

LIABILITY OF CORPORATE EMPLOYEES AND OFFICERS FOR WRONGFUL ACTS OF THE COMPANY

By Paul J. Riehle, Sedgwick, Detert, Moran & Arnold

When a corporation commits an intentionally wrongful act, when it misappropriates another company's trade secrets, intentionally interferes with another company's business, or files a malicious lawsuit, can the company's employees or officers be held personally liable? Two recent decisions of the California Court of Appeal offer contrasting answers. In *Brennan v. Tremco*, the court held that an employee who is not an officer or director may not have any personal liability for the acts of the corporation even if the employee personally participated in them. On the other hand, in *P.M.C. v. Kadisha*, the court held that an officer or director of a corporation may have personal liability without personal participation in the intentional wrongdoing by the corporation if the officer or director has reason to know of the unlawful conduct, does nothing to stop it, and may benefit from the wrongdoing.

On February 18, 2000, the California Court of Appeal decided *Brennan v. Tremco, Inc.*, a malicious prosecution case. Brennan was a former employee of Tremco who had gone to work for one of Tremco's competitors. Tremco then sued Brennan for misappropriation of trade secrets, fraud, and unfair competition, among other theories. Brennan prevailed in that case and then sued Tremco for malicious prosecution. He also sued two Tremco employees named Miller and McOwan. Brennan alleged that Miller and McOwan "instigated and/or were actively instrumental in initiating and maintaining," the lawsuit Tremco had filed against him. The decision does not identify what jobs were held by Miller and McOwan except to carefully point out that Miller and McOwan were not alleged to be officers or directors of Tremco. The trial court dismissed the action against Miller and McOwan on the pleadings, finding that there was no cause of action against them. The Court of Appeal affirmed.

Recognizing that a corporation must necessarily act through its employees and therefore a corporate employee cannot be held liable as a conspirator or as an aider and abettor to the corporation, the court said, "[i]n our view it would run counter to the decisions [that] hold that a corporate employee cannot be held

liable as a conspirator or aider or abettor in filing a lawsuit on behalf of a corporation, but can be held liable as an instigator of the filing."

Essential to this holding was the allegation that Miller and McOwan were acting within the course and scope of their agency and employment when they instigated the lawsuit. The court noted in a footnote that this factor is essential to the employee's immunity from a conspiracy cause of action. "Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage."

On March 14, 2000, the California Court of Appeal decided *P.M.C., Inc. v. Kadisha*. In that case, the plaintiff P.M.C. sued several of its former employees who had purchased stock in another company and had become directors of that corporation which plaintiff said had stolen its trade secrets and its customer lists. Three of the individual defendants moved for summary judgment on the grounds that they had joined the new company after the trade secrets had been obtained and that when they invested in the new company and became officers and directors of it, they had conducted an investigation to ensure that there was no ongoing theft or use of their former employer's confidential information. The trial court found no basis for personal liability against those individual defendants and granted summary judgment. The Court of Appeal reversed. While recognizing that "directors or officers of a corporation do not incur personal liability for torts of the corporation merely by reason of their official position," and while recognizing that, "it is well settled that corporate directors cannot be held vicariously liable for the corporation's torts in which they do not participate," the court held that an officer or director may be held liable for failing to stop misconduct he ought to know about, at least when he stands to personally benefit from it.

The Court of Appeal quoted from an earlier California Supreme Court decision in which corporate officers were found personally liable which had observed, "They encouraged the sowing and reaped the benefits. They cannot now disclaim the burden." In *P.M.C. v. Kadisha*, the evidence did not show quite as much participation by the corporate directors as in that earlier Supreme Court decision. Paraphrasing the earlier Supreme Court decision, it might have been said in *P.M.C. v. Kadisha* that, "The officers became aware of the sowing, did not undo it, and reaped the benefit. They cannot now disclaim the burden."