HHS Uses Responsible Corporate Officer Doctrine to Exclude Executives from Medicare/Medicaid

By Jim Dietz and David Dirr
jdietz@dbllaw.com ddirr@dbllaw.com

A recent decision by a federal district court in Washington D.C. serves as a warning to executives of healthcare-related corporations to be vigilant against healthcare fraud within their own businesses, or face personal consequences. In 2007, the federal government brought a criminal case against the drug maker Purdue Pharma and three of its senior executives. The government charged Purdue with felony misbranding of a drug with the intent to defraud or mislead. The complaint alleged that the drug maker marketed its drug Oxycontin as less addictive, less subject to abuse, and less likely to cause dependency than other painkillers. But in reality, long-term use of Oxycontin may cause patients to develop severe psychological and physical dependence.

The government charged the three executives—the chief executive officer, the executive vice president, and the chief legal officer—with misdemeanor drug misbranding under the "responsible corporate officer" doctrine. Under this doctrine, which was established by a line of cases from the U.S. Supreme Court, the government does not have to show that the executive participated in the wrongdoing or even knew about it. Rather, the government can obtain a conviction if the executive was in a position of power to prevent or end the wrongdoing, but failed to do so. The executives accepted an agreement to plead guilty to the charges and avoid jail time. The statement signed by the executives

as part of the settlement stipulated that none of the executives had personal knowledge of the misbranding, but that they each had the responsibility and authority to either prevent or quickly correct the wrongdoing.

After the criminal case concluded, the Office of the Inspector General (OIG) of the Department of Health and Human Services (HHS) sought to exclude the executives from participation in Medicare and Medicaid pursuant to its authority under 42 U.S.C. § 1320a-7(b). HHS ultimately imposed a twelve-year exclusion from Medicare and Medicaid, much longer than the typical exclusion of three years. The executives appealed their exclusions to federal district court, arguing that the exclusions were improper under the statute because their convictions were not based on any personal wrongdoing or actual knowledge of wrongdoing. The court disagreed and affirmed the exclusions.

An exclusion from the Medicare and Medicaid programs, especially a twelve-year exclusion, usually ends the career of a healthcare executive. These three executives will be barred from almost any employment in the healthcare industry. They cannot work for any company, nonprofit entity, or institution that receives any money from or does any business with Medicare or Medicaid. Furthermore, even after the twelve-year exclusion ends, the executives must apply to be reinstated, which is far from automatic.

This case shows that the government will aggressively prosecute fraud perpetrated by corporations in the healthcare industry, and may hold executives personally responsible for the wrongdoings of their businesses. Lack of participation or knowledge by a healthcare executive will not be a defense. The only defense in these situations is a showing by the executive that he or she was

powerless to prevent the wrongdoing. Healthcare executives who are not aggressively vigilant against wrongdoing within their companies may find themselves personally paying the consequences of such wrongdoing, and their careers in the healthcare industry at an end.