

The Criminalization of Business Judgments

Presented by

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Our Panel

- **Carl Hahn**, VP and Chief Compliance Officer, Northrop Grumman Corporation
- **Chris Graham**, Assistant General Counsel, Georgia-Pacific LLC
- **Jenny Kim**, Deputy General Counsel & VP, Public Policy, Koch Companies
- **Barry Boss**, Cozen O'Connor, Co-Chair, Commercial Litigation Department; Co-Chair, White Collar Defense & Investigations Practice (**moderator**)

Federal Criminalization of Business Judgments

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- U.S. constitution does not have specific delegation of criminal law authority
- U.S. criminal code from late 1800s
 - Based on Commerce Clause
 - Initially addresses railroad rates, Sherman Anti-Trust Act, food & drug purity
- U.S. Code has grown from base of about 30 statutes to about 5K statutes and untold numbers of regulations
 - Congressional Research Service, DOJ and ABA admit they cannot produce a total
- *Mens Rea*
 - Some new statutes and regulations do not require intention or knowledge (*mens rea*)

Recent Convictions

Health Care Fraud

Wire Fraud

Securities &
Financial Fraud



14 YEARS

Insider Trading

False Statements to
a Federal Officer

Conspiracy to Defraud the
Government

DOJ 2018 Fraud Statistics*



- 406 individuals charged
- 230 individuals pleaded guilty
- 38 individuals convicted at trial
- 10 corporate criminal enforcement actions
- More than **\$1 billion** in corporate U.S. criminal fines, penalties, forfeiture and restitution, and total enforcement action amounts payable to U.S. and foreign authorities of more than **\$3 billion**

* Source: DOJ Criminal Division, Fraud Section Year in Review (2018). *The summary stats exclude sealed cases and provide approximate dollar amounts for the referenced corporate enforcement action.*

The Stats: Health Care Fraud*

- 309 individuals charged
- **\$1.6 billion** in loss charged
- 180 individual pleaded guilty
- 67 individuals charged with opioid-related crimes
- 25 individuals convicted at trial
- 178 individuals sentenced
- 1 corporate criminal enforcement action resulting in **\$371 million** in corporate U.S. criminal fines and penalties, and total civil and criminal enforcement action amounts payable to the U.S. of **\$261 million**
- As compared to 2017, the DOJ Health Care Fraud Unit had a %56 increase in opioid defendants, a %40 increase in the number of individuals charged, and a %20 increase in number of convictions obtained.

* Source: DOJ Criminal Division, Fraud Section Year in Review (2018)

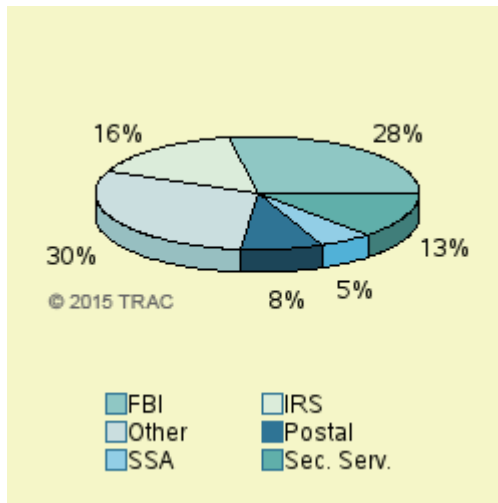
The Stats: Securities & Financial Fraud*

- 66 individuals charged
- 32 individual pleaded guilty
- 12 individuals convicted at trial
- 3 corporate criminal enforcement action resulting in **\$373.1 million** in U.S. criminal fines, penalties, and forfeiture, restitution, and total enforcement action amounts payable to the U.S. of **\$886.5 million**
- 1 declination in which the company agreed to disgorge illegal profits totaling more than **\$12.8 million** to either the DOJ or the SEC

*Source: DOJ Criminal Division, Fraud Section Year in Review (2018)

The Stats: 2015 Prosecutions*

Prosecutions by Investigative Agency



5,173 White Collar Crime Prosecutions

- Wire Fraud: 617
- Public Money, Property or Records: 403
- Bank Fraud: 390
- Mail Fraud Attempt & Conspiracy: 366
- Conspiracy to Commit Offense or Defraud: 330
- Fraud – Access Devices: 314
- Mail Fraud – Frauds & Swindles: 291
- Fraud – ID Documents: 268
- Aggravated Identity Theft: 262
- Health Care Fraud: 242

*Source: TRAC Reports

Case Studies

Criminalization of Everyday Business Decisions in Regulated Industries



CASE STUDY 1: WellCare Health Plans



- CEO, CFO, and General Counsel of WellCare, among other execs, convicted of healthcare fraud/lying to the FBI
- Florida's 80/20 Rule
- WellCare's business strategy
- Absence of regulation on point
- Consulted outside counsel
- Submitted refund forms each year
- Failed to clearly disclose methodology

CASE STUDY 2: Vascular Solutions



- A case of overzealous prosecutors deceived by an embittered whistleblower.
- The CEO charged with fraudulently marketing a vascular health device and spent half a decade and \$25M in fees fighting what turned out to be a groundless DOJ claim.
- The DOJ ignored the fact that the device in question had never harmed a patient and represented less than one percent of company sales.
- The CEO adhered to the advice of in-house counsel.
- Both the CEO and the company eventually acquitted of all charges.

The Stats: EH&S criminal enforcement

- EPA opened 129 environmental crime cases, charging 105 defendants, resulting in 73 years of incarceration for individual criminal defendants and \$88 million in fines, restitution and court ordered environmental projects. Fines and restitution imposed in FY 2018 were higher than at any point in the 2008 to 2012 period.
- EPA secured guilty plea from 4 operators of U.S. Technology Corporation for illegally transporting 9 million pounds of hazardous waste from Mississippi to unpermitted facility in Missouri.
- Volkswagen Official received 7-year Prison Term in Diesel-Emissions Cheating Investigation and criminal penalty of \$400k.
- EPA continues to pursue criminal enforcement cases - while the number of defendants criminally charged declined in FY 2018, the number of environmental criminal cases opened increased from the year before (for the first time since FY 2011).
- DOJ continues its Worker Endangerment Initiative.

CASE STUDY 3:

DeCoster Egg Farms



- The company and its two executives were charged with introducing adulterated food into interstate commerce, after a salmonella outbreak that had sickened about 56,000 people.
- The corporate entity pleaded guilty to three violations, including felony bribery of a USDA egg inspector, while the owner and his son/the CEO each pleaded guilty to a single misdemeanor count (that carries a maximum penalty of one year in prison and five years of parole or probation and a maximum fine of \$100,000).
- In addition, the family corporation was fined \$6.78M, while father and son paid a \$100,025 fine each, plus a restitution of more than \$83,000, and were sentenced to a three-month prison sentence each, followed by a one-year supervised release.
- The DeCosters argued in their appeal that a prison sentence would be a violation of the Eight Amendment's ban on cruel and unusual punishment and the jury trial guarantee of the Sixth Amendment because their employees unknowingly violated a strict-liability standard.
- The executives, represented by outside counsel, lost their appeal at the Eight Circuit and were unable to obtain a sentencing review by the U.S. Supreme Court.

CASE STUDY 4:

Yates v. United States, 135 S.Ct. 1074 (2015)

- Commercial fisherman given civil citation in 2007 by Florida authorities for having 72 fish smaller than minimum allowable. When he returned to port, only 69 of 72 non-conforming fish remained. Evidence said Yates directed crew to dispose of non-conforming fish.
- Yates charged by federal authorities with violation of Sarbannes Oxley for destruction of evidence (tangible object)
- Convicted. Upheld on appeal.
- Overturned by SCOTUS (split decision).

CASE STUDY 5:

Robertson v. United States, No. 18-609 (U.S. 2019)

- Robertson was charged with violations of the Clean Water Act (CWA) for building fire protection ponds and discharging dredge and fill material into a wetlands on his private property without a permit. The wetlands fed into a tributary creek that fed into a river that crossed state lines. That river, however, was 40 miles away from the site.
- First trial ended in a mistrial; a second jury convicted; Robertson was sentenced to 18 months in prison.
- Robertson appealed, arguing that the wetlands were not a navigable waterway under CWA. 991964
- Ninth Circuit affirmed, holding that CWA applied to wetlands connected to a navigable river.
- The defendant filed a writ of certiorari, arguing that the Ninth's Circuit's interpretation of "navigable waterway" was void for vagueness.
- The defendant then passed away while the petition was pending.
- SCOTUS granted writ of certiorari; vacated order upholding conviction; remanded to the Ninth Circuit in light of defendant's death in intervening period. It did not outright dismiss because the government argued that the restitution and fine issued should survive death and be assumed by estate.

CASE STUDY 6:

Skadden

Skadden

- Special counsel Mueller obtained a guilty plea last year from a junior Skadden lawyer, who admitted making false statements to FBI agents asking about the firm's work for a pro-Russia Ukrainian politician connected to Paul Manafort, President Trump's former campaign chairman.
- The Justice Department's national security division subsequently picked up the probe of Skadden's role in the matter.
- Skadden admitted to misleading the DOJ FARA unit about its unregistered work with Manafort.
- As part of a settlement with the DOJ, Skadden agreed to pay \$4.6M and said it would register as a lobbyist for a foreign government with the FARA unit to resolve its liability for FARA violations.
- The firm's misconduct involved one former partner and the firm was never alleged to have encouraged or aided the partner in making his misleading statements.
- The former partner was indicted in April 2019 for lying to the DOJ and concealing information about work he did for the government of Ukraine in 2012.

CASE STUDY 7:

Rochester Drug Co-Op



- William Pietruszewski, the compliance officer of a pharmaceutical company, Rochester Drug Co-Op, recently pled guilty to conspiracy to distribute narcotics and conspiracy to defraud the U.S..
- The compliance officer, a non-lawyer who was a logistics specialist by training, wore both the logistics and compliance officer hats for the company. He received little training in his role as chief compliance officer.
- The company allegedly maintained a watch list of doctors with alarming prescribing practices, but the company, including Pietruszewski, looked the other way and continued doing business with several of them.
- Pietruszewski admitted to failing to file suspicious activity reports to the DEA regarding suspicious pharmacy orders, which the DOJ used as a basis for a charge of defrauding the U.S. The Government also emphasized the failure to implement an adequate due diligence program.
- The company's CEO, Laurence Doud, was also charged.

Everyday-Costs: Operating under the Shadow of Investigation

Managing a Heavily Diversified Business

- Scope of regulatory engagement
- Volume and breadth of everyday business judgments
- How legal becomes involved
- Thresholds or triggers for legal review
- Impacts of regular investigations on company operations

How Does Criminalization of Everyday Business Decisions Happen? and How Can Corporations Protect Themselves?

Industry Oversimplification and Armchair Expertise

- Failure to understand how industry operates in real life
 - ➔ Oversimplification of how industry operates
- Industry “armchair expert” prosecutors and FBI agents
- Approaches and Solutions?

What may the future hold?

Legislative Proposals

Where federal law may go in the next few years:

- Corporate Executive Liability Act (S. 1010, introduced in April 2019 by Sen. Warren)
- Ending Too Big to Jail Act (S. 1005, reintroduced in April 2019 by Sen. Warren)
- Mens Rea Reform Act (S. 3118, introduced June 2018 by Sen. Hatch; not yet reintroduced)

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