

## Punishment without Guilt

Monday, July 25, 2011

About a month ago we admitted to pilfering an idea from an in-house lawyer friend. We didn't name names, but we described her as "brilliant and exceedingly well-dressed." Since that post appeared, we've received heaps of emails from friends asking us to admit that we were, in fact, talking about them. The same thing must have happened after Carly Simon's "[You're So Vain](#)" song hit the Top 40 in 1972-73. She probably got calls from all the most eligible glamour-boys (Hefner, Beatty, Jagger, Bexis) seeking confirmation that they had inspired the lyrics.

Recently another in-house lawyer, who is also brilliant, sartorially splendid, and relentlessly thoughtful, brought something interesting to our attention: the Chamber of Commerce's June 23 letter to the Office of Inspector General about the threatened debarment of the Forest Labs CEO. [Here](#) is a link to the Chamber of Commerce letter.

It may have been big news in late 2010 when Forest settled civil and criminal charges relating to the marketing of three drugs, but it was even bigger news in April of this year when the OIG (some say those letters stand for "Orwell-Inspired Government") notified Forest that it was considering excluding the CEO from participation in federal healthcare programs because he is an individual "associated with" Forest Labs.

The OIG's threat is disturbing in the extreme, because at no time during the government's six year investigation of Forest was the CEO ever accused of wrongdoing in connection with the settled matters. If it sounds as if the OIG is being less than fair, it's because it is. The OIG relies on its October 2010 Guidance for Implementing Permissive Exclusion Authority Under Section 1128(b)(15) of the Social Security Act, which says that knowledge by the executive is not required, as "Officers and managing employees ... may be excluded under section 1128(b)(15)(A)(ii) based solely on their position within the entity."

Ah, if only we could issue "guidances" in our lives that would justify our every whim and caprice. Why didn't we empty the dishwasher this morning? Didn't you see our guidance on Kitchen Conduct and Our Right to Perpetual Indolence? When the Drug and Device Law Daughter wonders why she cannot have the car Friday night, we can refer her to our recent guidance on Motor Vehicles and Exclusion of Imbecile Boyfriends Therefrom.

Maybe it's because we are dyed-in-the-wool Anglophiles, but we consider **The Economist** to be just about the most sensible journal out there. In an article titled "[Forest Firing: The government seeks to sack an innocent boss](#)," **The Economist** lays bare the moral and intellectual poverty of the OIG's position. The OIG is "retroactively ... taking down executives at firms that may have had problems in the past." The OIG says its policy "is intended to deter corporate misconduct. It may simply deter clever people from becoming drug executives." Just as terrifying, the OIG's chief counsel says he might use the threat of executive exclusion to "force companies to get rid of products which they have marketed improperly." There isn't "guidance" enough in the world to justify that abuse of power.

A firestorm of criticism prompted the OIG to issue a "[Fact Sheet](#)" defending its position. The Fact Sheet points out that the OIG hasn't yet decided to exclude the CEO, and that the OIG considers the following factors:

- \* circumstances of the misconduct and seriousness of the offense,
- \* individual's role in the company,
- \* individual's actions in response to the misconduct, and
- \* information about the company.

These factors aren't so much an explanation as a gavotte. (That's the first time in our lives we ever used the word "gavotte." It's in "You're So Vain." We had to look it up.) Notably, the individual's role (or lack of role) in perpetrating the misconduct seems utterly irrelevant. Sorry, but neither these factors nor the Fact Sheet supply comfort to anyone who worries about the limits of government power.

The letter from the Chamber of Commerce is much more persuasive than the OIG's Fact Sheet. The Chamber of Commerce makes several powerful points: (1) it's wrong and unfair to exclude someone from their employment based only on "guilt by association," (2) it is a violation of due process rights to deprive someone of their livelihood without any engagement in, or even knowledge of, any wrongdoing, especially when the OIG's exercise of "discretion" is "not subject to administrative or judicial review." and (3) punishing people who had nothing to do with the alleged fraud cannot possibly deter future wrongdoing. Rather, it will deter "qualified individuals from assuming positions of responsibility in the health care industry for

fear of unjust and unjustified sanctions."

We agree with the Chamber's letter, except maybe on one point: we're not so sure that the OIG's exclusion, if carried out, would evade judicial review. We suspect that the OIG might be thinking the same thing. Some of us used to be prosecutors. We know what prosecutorial discretion is. Sometimes justice comes from those things you decide *not* to do. If the OIG really does apply discretion, it will conclude that following through on its threat in this case would be a very bad idea.