CORPORATE PROSECUTIONS

The survival dilemma

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In 2005, Serono Inc. pleaded guilty to federal felony offenses and paid, together with its shareholders, more than $700 million in criminal and civil penalties, yet all of its employees accused of criminal misconduct were subsequently acquitted. Similarly, TAP Pharmaceutical Products Inc. pleaded guilty to federal felony offenses and paid more than $800 million in criminal and civil penalties, yet the allegedly culpable employees either were acquitted by a jury or had the charges dismissed by a federal judge.

Something is amiss. These results are no accident, and what is wrong is of a constitutional dimension. Indeed, these cases provide a window into what ails corporate criminal dispute resolution in 21st century America: a creeping erosion of any meaningful corporate jury trial right.

Although numerous federal courts have held that a corporation, like any other "accused," has a Sixth Amendment right to a trial by jury, the reality is that corporations cannot afford to exercise their rights to jury trials and must instead resolve their disputes with the government, on pain of corporate death, in a conference room far removed from the salutary environment of a public courtroom, and without any of the traditional safeguards for ensuring fair and just results in accordance with the rule of law. Corporate criminal pleas obtained in this manner are neither reliable as a reflection of guilt, nor fair to the corporation itself or to its innocent shareholders and other stakeholders.

The nub of the problem facing corporate America, as Arthur Andersen learned the hard way, is that an indictment itself — the price of corporate admission to the courtroom in a criminal case — spells potential corporate death. Although little known as a part of the government's arsenal in corporate criminal cases, federal law permits the exclusion, suspension or debarment of corporations without a criminal conviction for conduct that has merely been alleged in a criminal indictment. It is thus not surprising that virtually all rational corporations, especially those in heavily regulated industries such as health care and government contracting, conclude, as a business matter, that they cannot incur the risks associated with taking an indictment and going to trial, even when, in the corporation's assessment and that of its seasoned counsel, the threatened case is without factual or legal merit. The upshot, as reflected in the Serono and TAP acquittals, is the unappealing specter of innocent guilty pleas leveraged by threatened disqualification from doing business and attained without benefit of judicial process.

Off-label information

The government's recent aggressive campaign to prosecute and punish the dissemination of truthful, nonmisleading off-label information by pharmaceutical manufacturers provides a stark illustration. Not content to limit its prosecutions to false or misleading statements or other inherently wrongful conduct, the government has extended its theory of criminal wrongdoing to reach truthful, nonmisleading speech about a lawful activity that physicians routinely and responsibly engage in on a daily basis throughout the country — namely, off-label prescribing, often in circumstances in which the off-label use is not only medically accepted, but also the "standard of care" in the treatment of life-threatening illnesses such as cancer. This truthful, nonmisleading speech includes the dissemination of peer-reviewed journal articles and other scientific and medical research.

There is no one sitting in jail for being convicted of talking about potentially beneficial new medical therapies, and there is a dearth of legal precedent to support the government's overbroad theory of

criminality. And yet, while there are strong legal and constitutional defenses to the government's attempted criminalization of truthful, nonmisleading off-label dissemination, there is no available avenue for targeted corporations to gain access to a judge or jury without risking corporate death akin to that of Arthur Andersen. And so they plead and pay, and the public shareholders and other corporate stakeholders pay the price, without benefit of anything even approaching the due process upon which we rightly rely for the fair resolution of legal disputes.

The stakes are particularly high in the off-label arena. With the public health, patient access to information about potentially important new therapies and the First Amendment all hanging in the balance, let the government first prove in court the individual misconduct for which it seeks to punish the corporation. It will be hard, as the government almost certainly will find, to persuade any jury in America that talking truthfully about a lawful activity is a crime. We should ensure that, in our system of criminal justice, it is equally hard to hold corporations criminally culpable for the noncriminal conduct of their employees.

The goal of restoring to the American corporation meaningful due process for the resolution of criminal disputes with the government will require nothing less than a wholesale re-examination of the corporate criminal liability doctrine and the legal framework for imposition of corporate criminal punishment. The government should be required to establish that criminal misconduct, in fact, occurred — through a conviction and not simply an allegation — and that the conduct was sufficiently harmful and pervasive to warrant imposition of the severe remedy of disqualification from business.

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