

**420 CRIMINAL LIABILITY OF A CORPORATION**

[The defendant] [One of the defendants] in this case is a Wisconsin corporation. A corporation is a legal entity that can act only through its agents.

(Name of defendant) is charged with committing the crime of (charged crime), on the basis that the crime was directly committed by (name of agent),<sup>1</sup> an agent of (name of defendant).

**State's Burden of Proof**

Before you may find the defendant guilty, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. (Name of agent) committed the crime of (name charged crime).
2. (Name of agent) was an agent of (name of defendant).
3. (Name of agent) was acting within the scope of employment.

**Statutory Definition of the Crime**

The crime of (charged crime), as defined in § \_\_\_\_\_ [of the Criminal Code of Wisconsin],<sup>2</sup> is committed by one who

[LIST THE ELEMENTS OF THE CHARGED CRIME AS IDENTIFIED IN THE APPLICABLE UNIFORM INSTRUCTION. USE THE NAME OF THE ALLEGED AGENT IN PLACE OF "THE DEFENDANT" THAT IS TYPICALLY USED. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTION AS NECESSARY.]

Next consider whether (name of agent) was an agent of (name of defendant) and committed (charged crime) while acting within the scope of employment.

### **Meaning of "Agent"**

Agents are officers, directors, employees, or other people who are authorized by a corporation to act for it.

### **Meaning of "Scope of Employment"**

Agents are within the scope of employment when they perform acts they have the express or implied authority to perform and their actions benefit or are intended to benefit the interest of the corporation. When agents step aside from acts they are hired to perform and do something for their own reasons or for reasons not related to the business of the employer, their acts are outside the scope of employment.

[ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[A corporation may be responsible for the actions of its agent done within the scope of employment and to benefit the corporation, even though the conduct of the agent may be contrary to the corporation's actual instructions or stated policies. The existence of such instructions and policies, however, if any exist, may be considered by you in determining if the agent was acting within the scope of employment or to benefit the corporation.]<sup>3</sup>

[ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE.]

[If you find that an act of an agent was not committed within the scope of the agent's employment or with intent to benefit the corporation, then you must consider whether the

corporation later approved the act. An act is approved if, after it is performed, another agent of the corporation, having full knowledge of the act and acting within the scope of employment and with intent to benefit the corporation, approved the act by words or conduct. A corporation is responsible for any act or omission approved by its agents.]<sup>4</sup>

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that (name of agent) committed all the elements of the crime of (name charged crime), that (name of agent) was an agent of (name of defendant), and that (name of agent) was acting within the scope of employment, you should find (name of defendant) guilty.

If you are not so satisfied, you must find (name of defendant) not guilty.

### **COMMENT**

Wis JI-Criminal 420 was originally published in 1962 and revised in 1987, 1995, and 1999. This revision was approved by the Committee in February 2005.

The 1995 revision of this instruction replaced three instructions: Wis JI-Criminal 420 CORPORATE LIABILITY: ACTS OF MANAGEMENT; Wis JI-Criminal 425 CORPORATE LIABILITY: ACTS OF LESSER EMPLOYEES: STRICT LIABILITY CASES; Wis JI-Criminal 430 CORPORATE LIABILITY: ACTS OF LESSER EMPLOYEES: OTHER THAN STRICT LIABILITY CASES. The text of each of those instructions was essentially the same, reflecting only that a different type of officer or employee was involved. The revised instruction is based on the premise that a corporation acts through its agents and that agents may be officers, directors, employees, and others who are authorized to act on its behalf. It will be a factual question in each case whether a particular person who directly committed the crime was an agent of the defendant corporation, but once that question is settled, the other requirements are the same regardless of the type of agent involved: the agent must have been acting within the scope of employment and with the effect or intent of benefitting the corporation.

The Committee recommends specifically identifying the culpable agent in the instruction. See footnote 1. The reported appellate decisions, in reviewing the sufficiency of the evidence, sometimes address two different theories of culpability. See the Knutson and Steenberg Homes decisions, summarized below, which discuss actions by employees that are directly connected with the harm caused and actions by higher-ranking corporate officials that failed to prevent the harm from taking place. A corporation may be criminally liable under either approach, but the instruction should clearly describe the conduct that is alleged to be the basis for

the criminal charge. This instruction is drafted for the first situation: an identified agent of the corporation commits a crime while acting within the scope of employment.

The instruction is set up in a way that parallels the approach used for party to crime cases: the jury must determine whether someone directly committed the crime charged and then determine whether that person had a sufficient connection with the defendant corporation to extend liability to that corporation. See Wis JI-Criminal 400.

Until 1995, Wisconsin case law addressing the standard for criminal liability of a corporation was limited to a single case, though there were several reported decisions dealing with other legal issues in the context of a prosecution of a corporation. [See, for example, State v. Fetting, 172 Wis.2d 428, 493 N.W.2d 254 (Ct. App. 1992), a consolidated appeal with State v. Tankcraft, Inc.] Vulcan Last Co. v. State, 194 Wis. 636, 217 N.W. 412 (1928), was, for many years, the only Wisconsin decision directly stating the standard. More recently, its continued validity was confirmed in State v. Richard Knutson, Inc., 196 Wis.2d 86, 537 N.W.2d 420 (Ct. App. 1995), and State v. Steenberg Homes, Inc., 223 Wis.2d 511, 589 N.W.2d 668 (Ct. App. 1998). This instruction is believed to be consistent with the principles established by these cases. The decisions are summarized below.

Vulcan Last: The Vulcan Last Company wanted the city of Crandon to extend city water service to its plant. A Vulcan employee who sat on the city council voted against the bond issue that would finance the water service extension. The day after the council vote, the employee was fired by a supervisor who assembled all the employees and told them that any man who voted against the interests of the company would be discharged.

The corporation was charged with violating a statute that prohibited employers from attempting "to influence a qualified voter to give or withhold his vote at an election." [The statute still exists; see, § 103.18.] The Wisconsin Supreme Court affirmed the conviction, using the case to adopt the then-modern view that corporations could be convicted of a crime. The relevant legal rule was stated concisely:

Corporations must of necessity act through their agents. When these agents act within the scope of their authority their acts are the acts of the corporation, for which the corporation is liable both civilly and criminally. If the acts are within the scope of the authority of the agent, the corporation is liable criminally for the act although the act may not have been expressly authorized by the corporation, even if the corporation has expressly forbidden its agent to act in the manner that made it answerable to punishment under the criminal law.

194 Wis. 636, 643.

Vulcan Last indicates that the crux of the matter is whether the agent was acting within "the scope of employment." That is the issue emphasized in the revised instruction.

Until 1995, the part of the Vulcan Last decision quoted above had been cited in only two cases: one a civil case on an unrelated point; and, the other a criminal case where a corporation was held responsible for a fine imposed on an overweight truck. State v. Dried Milk Products Cooperative, 16 Wis.2d 357, 114 N.W.2d 412 (1962).

Knutson: Richard Knutson, Inc., undertook the construction of a sanitary sewer line for the city of Oconomowoc. A backhoe operator employed by the company struck a power line with the boom of the backhoe. Another member of the work crew who was trying to attach a chain to the backhoe's bucket was instantly electrocuted. The corporation was charged with negligent homicide in violation of § 940.10.

In affirming the conviction, the court of appeals confirmed that the standard set forth in Vulcan Last continues to be valid. The court's consideration of the issue was tied in with the question whether a corporation was covered by § 940.10 which defines the crime in terms of "whoever causes the death of another human being . . ." [Emphasis added.] The defendant argued that in the context of this phrase, "whoever" necessarily refers to a human being. The court of appeals rejected this argument, relying in part on the fact that prior to the adoption of the 1955 Criminal Code, a corporation could be held criminally liable, citing Vulcan Last. The court reiterated the general rule that "[a] corporation acts of necessity through its agents . . . ; therefore, the only way a corporation can negligently cause the death of a human is by the act of its agent – another human." 196 Wis.2d 86, 105. One of the citations offered as support for this proposition was Wis JI-Criminal 430 [copyright 1987], which was based on Vulcan Last, and which is now replaced by Wis JI-Criminal 420.

Steenberg Homes: An employee of Steenberg Homes, Inc., was driving a Steenberg tractor-trailer when the trailer disengaged and struck three bicyclists, killing two of them. Neither the driver nor his supervisor/trainer had attached the safety chains between the tractor and the trailer, allowing the trailer to disengage. The corporation was convicted of two counts of homicide by negligent operation of a vehicle in violation of § 940.10.

In affirming the convictions, the court relied on several substantive rules, all derived from Vulcan Last:

A corporation can be held liable for the acts of its employees committed within the scope of employment. . . . Employees act within the scope of employment when they perform acts which they have express or implied authority to perform and their actions benefit or are intended to benefit the employer. An employer can be held responsible for the acts of an employee performed within the scope of employment, even though the conduct of the employee is contrary to the employer's instructions or stated policies.

223 Wis.2d 511, 520.

1. The Committee recommends specifically identifying the culpable agent in the instruction. The reported appellate decisions, in reviewing the sufficiency of the evidence, have addressed two different theories of culpability. See the Knutson and Steenberg Homes decisions, summarized above, which discuss actions by employees that are directly connected with the harm caused and actions by higher-ranking corporate officials that failed to prevent the harm from taking place.

For example, in Knutson, a death was caused when the operator of a backhoe struck a power line with the backhoe's boom. The corporation's liability could be based on two theories:

(1) the backhoe operator was the agent, the operator was criminally negligent, that criminal negligence caused the victim's death, and the corporation is responsible for the criminal act of its agent, who was acting within the scope of employment; or,

(2) the corporation, acting through its officers, was criminally negligent in failing to have in place safety precautions that would have prevented the death.

In Steenberg Homes, two deaths were caused when a semitrailer detached and struck bicyclists. Again, two theories could support the corporation's liability:

(1) the truck driver, an agent of the corporation, was criminally negligent in failing to double check the proper attachment of the safety chains; or,

(2) the corporation, acting through its officers, was criminally negligent in failing to have in place safety procedures that would have assured proper attachment and checking of the safety chains.

A corporation may be criminally liable under either approach, but the instruction should clearly describe the conduct that is alleged to be the basis for the criminal charge. This instruction is drafted for the first situation: an identified agent is charged with committing a crime while acting within the scope of employment. If the charge is based on the failure to have proper safety procedures in place, an instruction on omission liability may be required. On omission liability generally, see State v. Williquette, 129 Wis.2d 239, 385 N.W.2d 145 (1986), and State ex rel. Cornellier v. Black, 144 Wis.2d 745, 425 Wis.2d 21 (1988).

2. Use the phrase in brackets only if the charge is for a crime defined in the Criminal Code (Chapters 939 - 950, Wis. Stats.) With crimes allegedly committed by corporations, it may be common for charges to be based on offenses defined outside the Criminal Code, such as environmental regulations, hazardous waste regulations, etc.

3. United States v. Basic, 711 F.2d 570, 572-73 (4th Cir. 1983); United States v. Beusch, 596 F.2d 871, 877 (9th Cir. 1979).

4. See Wis JI-Civil 4015, Agency: Ratification. Also see Jury Instructions of the Seventh Circuit, No. 5.04 (West, 1980).