GUEST COLUMN

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The uncomfortable resurgence of the responsible corporate officer doctrine

Corporate executives in the health care and environmental industries are rapidly coming to appreciate the implications of the responsible corporate officer doctrine, a recently-revitalized weapon in U.S. Department of Justice's battle against corporate crime.

This doctrine is a peculiar exception to the usual requirements for a criminal prosecution. Ordinarily, criminal law requires a defendant to have committed a criminal act, and to have done so with criminal intent.

The responsible corporate officer doctrine departs from that model and imposes vicarious and strict liability on corporate officers based entirely on their position within the company. Under the doctrine, a corporate officer can be held criminally liable for a low-level employee's criminal activity, even if the officer did not participate in or know anything about the criminal activity. The criminal liability is based entirely on the officer's responsibility and authority to prevent or correct the violation, and his failure to do so. The only defense is where prevention of the crime was "objectively impossible," which is almost never the case.

This doctrine has been around a long time, although it has been used only occasionally. The two leading cases upholding the doctrine involve an interpretation of the Food, Drug, and Cosmetic Act: *U.S. v. Dotterweich*, 320 U.S. 277 (1943)(misbranded drugs) and *U.S. v. Park*, 421 U.S. 658 (1975)(rats in a warehouse). Those cas

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es involved misdemeanor violations and relatively small fines, which helps explain why the U.S. Supreme Court tolerated and upheld the doctrine.

The responsible corporate officer doctrine was used primarily for prosecutions brought under the Food, Drug, and Cosmetic Act until the mid-1980s, when it began to be used for environmental crimes as well. Some environmental statutes, such as the Clean Air Act and Clean Water Act, expressly provide that "responsible corporate officers" are among the "persons" who can be prosecuted for any violations. See 33 U.S.C. Section 1319(c)(6)(1987 Clean Water Act).

The rationale for the doctrine is straightforward. Prosecuting "public welfare" offenses is particularly important because those crimes can have a far-reaching impact. Yet, prosecuting the low-level employees who actually carried out the crimes is often impossible, unfair, or unappealing. Similarly, prosecuting the corporation often has minimal deterrent value because the corporation can regard the criminal fines as a "cost of doing business." On the other hand, prosecuting corporate executives for crimes committed "on their watch" will encourage greater supervision and prevention of those crimes, which will ultimately provide greater protection for the public.

Recently, federal authorities announced a return to using the responsible corporate officer doctrine. In 2009, Assistant Attorney General Tony West said the Justice Department would be making more use of the doctrine to combat health care fraud; and in 2010, Food and Drug Administration Commissioner Margaret Hamburg made a similar announcement.

True to those announcements, several responsible corporate officer prosecutions have recently been brought. Two aspects of those prosecutions are, however, somewhat unsettling: the doctrine's practical implications in this new world of corporate cooperation, and the unexpected use of these convictions to obtain prison sentences and debarment.

From a practical point of view, the responsible corporate officer doctrine is largely a way for the Justice Department to prosecute individual corporate executives whom it believes or suspects (but cannot prove) actually played a role in directing, encouraging, or approving the corporation's criminal conduct. In that sense, the doctrine operates a bit like criminal liability based on theories of recklessness or criminal negligence, or like the practice of proving criminal knowledge through a defendant's "conscious avoidance" of learning the underlying facts. The doctrine is thus an easier "fall-back" way of bringing or threatening criminal charges against a deserving corporate officer.

More to the point, prosecutors can thus use the threat of a responsible corporate officer prosecution to put pressure on corporate executives to cooperate with the government's investigation. With the doctrine in hand, the prosecutor's negotiation with the executive and his attorney is no longer simply about what the executive did and what he knew; the prosecutor can simply say, "This was your area of responsibility, right?" Such a threat can be effective because the doctrine is broad and vague, and its use is limited primarily by prosecutorial discretion.

The recent use of the doctrine is disturbing, though, because it goes beyond *Dotterweich* and *Park*, which involved only minimal fines for misdemeanor charges. The recent sentences for responsible corporate officer violations have included substantial incarceration — at least, "substantial" by the standards of a corporate executive who did little to warrant any conviction at all. In the Synthes prosecution, for example, four executives pleaded guilty to responsible corporate officer misdemeanors and were sentenced in 2011. Two were sentenced to nine months in prison; one was sentenced to eight months in prison; and one was sentenced to five months in prison. All four received fines of $100,000.

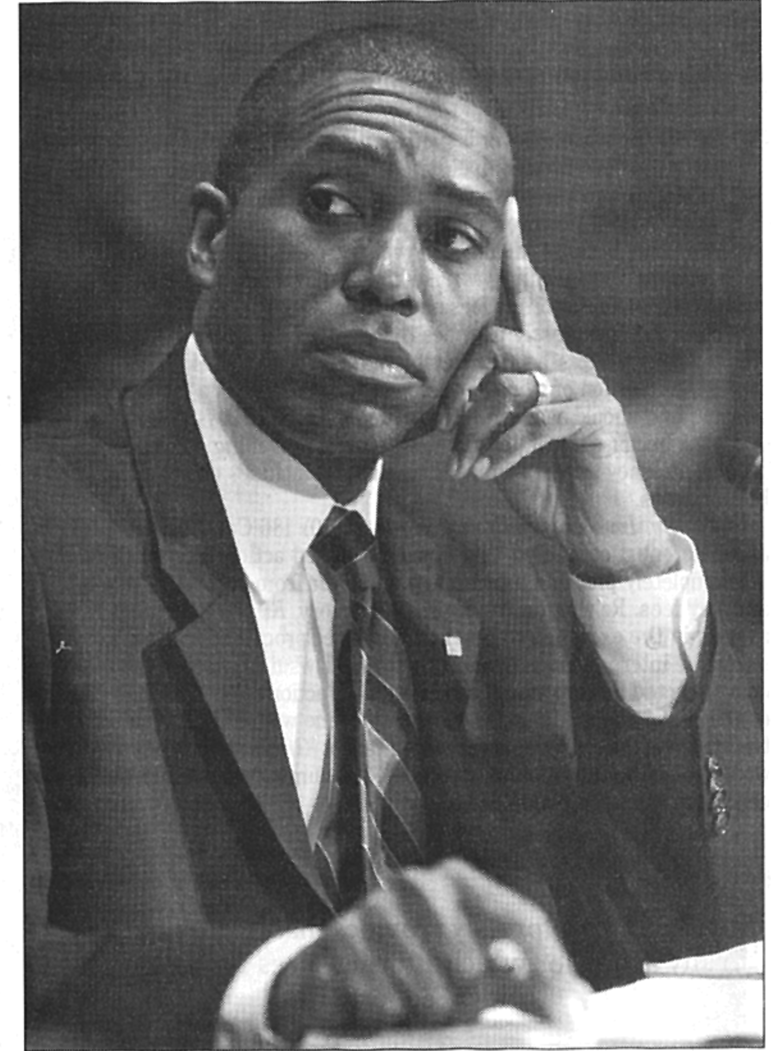
Also unsettling is the government's recent use of these convictions to debar executives from further work in their industry — arguably a greater consequence than the misdemeanor conviction and fine. For example, in the Purdue Frederick case, an executive who pleaded guilty to a responsible corporate officer count was debarred for 12 years, even though the common period of debarment would be only three years if the officer had directly committed the crime.

> Under the doctrine, a corporate officer can be held criminally liable for a low-level employee's criminal activity, even if the officer did not participate in or know anything about the criminal activity.

The legitimacy of that debarment is being challenged on appeal, but the point here is clear: A guilty plea to a "soft" or "fall-back" responsible corporate officer count can have harsh and far-reaching consequences, which is quite different than the small, almost-regulatory fines envisioned by *Dotterweich* and *Park*.

These renewed applications of the doctrine also raise questions about how itmight be used in the future. If the doctrine can be the basis for substantial prison time, can it also be used for felony prosecutions? Although the doctrine is now limited to public welfare offenses involving health care and environmental crimes, could it also be used for other crimes that can be characterized as public welfare offenses, or perhaps for crimes that do not involve public welfare at all? Is the doctrine a creature of statutory interpretation, or has it evolved into a common law concept applicable to other settings entirely?

Finally, there is a quirky recent development that, properly interpreted, might serve as a "wake-up call" regarding this new threat of responsible corporate officer prosecutions. Just this month, insurance companies have begun offering "RCO insurance" to cover the economic loss an executive might suffer as a result of such a prosecution, debarment, and/or loss of salary. Needless to say, the insurance company will not also serve the executive's



Associated Press

Assistant Attorney General Tony West.

prison sentence.

The lesson going-forward is therefore clear: Executives must protect themselves through active and responsible adherence to the corporate compliance program. The days of "protecting yourself from criminal responsibility by doing nothing" are long behind us.