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A Walk in the *Park* Shouldn't Lead to Jail Time: Recent Decisions Explain Why Incarceration Is Never Appropriate for 'Responsible Corporate Officers' Who Lack Criminal Intent





By Mark P. Goodman, Maura K. Monaghan, Helen V. Cantwell, Kristin D. Kiehn and Jacob W. Stahl

For a number of years, the Department of Justice ("DOJ") has taken the position that a healthcare or food company executive can be convicted of a misdemeanor and imprisoned for up to one year even if he or she did not personally violate the law or know that others were violating it. Under DOJ's interpretation of the Supreme Court's seminal *United States v. Park* opinion[1], these and other career-threatening consequences can befall an otherwise innocent responsible corporate officer ("RCO") solely because *others* at the company violated the Federal Food, Drug and Cosmetic Act ("FDCA"). DOJ's justification: by virtue of the RCO's position in the corporate hierarchy, he or she had the responsibility and authority – at least theoretically – to prevent an FDCA violation and thereby avert harm to the public.

Two recent developments would appear to be inconsistent with DOJ's aggressive interpretation of the RCO doctrine. First, last year, the Supreme Court in *United States v. Elonis*[2] overturned the conviction of a defendant convicted on the theory that violent posts he made on his Facebook account threatened other people. Even though the posts were objectively threatening, the Court threw out his conviction because the government did not establish *mens rea* – the bedrock principle that a defendant can be convicted of a crime only if he or she intended to violate the law. While *Elonis* is technically distinguishable from *Park*, there is no obvious reason why *mens rea* should be required for potential harm to the public arising from violent and menacing Internet posts but not for harm arising from FDCA violations.

Second, in the Eighth Circuit Court of Appeals' recent decision in *United States v. DeCoster*[3], two of the judges – building on earlier precedent – rejected DOJ's interpretation of the RCO doctrine. The views of these judges were of no help to the RCO defendants in *DeCoster* because a different majority believed that the defendants had acted negligently. But the combination of (i) the views of the dissenters in *DeCoster*, (ii) the *Elonis* opinion, and (iii) certain earlier precedents discussed below could be of significant help to healthcare or food executives who are prosecuted criminally as RCOs solely on the basis of their corporate position.

Below, we explain how these developments might lay the foundation for future RCO defendants to argue that

[1] 421 U.S. 658 (1975).

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[2] 135 S. Ct. 2001 (2015).
[3] 2016 BL 216013 (8th Cir. July 6, 2016).

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they cannot be convicted and imprisoned absent proof of actual wrongdoing.

The Supreme Court Has Never Endorsed DOJ's Expansive View of RCO Liability

Park involved the applicability of the RCO doctrine under circumstances that are very different from the types of circumstances in which DOJ claims it can be applied today. The defendant, Mr. Park, was charged under the FDCA's misdemeanor RCO provision (21 U.S.C. § 331) because he was the president of the Acme supermarket chain at the time that Acme stored food in an insanitary warehouse (a FDCA violation). The government established that Mr. Park *was* aware of the violation, and he was convicted and fined $250. The appellate court overturned Mr. Park's conviction because the government failed to establish that Mr. Park engaged in any ''wrongful action.'' The government appealed to the Supreme Court.

In Supreme Court briefing, the government provided an important limitation on its application of the RCO doctrine: it represented that it would ''not ordinarily recommend prosecution unless [the RCO], after *becoming aware of possible violations* . . . has failed to correct them or to change his managerial system so as to prevent further violations'' (emphasis added).[4]

The Supreme Court affirmed Mr. Park's conviction, explaining that the FDCA ''punishes neglect where the law requires care, or inaction where it imposes a duty.''[5] RCOs who fail ''to devise whatever measures are necessary to ensure compliance with the [FDCA] bear a responsible relationship to, or have a reasonable share in, violations.''[6] The Court justified that duty as ''no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.''[7] The Court identified only one limitation on the RCO doctrine: that it was ''objectively impossible'' to prevent an FDCA violation from occurring.[8]

The *Park* decision relied on *Morissette v. United States*,[9] where the Supreme Court explained that proof of *mens rea* is not necessary when the following criteria are met: (1) ''whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity'' and (2) ''penalties commonly are relatively small, and conviction does not [cause] grave damage to an offender's reputation.''[10]

There are two significant distinctions between the Supreme Court's RCO jurisprudence and DOJ's more recent application of the doctrine. First, starting in 2007, DOJ apparently determined that it was not bound by what it had told the *Park* Court concerning when the RCO doctrine would be applied. As a result of the government's investigation of Purdue Pharma, three senior executives pled guilty as RCOs because others at Purdue allegedly had violated the FDCA. The prosecutor subsequently admitted under oath at a Senate hearing that he was unaware of any evidence that these executives had knowledge of the alleged corporate misconduct at issue.[11] Similarly, as discussed below, the DeCosters pled guilty as RCOs even though the government admitted they had no knowledge of FDCA violations at their company.

Second, the consequences of an RCO misdemeanor conviction are now anything but ''small.'' While Mr. Park was fined $250, RCO defendants in several instances have been sent to prison.[12] Moreover, an RCO conviction can have career-threatening consequences for healthcare executives. In 1977 – two years after the *Park* decision was issued – Congress passed the Medicare-Medicaid Anti-Fraud and Abuse Amendments.[13] This statute provides that an individual may be excluded from participating in federal healthcare programs for engaging in certain types of unlawful conduct. Such exclusions make it very difficult, if not impossible, for the individual to continue working in the healthcare industry. Following the Purdue executives' RCO pleas, the Department of Health and Human Services (''HHS'') sought to exclude the executives from federal health care programs for a period of 20 years. After extensive litigation, HHS's ability to use RCO convictions as the basis for exclusion was upheld, although the duration of the exclusion imposed was reduced.[14] RCO convictions for healthcare executives therefore may result in the equivalent of a professional death sentence even where they had no knowledge of alleged misconduct.

Elonis Establishes the Framework to Challenge Park's Mens Rea Exception

Although *Elonis* involved a felony conviction under a statute criminalizing the communication of violent threats, the principles underlying the opinion challenge *Park*'s assumption that *mens rea* can be dispensed with in prosecutions under ''public welfare'' criminal stat-

[4] Brief for the United States, *United States v. Park*, No. 74-215, at 31-32 (U.S. 1975).
[5] 421 U.S. at 671.
[6] *Id*. at 672.
[7] *Id*.
[8] *Id*. at 673.
[9] 342 U.S. 246 (1952).
[10] 342 U.S. at 256.
[11] *Evaluating the Propriety and Adequacy of the OxyContin Criminal Settlement: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 11, 21 (July 31, 2007).
[12] *See, e.g.*, DOJ Press Rel. 11-306, Former Drug Company Executive Pleads Guilty in Oversized Drug Tablets Case (Mar. 10, 2011), http://www.justice.gov/opa/pr/2011/March/11-civ-306.html; DOJ Press Rel., Former Executives of International Medical Device Maker Sentenced to Prison in Unlawful Clinical Trials Case (Nov. 21, 2011), http://www.fda.gov/ICECI/CriminalInvestigations/ucm280937.htm.
[13] 42 U.S.C. § 1320a-7b(b)(3)(A).
[14] *See Friedman v. Sebelius*, 686 F.3d 813 (D.C. Cir. 2012).

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utes. Mr. Elonis made a series of violent and vulgar posts on his Facebook account threatening a wide swath of people, including a co-worker, his estranged wife, a kindergarten class, the police, and the FBI. He was indicted for allegedly violating 18 U.S.C. § 875(c), which makes it a crime to transmit ''any communication containing any threat . . . to injure the person of another.'' Mr. Elonis' counsel argued that he was emulating rap lyrics and never intended to hurt anyone. The jury was instructed that a statement is a ''true threat'' if a ''reasonable person'' would understand the statement to be ''a serious expression of an intention to inflict bodily injury.''[15] Mr. Elonis was convicted on nearly all counts and sentenced to almost four years in jail. His conviction was upheld by the appellate court.

In Supreme Court briefing, the government argued that Mr. Elonis' conviction was appropriate because of the objective harm that he caused: ''Even if [the defendant] subjectively intended his posts to carry a different meaning, those beliefs did nothing to prevent or mitigate the substantial fear and disruption that his threats caused.''[16]

The Supreme Court reversed Mr. Elonis' conviction, concluding that the government failed to prove he acted with *mens rea*. Instead, the conviction was ''premised solely on how his posts would be understood by a reasonable person.''[17] That standard, however ''is a familiar feature of civil liability in tort law, but is inconsistent with the conventional requirement for criminal conduct – *awareness* of some wrongdoing.''[18] The Court observed that the ''understanding took deep and early root in American soil'' that ''wrongdoing must be conscious to be criminal.''[19] As such, *mens rea* is essential because it ''separate[s] wrongful conduct from otherwise innocent conduct.''[20]

The Supreme Court again affirmed the importance of *mens rea* to criminal convictions earlier this year in *Torres v. Lynch*, holding that ''courts interpret criminal statutes to require that a defendant possess a *mens rea*, or guilty mind, as to every element of an offense,'' ''even when the statute by its terms does not contain any demand of that kind.''[21] The Court held that, ''absent an express indication to the contrary,'' courts infer ''that Congress intended such a mental-state requirement.''[22]

The Supreme Court's justification for the RCO doctrine could be applied equally to Mr. Elonis' violent Facebook posts. Decades ago, the *Park* Court held that RCOs are subject to heightened duties – on pain of criminal liability – because circumstances of ''modern industrialism'' render the public vulnerable to harm from tainted food and drugs.[23] In Mr. Elonis' case, the government justified his conviction for a 21st century crime – Internet stalking – on the basis that his subjective beliefs about his posts ''did nothing to prevent or mitigate the *substantial fear and disruption that the threats caused*.''[24] **Both cases rely on the core theory that criminal liability is appropriate where a person's actions (or inactions) create a risk of substantial harm regardless of the person's intent or awareness. If, according to the Supreme Court, the government must demonstrate** *mens rea* **even where Mr. Elonis'** *affirmative acts* **caused objective harm, requiring** *mens rea* **should be even more compelling in the case of healthcare and food executives prosecuted on the theory that they could have – but did not – prevent wrongdoing. That** *Elonis* **involved a felony and** *Park* **involved a misdemeanor should not be treated as a distinguishing factor because RCO convictions now carry much more severe consequences for healthcare and food executives than at the time of the** *Park* **conviction.**

Appellate Courts Have Challenged Imposition of Criminal Liability on RCOs that Were Unaware of Wrongdoing

DOJ's interpretation of the RCO doctrine is inconsistent with three appellate decisions that strongly suggest that RCOs can be convicted and imprisoned only if – at the very least – the government can establish actual negligence as a proxy for *mens rea*.

The first, *United States v. Ayo-Gonzalez*,[25] involved the appeal by a ship captain who was convicted under a provision that imposed criminal strict liability on the person in charge of a foreign ship that was illegally fishing in the United States. The defendant sought to use *Park* to his advantage, claiming that it required the government to prove he acted negligently. The court agreed that ''holding that criminal liability could attach *solely* upon proof that the corporation committed a violation and the defendant was an officer of the offending corporation would indeed have *grave due process implications*.''[26] But the court found *Park* distinguishable because Mr. Park presided over a large grocery chain and it was ''not at all certain that an official of such a corporation has the power to prevent violations merely by virtue of his position.''[27] By contrast, the captain of a fishing ship captain has ''virtually plenary authority over its vessel and her crew'' and thus necessarily had the authority and responsibility to ensure legal compliance.[28] If the president of a supermarket chain 40 years ago could not be convicted without proof of negligence, *a fortiori*, that should be true at of an executive presiding over a global healthcare or food company.

The second, *Lady J. Lingerie, Inc. v. City of Jacksonville*,[29] involved a challenge to a municipal ordinance that subjected owners of adult entertainment establishments to criminal sanctions, including imprisonment, if their employees engaged in wrongdoing. The Eleventh Circuit highlighted an important distinction between the challenged ordinance and Park's conviction: ''Park's only punishment was a fine; incarceration is a different matter.'' It held that ''due process prohibits the state from imprisoning a person without a proof of some form of personal blameworthiness more than a 'reasonable share.' '' The court noted that, as a matter of due process, a person can be incarcerated only if

[15] 135 S. Ct. at 2007.
[16] Brief for the United States at 13-14.
[17] 135 S. Ct. at 2011.
[18] 135 S. Ct. at 2011.
[19] *Id.* at 2012.
[20] *Id.* at 2010 (quoting *Carter v. United States*, 530 U.S. 255, 269).
[21] 136 S. Ct. 1619, 1630-31 (2016).
[22] *Id*. at 1631.
[23] *Park*, 421 U.S. at 668 (*quoting United States v. Dotterweich*, 320 U.S. 277, 280 (1943)).
[24] Brief for the United States at 13-14.
[25] 536 F.2d 652 (5th Cir. 1976).
[26] *Id.* at 662 (emphasis added).
[27] *Id.*
[28] *Id.*
[29] 176 F.3d 1358 (11th Cir. 1999)

there is ''individualized proof of an [unlawful] intent or act.''[30] The court therefore upheld the ordinance as constitutional only insofar as the employer could be fined – but not imprisoned – for the acts of his or her employees. The court's reasoning in *Lady J.* should apply with equal force where the incarceration of healthcare and food executives is sought on the sole basis that their job title theoretically gave them a ''reasonable share'' in a FDCA violation.

The third, *United States v. DeCoster*, involved a father and son who owned and operated Quality Egg. They pleaded guilty to misdemeanor FDCA violations as RCOs after their business shipped salmonella-tainted eggs. Their plea agreements stated that the government had not identified anyone at Quality Egg – including the defendants – who was aware of the FDCA violation (the sale of salmonella-tainted eggs). The trial court sentenced the defendants to three months in prison. The defendants appealed, challenging the constitutionality of incarceration in the absence of awareness of the underlying FDCA violation.

The majority opinion upheld the incarceration. It ''conclude[d] that the record here shows that the DeCosters are liable for negligently failing to prevent the salmonella outbreak,'' citing to the *Park* dissent, which had construed the majority holding as establishing a negligence standard.[31] The *DeCoster* majority relied on findings that Quality Egg's sanitation practices were ''egregious''; that the DeCosters knew their employees had bribed and deceived government inspectors; and that the DeCosters knew or should have known that remedial sanitation measures were necessary.

Although it affirmed the conviction by applying a negligence standard, the majority did not expressly resolve the question of whether an RCO's failure to prevent an FDCA violation is inherently a negligent act and thus further proof of negligence is unnecessary, or whether the government must establish actual negligent conduct. Its attempt to distinguish *Lady J.*, however, suggests that the court ascribes to the former approach. The majority claimed that *Lady J.* involved vicarious liability (liability of an employer on account of acts of an employee) whereas under *Park*, ''some measure of blameworthiness'' is ''imported'' onto the RCO.[32] This was a misinterpretation of *Lady J.* The Eleventh Circuit was not simply addressing vicarious liability. The Eleventh Circuit held that, even if the RCO had a ''responsible relation'' to the violation – a phrase directly borrowed from *Park* to describe the basis for RCO liability – that was not enough to justify incarceration absent ''individualized proof of [unlawful] intent or act.''[33]

Unlike the majority, the *DeCoster* concurrence expressly stated that *Park* ''require[s] a *showing of negligence* before exposing an [RCO] to imprisonment for the acts of a subordinate.''[34] It concurred with the majority only because the district court had concluded that the government established the DeCosters were negligent. The concurrence's standard can be invoked in the future by RCO defendants who can establish that they acted with due care – including playing an active role in compliance oversight – and had no reason to know of the underlying violation.

The dissenting opinion in *DeCoster* would have imposed an even higher burden on the government: proof of actual *mens rea*. The dissent, relying on *Torres*, stated that the FDCA's misdemeanor provision should be interpreted to include a *mens rea* requirement because there is no ''express congressional statement'' in the statute to the contrary.[35] The dissent concluded that the defendants did not act with *mens rea* because no one knew that contaminated eggs were being sold, and because Quality Eggs immediately agreed to FDA's request for an expansive, costly recall. On that basis, the dissent concluded that current Supreme Court precedent should preclude incarceration of the DeCosters.

Conclusion

One of DOJ's stated objectives in the 2015 ''Yates Memorandum'' is to hold corporate executives responsible for corporate criminal conduct.[36] The Yates Memorandum specifically noted the challenge supposedly facing prosecutors: ''In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt.''[37] That same rationale is used to justify the RCO doctrine. For DOJ, the RCO doctrine is an attractive option both for holding executives ''accountable'' where there is no evidence that they were connected to wrongdoing by others, and as a ''backup'' in circumstances where DOJ does not believe it can establish the factual or legal basis to obtain the conviction of an executive under a felony statute.

The developing case law discussed above should be useful in undermining future DOJ efforts to use the RCO doctrine as a shortcut to proving criminal liability. In an era of large, multi-national corporate structures, it is grossly unfair for the government to use the RCO doctrine as a bludgeon to subject senior corporate executives to potentially ruinous consequences – including incarceration and exclusion from federal healthcare programs – simply because they theoretically could have prevented a violation. To the extent that DOJ seeks to establish individual ''accountability'' absent evidence of criminal culpability, it should be limited to seeking redress through civil remedies.

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[30] *Id.* at 1368.
[31] 2016 BL 216013 at *5-6.
[32] *Id.* at *5.
[33] 176 F.3d at 1368.
[34] *Id.* at *10 (emphasis added).
[35] Slip Op. at 22, quoting *Torres v. Lynch*, 136 S. Ct. 1619 (2016).
[36] http://www.justice.gov/dag/file/769036/download.
[37] *Id.*

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