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Corporate Criminal Liability

When Is Enough Too Much?

By Robert J. Anello

The concept of corporate criminal liability in the United States is expansive; corporations can be held liable for the actions of a single employee or a small group of employees, even if those actions violate clear company policy. Nevertheless, for years, legal scholars, white-collar practitioners, and the mainstream media have proclaimed that government efforts to police corporate wrongdoing are failing. A parade of Department of Justice (DOJ) press releases detailing the resolution of criminal charges against one corporation after another tells a different story. In numerous recent cases, utilizing a combination of substantial fines, deferred prosecution agreements, regulatory settlements, and required institutional reforms and monitors — remedies that may not be available as a consequence of an actual conviction — the DOJ has exacted a steep toll on companies for their institutions' legal violations.

While the government is busy holding businesses liable for criminal conduct, skeptics remain critical of its methods. Some have argued that the government's increased reliance on deferred prosecution and non-prosecution settlement agreements is too soft a reaction to corporate wrongdoing and has resulted in "cookie-cutter" justice. Others believe corporations feel constrained to enter into these agreements rather than assert meritorious defenses in the face of potentially disastrous business consequences. Still others feel that the government's focus on settling with corporate entities has resulted in a failure to prosecute the individuals who actually engage in the criminal conduct.

The only consistent message to emerge is that the debate over corporate criminal liability and how to punish corporate wrongdoing remains lively.

Historical Perspective

Since 1909, American courts have imputed criminal liability to corporations on the theory that corporations should be deemed to have the knowledge and purpose of the agents and officers through whom it acts. *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481, 494-95 (1909). Although, with the emergence of a global economy, other countries have embraced the idea of corporate criminal liability, the degree to which particular acts committed by individuals may be attributed to, and constitute crimes committed by, a corporation still differs greatly across the globe. *See* Robert J. Anello, "Preserving the Corporate Attorney-Client Privilege: Here and Abroad," 27 *Penn State Int'l L. Rev.* 291, 306-308 (Fall, 2008) (detailing distinctions between the United States and other countries).

Corporate criminal liability in the United States is rooted in the tort law doctrine of *respondeat superior*. Courts have recognized that the imposition of criminal liability on a corporation acts as a deterrent, holding that "to give [corporations] immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting [wrongdoing]." *New York Central*, 212 U.S. at 495-96. Further, American notions of corporate criminal liability recognize that corporations should be held accountable for a corporate culture that encourages misconduct, or for the failure to establish internal policies sufficient to prevent misconduct.

Arguably, the era of big business prosecutions began in the late 1980s, when then-United States Attorney Rudy Giuliani investigated the major Wall Street investment banking firm, Drexel Burnham Lambert, and its employee, Michael Milken, for illegal activities related to the junk bond market. Narrowly avoiding an indictment under the racketeering laws, Drexel Burnham pleaded *nolo contendere* to six felonies for illegal stock parking and stock manipulation, and paid a fine of $650 million — the largest securities fine ever imposed at the time. Within two years, the company declared bankruptcy and closed its doors.

Corporate prosecutions increased in the 1990s. In 1991, the United States Sentencing Commission supplemented the Sentencing Guidelines with a new chapter titled "Sentencing of Organizations," which encouraged corporations to self-report and cooperate with the government to obtain leniency at sentencing. In 1999, the DOJ issued the first in a series of specific guidelines on its policy for the filing of criminal charges against corporations. Its "Principles of Federal Prosecution of Business Organizations" have

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since undergone a number of revisions, sparking additional debate about the extent to which the government should require a corporation to waive the attorney-client privilege and work-product doctrine in order to avoid prosecution.

Perhaps the most well-known business prosecution of the past decade is that of Arthur Andersen LLP, the accounting firm with a then-global reputation for top-notch accounting, auditing, tax, and consulting work. Andersen, the outside accountant for Enron Corporation, was indicted for destroying Enron documents in the weeks leading up to Enron's bankruptcy in 2001. Based on the actions of a handful of individuals, the firm, which employed over 100,000 individuals worldwide, was convicted of obstruction of justice in 2002 and subsequently suffered a very public and dramatic collapse. The Andersen case repeatedly has been cited as proof that "[a] criminal indictment can have devastating consequences for a corporation and risks the market imposing what is in effect a corporate death penalty." Andrew Weissman & David Newman, "Rethinking Corporate Criminal Liability," 82 *Ind. L. J.* 411, 426 (2007).

What Corporate Criminal Liability Looks Like Today

Motivated in large part by the supposed "Andersen effect," the government recently has moved away from the indictment of corporations and toward the increased use of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) in which the government agrees to forgo prosecution if a company admits to wrongdoing; cooperates with any ongoing investigations, including those against individual employees; pays monetary penalties and fines; and improves its compliance programs to better insure against future wrongdoing. In the past decade, the total number of corporate DPAs and NPAs entered into by the DOJ has risen sharply, totaling more than 150 since 2007. In the first part of 2012, more than 20 such agreements were reached. Peter J. Henning, "Deferred Prosecution Agreements and Cookie-Cutter Justice," *The New York Times* (Sept. 17, 2012).

The most recent notable example of the government's use of a DPA involved global bank HSBC, which was under investigation by federal regulators and the Senate Permanent Subcommittee for money-laundering activity. In December 2012, the government announced it would not indict, but instead had reached a record $1.92 billion settlement pursuant to a DPA that also required HSBC to undertake enhanced anti-money laundering and other compliance measures to prevent further misconduct. Press Release, Department of Justice, "HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement" (Dec. 11, 2012).

The government's record financial recovery is not limited to HSBC. In fact, 2012 marked a record year for the DOJ in terms of the amount of money paid by corporations such as banks, pharmaceutical companies and military contractors to resolve corporate fraud cases. Michael S. Schmidt and Edward Wyatt, "Corporate Fraud Cases Often Spare Individuals," *The New York Times* (Aug. 7, 2012). The use of DPAs and NPAs allows the government to alter corporate compliance programs and recoup significant sums equal to or greater than amounts which might be obtained after a criminal prosecution. At the same time, corporations are able to avoid the collateral consequences of a criminal indictment or conviction, which may result in the loss of regulatory licenses required to do business in certain industries, and thereby avoid harm to thousands of innocent employees that might come with a full-fledged criminal proceeding.

Critics of DPAs and NPAs believe, however, that they lack any real deterrent effect, often citing the multiple proceedings against Swiss bank UBS as an example. *See, e.g.*, James B. Stewart, "For UBS, a Record of Averting Prosecution," *The New York Times* (July 20, 2012). Before its December 2012 guilty plea to felony wire fraud — the first time a major financial institution has been convicted of a crime since the Drexel Burnham 20 years ago — UBS entered in to a series of immunity, non-prosecution and deferred prosecution agreements with the government. *Id.*

Others believe that the government's devotion of resources to settling with companies with deep pockets allows the responsible corporate executives and employees to walk away scot free. In response, government officials and other commentators say it is often too difficult to find evidence directly linking employees to the wrongdoing. For example, it has been written that "[s]enior executives in particular are often insulated from day-to-day decisions … and have learned to steer clear of e-mails or other evidence that might prove that they knew the company was breaking the law." Michael S. Schmidt and Edward Wyatt, "Corporate Fraud Cases Often Spare Individuals," *The New York Times* (Aug. 7, 2012).

Despite the lack of individual prosecutions, it is worth noting that individuals may be "punished" without the drastic remedy of indictment. Corporate employees and management frequently pay the price in the form of a resignation or firing, as seen in the case of British bank Barclays. There, the chief executive and chief operating officers resigned in the aftermath of a settlement with DOJ and regulators over accusations that the bank sought to benefit its trading positions and the media's perception of the bank's financial health by submitting improper numbers used for the fixing of key interest rates. Similarly, in the HSBC case, the government's press release specifically notes that the bank terminated a number of employees responsible for its anti-money laundering program.

Conclusion

Concerns that corporations are being treated too easily overlook the real and legitimate consequences of holding a company responsible for the acts of a few wrongdoers. History has shown what can happen to criminally convicted corporations and, in turn, to their entirely innocent employees. The stakes in today's global economy are even higher; the government's decision to enter into a DPA with HSBC was influenced by concerns that an indictment "could jeopardize one of the world's largest banks and ultimately destabilize the global financial system." Ben Protess and Jessica Silver-Greenberg, "HSBC to Pay $1.92 Billion to Settle Charges of Money Laundering," *The New York Times* (Dec. 10, 2012). Judicially created law deeming corporate entities criminally liable for acts of an agent is harsh enough in itself. Tempering the consequences of such liability is a reasonable and necessary exercise of discretion in a system that holds corporations criminally liable for the conduct of a few.

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