

Legal Alert

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"Responsible Corporate Officer" Doctrine

QUESTION: CAN THE GOVERNMENT CONVICT ME PERSONALLY FOR A CRIME COMMITTED BY MY COMPANY WITHOUT MY KNOWLEDGE OR PARTICIPATION?

ANSWER: THE "RESPONSIBLE CORPORATE OFFICER" DOCTRINE MAY MAKE MANAGERS GUILTY OF CORPORATE CRIMES COMMITTED WITHOUT THEIR KNOWLEDGE OR PARTICIPATION!

Beware the Responsible Corporate Officer Doctrine!

If you manage people who might cause crimes affecting the federal government, watch out! Three corporate officers of the company that developed and marketed OxyContin were ordered to give up compensation received from the company totaling about \$34.5 million! They were sentenced to 400 hours of community service and fined \$5,000. They were put on probation for three years. To rub salt in the wounds, the Department of Health and Human Services decided to exclude the individuals from participation in federal healthcare programs for 20 years!

Michael Friedman, Paul Goldenheim, and Howard Udell worked for Purdue Frederick Company when it misbranded the painkiller OxyContin, a controlled substance. The company was convicted of fraudulent misbranding and the individuals were convicted under the "responsible corporate officer" doctrine for the misdemeanor of misbranding a drug. *Friedman v. Sebelius*, 686 F.3d 813 (D.C. Cir., 2012).

Those penalties were harsh for misdemeanors! Keep in mind that the court said there was no evidence that the crimes had an adverse impact on people or that the misbranded OxyContin hurt anyone!

So what was going on here? Well, the OxyContin company pleaded guilty to felony misbranding because some "unnamed employees" marketed OxyContin "as less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications." The company was put on probation for five years and fined \$500,000. In addition, other monetary sanctions were imposed of approximately \$600 million.

But what did the individuals do to be punished so severely? They failed to prevent the company's fraudulent marketing of OxyContin. They were "responsible corporate officers" because each was a "corporate agent, through whose act, default or omission the corporation committed a crime" in violation of the Food, Drug, and Cosmetic Act. They could be charged criminally for wrongdoing by the corporation "whether or not the crime required 'consciousness of wrongdoing.'" The Court of Appeals said that the responsible corporate officer doctrine extends criminal liability "not only to those corporate agents who themselves committed the criminal act, but also to those who by virtue of their managerial positions or other similar relation to the actor could be deemed responsible for its commission."

Why Should You Care?

But why should you care if you are not in the food, drug or cosmetic business? Back in 1975, the United States Supreme Court noted that there was a class of cases where the liability of managerial officers "did not depend on their knowledge of, or personal participation in, the act made criminal by the statute." So, under other statutory schemes, it is possible for people to be prosecuted where "an omission or failure to act was deemed a sufficient basis for a responsible corporate agent's liability." *United States v. Park*, 421 U.S. 668, 671 (1975).

What should you look for in other statutory schemes that might also impose some form of responsible corporate officer criminal liability? In the Food, Drug, and Cosmetic Act someone can be excluded from participation in any Federal healthcare program if that person has been convicted "of a criminal offense consisting of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct" The court in the *Friedman* case said the "key phrase" is "relating to." Therefore, the activity does not actually need to be financial misconduct, so long as it is "relating to" financial misconduct. (For that matter, "financial misconduct" seems like a dangerously vague term.)

Healthcare, financial and other federal regulatory schemes increasingly include criminal and other personal sanctions of managers whose subordinates commit corporate crimes. Just when you thought the corporation could shield you from liability and responsibility, the feds have proven you wrong. Because the penalties in such situations can be so draconian, you may want to check with me if you have any questions about the laws and regulations applying to your particular field.

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