ASSUMING THIS COURT IMPLIES THE RESPONSIBLE CORPORATE OFFICER DOCTRINE INTO SECTION 6928(D)(3), AGAIN, THE FACTS DEMONSTRATE THAT ONLY MR. BARKER IS LIABLE.

A. *The Court Cannot Use the Responsible Corporate Officer Doctrine to Erase From the Statute the Requirement that Defendants Act "Knowingly."*

The responsible corporate officer doctrine imposes liability on corporate officials "who . . . have a responsible share in . . . further[ing] . . . the transaction which the statute outlaws." *United States v. Dotterweich*, 320 U.S. 277, 284 (1943); *See also United States v. Park*, 421 U.S. 658, 669 (1975) (quoting *Dotterweich*, 320 U.S. at 284). *Dotterweich* and *Park* are the leading Supreme Court cases applying the responsible corporate officer doctrine. However, as previously indicated, *Dotterweich* and *Park* are not relevant because they both applied a strict liability standard. Messrs. Canner and Barker were charged under a statute requiring violators to act "know-

ingly." As also indicated, courts strictly adhere to the "knowledge" requirement in cases proceeding under 42 U.S.C. § 6928(d). *Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985); and *Hayes Int'l Corp.*, 786 F.2d 1499 (10th Cir. 1986). Consequently, if this court implies the responsible corporate officer doctrine into the statute, the government still must prove that Messrs. Canner and Barker acted "knowingly." This conclusion is supported by *Dotterweich* and *Park*.

Justice Frankfurter in *Dotterweich* noted that the act under which the defendant was prosecuted dispensed with the traditional element of mens rea. *Dotterweich*, 320 U.S. at 280-281. *See also Park*, 421 U.S. at 670-671. Consequently, the court felt justified in construing the statute liberally. *Dotterweich*, 320 U.S. at 280-281; *Park*, 421 U.S. at 670-671. The Court in *Park* also noted that an amendment to the statute imposing liability for willful or grossly negligent acts was "subsequently stricken in conference." *Park*, 421 U.S. at 672 n. 15 (citing 94 Cong. Rec. 8551, 8838 (1948)). Moreover, Chief Justice Burger in *Park* wrote that *Dotterweich* left the problem of determining who stands in a responsible relation to the company up to "settled doctrines of criminal law." Settled doctrines of criminal law do not include modifying a congressionally established level of mens rea in the statute. *Gordon*, 347 U.S. at 909-910. Finally, the commentators considering the issue agree that the "knowingly" requirement cannot be read out of the statute when a court applies the responsible corporate officer doctrine. Olds, Unkovic & Levin, *Thoughts on the Role of Penalties in the Enforcement of the Clean Air and Water Acts*, 17 Duq. L. Rev. 1, 23 (1977-1978); Comment, *The Criminal Responsibility of Corporate Officials for Pollution of the Environment*, 37 Alb. L. Rev. 61, 74 (1972). Consequently, if this Court implies the responsible corporate officer doctrine into the statute, the evidence must be sufficient to conclude that Messrs. Canner and Barker possessed the requisite level of knowledge under the statute.

To reiterate, there is no evidence that Mr. Canner was aware that the false statement or violations of environmental laws were practically certain to result from his policy of dele-

gating responsibility for environmental compliance to Mr. Barker, or from the fact that Frank Formes knew that the EPA was investigating a spill outside the gate of Omni's New Union City plant. The evidence is sufficient, however, to establish that Mr. Barker was aware that Mr. Adams' statement to Inspector Durden was practically certain to follow from Mr. Barker's conduct. Mr. Barker used his superior position in the company, expertise and knowledge to impart some "advice" to Mr. Adams. The record demonstrates that Adams took that advice. Moreover, Barker effectively caused the violation by inducing Adams to rely on Barker's superior position, expertise and knowledge. Finally, Mr. Barker failed to remedy any wrongdoing after Adams reported the conversation with Inspector Durden to him. The evidence conclusively establishes that only Mr. Mr. Barker possessed the requisite level of knowledge.

B. *What the Government Must Prove if the Responsible Corporate Officer Doctrine is Implied into Section 6928(d)(3).*

> The Government establishes a *prima facie* case against responsible corporate officials when it introduces evidence sufficient to warrant a finding by the trier of the facts that 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. The failure to fulfill the duty imposed by the interaction of the corporate agent's authority and the statute furnishes the causal link.

Park, 421 U.S. at 673-674. Consequently, the nexus between the responsible corporate officer doctrine and liability under the statute is duty and breach of duty. Therefore, liability for Messrs. Canner and Barker depends on the scope of the duty.

Responsible corporate officers must exercise a "demanding level" of "foresight and vigilance." *Park*, 421 U.S. at 672. The demanding level of foresight and vigilance must be exer-

cised "either to prevent in the first instance, or promptly to correct the violation complained of" *Id.* at 674. Therefore, when the statute provides for strict liability, the responsible corporate officer is under a duty to exercise a demanding level of foresight and vigilance to prevent violations of environmental laws. However, § 6928(d)(3) is not a strict liability statute. Consequently, as the discussion below demonstrates, the duties of Messrs. Canner and Barker are modified accordingly.

1. *The Government failed to prove that Mr. Canner did not exercise the proper level of vigilance under section 6928(d)(3).*

If 42 U.S.C. § 6928(d)(3) was a strict liability statute, then corporate officials might be expected to exercise excessive levels of vigilance to prevent violations. However,

> [t]he imposition of criminal liability on a corporate official . . . for engaging in conduct which only after the fact is determined to violate the statute . . . without inquiring into the intent with which it was undertaken, holds out the distinct possibility of over deterrence; . . . conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who choose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.

United States Gypsum Co., 438 U.S. at 441. "[W]here the conduct proscribed is difficult to distinguish from conduct permitted . . . the excessive caution spawned by a regime of strict liability will not necessarily redound to the public's benefit." *Id.* at 441-442 n. 17. With strict liability statutes, "excessive caution . . . is entirely consistent with the legislative purpose." *Id.* (citing *Park*, 421 U.S. at 671-672). Thus, *United States Gypsum Co.* cautions that in a non-strict liability setting, imposing a duty of excessive caution or vigilance may not benefit the public, particularly where prohibited acts are difficult to distinguish from lawful conduct. Where prohibited acts are difficult to distinguish from lawful conduct, imposing lia-

bility without first inquiring whether the defendant acted culpably "holds out the distinct possibility of overdeterrence." *United States Gypsum Co.*, 438 U.S. at 441.

The district court held Mr. Canner liable because "[o]therwise we will be establishing incentives for other corporate executives to insulate themselves from knowing anything about the environmental actions of their companies" (R.6). In essence, the district court refused to acquit Mr. Canner because he delegated authority for environmental compliance to Mr. Barker. If § 6928(d)(3) imposed strict liability, then corporate officers might reasonably be expected to exercise excessive caution. However, § 6928(d)(3) does not impose strict liability. Therefore, the district court abused its discretion in refusing to grant Mr. Canner's motion for acquittal when the facts in the record do not establish that Mr. Canner was not acting in good faith. The district court committed precisely what *United States v. Gypsum Co.* warned against — engaging in overdeterrence.

Mr. Barker, unlike Mr. Canner, did not exercise the proper level of vigilance. Mr. Canner imposed an affirmative duty on Mr. Barker to ensure that the plant operated within the parameters of environmental laws (R.3). If any violation is found, it is because Mr. Barker failed to exercise vigilance to ensure Mr. Adams did not make any false statements to the EPA, or because he did not promptly correct the violation once he learned about it (R. 4).

2. *The government failed to prove that Mr. Canner could have foreseen the violation and taken steps to prevent its occurrence.*

Foreseeability is generally a question of fact for the jury. However, when the evidence at trial is insufficient to maintain a conviction, the defendant should be acquitted. Fed. R. Crim. P. 29(a). The government has failed "in its ultimate burden of proving beyond a reasonable doubt" that Mr. Canner could have foreseen yet failed to prevent or correct the violation. *Park*, 421 U.S. at 673.

The responsible corporate officer doctrine is a method of

holding responsible corporate officials "criminally liable for 'causing' violations." *Id.* Mr. Barker had an affirmative duty to ensure that the New Union plant operated within the parameters of the environmental laws (R.3). Any alleged violation occurred because Mr. Barker induced Mr. Adams to take some "advice." The record demonstrates that Adams took that "advice" from Mr. Barker, relying on Mr. Barker's superior position in the company, skill and knowledge (R.4). Mr. Barker's failure to perform his duty by giving Mr. Adams the wrong advice, and then failing to remedy any alleged violations after Mr. Adams reported the violation with the Inspector to Mr. Barker, breaks any causal thread of liability running to Mr. Canner. *In Re Bell & Beckwith*, 50 B.R. 422, 432 (Bankr. N.D. Ohio 1985).

Mr. Canner cannot be held to have failed to exercise the requisite level of foresight because he had no notice of the allegedly false statement. Moreover, Mr. Canner had no notice that he could not rely on Mr. Barker to prevent violations from occurring or remedying them once they do occur. Therefore, Mr. Canner could not have exercised any level of foresight to prevent the alleged violation. Mr. Barker's myriad of wrongful acts negates the possibility that without notice, Mr. Canner could have foreseen and therefore acted to prevent the alleged violation from occurring. *In Re Bell & Beckwith*, 50 B.R. at 432.

CONCLUSION

For the reasons set forth, Appellant Canner respectfully requests that the judgment of the United States District Court for the District Court of New Union be reversed as to him, and that this court enter a judgment of acquittal in his favor.