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Food Outbreak and Product Recall Advisory

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DeCoster Rehearing Denied—Food and Beverage Company Executives Face Risks of Prosecution as Responsible Corporate Officers

A recent Eighth Circuit decision that two corporate officers must serve jail time for failing to prevent the distribution of contaminated eggs despite the fact that they did not know the eggs were infected reaffirms continuing risks faced by food and beverage executives, though the case suggests arguments that could be raised to future prosecutions.[1] In *DeCoster*, the Eighth Circuit recently denied the petitions of Quality Egg LLC's owner, Jack DeCoster, and CEO, Peter DeCoster, for rehearing *en banc*. Both had pled guilty under the "responsible corporate officer" doctrine[2] for introducing adulterated eggs into interstate commerce under the Federal Food, Drug and Cosmetic Act of 1938 (FDCA). The district court sentenced each executive to three months in prison, one year of supervised release and a $100,000 fine.[3] The Eighth Circuit affirmed the sentences and the DeCosters sought rehearing from the entire Eighth Circuit panel.

In denying rehearing, the Court rejected arguments of the DeCosters and amici[4] that the sentences conflicted with prior Supreme Court precedent involving responsible corporate officers and with other decisions holding that due process does not permit jail time for vicarious liability offenses in which a defendant is being held responsible for the conduct of others. The DeCosters argued that their prison sentences were "unconstitutional because they did not personally commit wrongful acts," and emphasized that even the District Court determined that "nothing in the record indicated that [they] had actual knowledge that the eggs they sold were infected with salmonella."[5] The amici argued that use of the responsible corporate officer doctrine had been rare and, until 2011,[6] had never been employed to put executives who neither participated in nor knew of the underlying criminal conduct in prison.

The government, rather than argue that the DeCosters' awareness of the infected eggs was irrelevant, contended that the District Court had properly accepted the defendants' guilty pleas and made factual findings about the DeCosters' knowledge. The government contended that the District Court had found that the DeCosters knew their company had

[1] *United States v. DeCoster*, 828 F.3d 626 (8th Cir. 2016), *reh'g denied en banc*, (Sept. 30, 2016).

[2] The doctrine is also known as the responsible relation doctrine or the *Park* doctrine. *See United States v. Park*, 421 U.S. 658 (1974).

[3] *Id.*, 828 F.3d at 631.

[4] The amicus brief was filed by the National Association of Manufacturers and the Cato Institute.

[5] *Id.*

[6] The FDA changed its procedures manual to remove the requirement that an executive have knowledge of and actual participation in the violation before prosecuting a case. FDA, *Regulatory Procedures Manual*, § 6-5-3. (June 2015), available here (last visited November 23, 2016).

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Salmonella contamination issues and negligently decided not to adopt remedial measures,[7] and as a result, the case was not one in which there was ignorance of a contaminated product.

The Eighth Circuit denied rehearing without comment.[8] Therefore, it is difficult to know whether it concluded that knowledge is irrelevant, or if it was persuaded that the DeCosters knew there was a contamination issue and negligently failed to act. Accordingly, the record at least suggests an argument in response to future prosecutions that incarceration should be prohibited absent at least some evidence of awareness of the contamination and neglect.

Nevertheless, it would be imprudent to ignore the risks based on such a reading of a thin record involving only a denial without comment from the Eighth Circuit. The decision ultimately upheld the DeCosters' sentences, and the underlying decisions reflect the fact that executives face potential criminal prosecution and jail time for food contamination events even if they did not know about, or participate in, the misconduct. The government's press release at the time of the DeCosters' initial sentencing expressed its intention to continue to bring prosecutions regardless of "[c]laims of ignorance" and claims that "'I delegated the responsibility to someone else' will not shield [executives] from criminal responsibility."[9]

Executives and top employees in the food and beverage industry would continue to be well-served by exercising appropriate caution and vigilance; re-examining and enhancing their company's diligence; ensuring effective quality, safety and reporting compliance programs; encouraging a culture committed to compliance and transparency concerning food safety issues; and establishing a recall and crisis management plan to address food safety issues, should they arise.

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[7] The government relied on the sentencing record and disputed the dissent's reliance on the defendants' guilty plea, which did not concede that either of the DeCosters "had knowledge of salmonella contamination at any relevant time." *United States v. DeCoster*, 828 F.3d 626, 642 (8th Cir. 2016) (Beam, C., dissenting opinion).

[8] *United States v. DeCoster*, 828 F.3d 626 (8th Cir. 2016), *reh'g denied en banc*, (Sept. 30, 2016). Chief Judge Riley, Judge Wollman, and Judge Loken voted to grant rehearing *en banc*; Judge Kelly did not participate in the decision.

[9] April 13, 2015 Department of Justice Press Release, available here (last visited November 23, 2016).