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Food Safety's Criminal State of Mind

By Rena Steinzor | January 6, 2016

Opinion

As **Food Safety News** editor Dan Flynn has reported, lawyers for Austin “Jack” DeCoster and Peter DeCoster, owners and operators of Quality Egg, have recruited some heavy hitters in their ongoing battle to avoid prison time. Despite pleading guilty to the felony of bribing a public official to approve shipment of bad eggs and the misdemeanor of introducing misbranded or adulterated food into interstate commerce, the DeCosters have challenged the decision by U.S. District Court Judge Mark Bennett to sentence them to three months in prison.

The case has attracted amicus briefs from the Chamber of Commerce and the National Association of Manufacturers (NAM), two of the most powerful trade associations in Washington D.C. They argue that the appellate court should eliminate the “responsible corporate officer” doctrine established by the Supreme Court in food and drug cases. The Chamber and NAM are also lobbying Congress to enact legislation that would make it virtually impossible for prosecutors to go after people like the DeCosters.



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If this short-sighted crusade to weaken the criminal law succeeds, we will have lost an important opportunity to bolster efforts by the Food and Drug Administration and Department of Agriculture to police unscrupulous companies that scoff at basic safety standards and purvey contaminated food. The DeCosters operated facilities that were breeding grounds for Salmonella. The millions of eggs they produced and sold sickened an estimated 56,000 people.

As usual when the substance of a debate is a little complicated, industry advocates have gone out of their way to confuse the public and the court about the DeCoster case. Should confusion reign, major stakeholders in the outcome — including every reputable food processor in the nation and all of their hundreds of millions of consumers — will miss an important opportunity to understand and defend their own interests.

The Chamber and NAM argue that the DeCosters were sentenced on the basis of a law that does not require the defendant to harbor a “guilty” state of mind, normally a prerequisite of criminal prosecutions. They say that the combination of this “strict liability” statute and a Supreme Court doctrine imposing liability on “responsible corporate officers” means that innocent bystanders could get caught in a Kafka-like nightmare.

The business groups are certainly right that the misdemeanor provisions of the Food, Drug and Cosmetic Act impose strict liability. If a food producer sends contaminated food into interstate commerce, the corporation and its individual employees can be sent to prison for up to one year without any evidence to prove they consciously set out to hurt people.

Strict liability requires special care be taken by those involved in businesses that could cause serious harm to public health. If they shrug off this affirmative duty, and their bad products sicken consumers, they can be found guilty of a misdemeanor. When combined with the responsible corporate officer doctrine, potential defendants may include senior managers who have responsibility for supervising food processing and who could — and should — have prevented the production and sale of tainted food. The Supreme Court extended the doctrine to any “public welfare offense.”

Whatever you think of these aspects of the criminal law in theory, the fact remains that the prosecution of the DeCosters did not involve the targeting of senior managers who claimed not to know that something was wrong at their facilities. The Chamber and NAM want us to consider the case in a factual vacuum that makes prosecutors look vengeful, the DeCosters appear victimized, and an extraordinarily serious outbreak of Salmonella from eggs seem to be an unforeseen accident. On behalf of Judge Bennett and the Department of Justice lawyers, none of whom can speak for themselves for ethical reasons, the record must be set straight.

The bribery charge against the DeCosters was a felony punishable by 15 years in jail. The allegation that they introduced misbranded food into interstate commerce was a misdemeanor charge punishable by a \$1,000 fine and/or up to a year in prison. Why giving a federal official a bribe is a serious felony while the act of running a food production facility that makes people desperately sick is a mere misdemeanor is a topic for another day.

As readers of this journal know only too well, Stewart Parnell, chief executive officer of the Peanut Corporation of America, got 28 years in jail not because he deliberately shipped contaminated peanut paste that killed nine people but rather because he committed wire fraud, a felony, when he defrauded his corporate clients by providing false test results. This strange discrepancy in the law is one reason prosecutors typically bring companion felony charges against food safety defendants.

In any event, even though the DeCosters pleaded guilty, they did not simply waltz into court, wave at a judge, say that they wanted to enter a plea, and leave. Rather, they were required to “allocute” — the legal term for admitting in front of the judge that the core factual substance of the prosecution’s case is true. At the time of the plea itself, the DeCosters apparently thought they would escape jail, although they were also compelled to acknowledge that their anticipated sentence might change if Judge Bennett deemed harsher punishment appropriate.

At sentencing, Judge Bennett made clear that the prison sentence he imposed was justified by the egregious food safety violations at Quality Egg’s six farms in Iowa, which housed a total of five million layer hens and several processing plants where eggs were cleaned, packed and shipped.

“The illegal labeling of the eggs happened on their watch,” the judge said. “The backdating of the time that the eggs were processed happened on their watch. Incredible unsanitary conditions happened on their watch.”

Those “incredible” unsanitary conditions were discovered by FDA inspectors. They discovered live and dead rodents in laying areas, feed areas, conveyer belts and outside of the buildings. Vermin, including flies and maggots, were too numerous to count. Manure was piled to the rafters in one building, on a floor located beneath the laying hens. The inspectors examined Quality Egg’s food safety policies and discovered that although the company had developed written plans for Salmonella prevention, employees ignored them. Employees did not clean their equipment and had no documentation on pest control measures they had implemented.

Testing of eggs from the facility showed a rate of contamination about 39 times higher than the national incidence rate at that time. Barn environments were pervasively contaminated, with 63 percent of laying hen house contaminated with Salmonella enteritidis. The DeCosters admitted that between 2006 and 2010 they had received numerous test results revealing Salmonella contamination throughout their facilities, including analyses of the organs of dead hens showing the presence of the bacteria.

We'll never know why federal prosecutors promised the DeCosters that they would support a sentence that included no prison time when the bribery charges alone, if proven at trial, could have resulted in years behind bars. They may well have had undisclosed misgivings about their evidence and their ability to convince a jury to convict. But the judge in such circumstances makes an independent decision, as all the parties understood. It's too easy to say that the judge depended on facts that the government alleged and the defendants accepted under duress. The DeCosters had the best representation money could buy and were not railroaded into pleading guilty.

The new regulatory system designed to prevent the egregious misbehavior exhibited by the DeCosters is barely off the ground, five years after Congress authorized it. It's not clear whether the stringent rules would have had any effect on the DeCosters' behavior. If they win their appeal or if Congress makes it impossible to prosecute food safety criminal cases, consumers will be at considerably greater risk.

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