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Federal Government Urges Appellate Court to Uphold Executives' Exclusions from Federal Health Care Programs

By Christopher R. Hall and Gregory G. Schwab

We have previously written (in prior *White Collar Watch* articles and *The Champion*) about the federal government's attempt to exclude from federal healthcare programs three former Purdue Frederick Co. ("Purdue") executives. The government recently filed a brief in the Court of Appeals for the District of Columbia to affirm a district court ruling that sustained an order debarring the executives for a period of 12 years. The lower court's order effectively ended the managers' careers because no company that receives funds directly or indirectly from federal healthcare programs may employ them during the exclusion period. The government's most recent brief seeks to cement the ability of the Secretary of HHS to end the careers of executives convicted under the "responsible corporate officer" ("RCO") doctrine.

We begin with a brief overview. In 2009, HHS excluded the three Purdue executives for 20 years after they pleaded guilty to a misdemeanor provision of the Food Drug and Cosmetic Act. Section 301 of the FDCA holds persons who introduce misbranded or adulterated food or drugs into interstate commerce strictly liable and subjects them to a term of imprisonment of not more than one year. Typically, criminal laws require knowledge or intent before criminal liability attaches, but Congress—in enacting this provision of the FDCA—and the Supreme Court—in upholding the provision—have established the so-called responsible corporate officer doctrine. By operation of this exception to the criminal intent requirement, people who have a "responsible relationship" to the illegal sale of adulterated or misbranded food or drugs are guilty of a misdemeanor offense on a showing that they failed either (1) to prevent the offense, or (2) to remedy the wrong immediately upon learning of it. The Purdue executives agreed in a criminal proceeding that they had a "responsible relationship" to the illegal distribution by their company of an addictive pain killer called OxyContin, but have opposed an attempt by the Secretary of HHS to administratively exclude them from the healthcare industry for 20 years. They have opposed the Secretary's effort on the ground that the exclusion statute and administrative regulations require a showing of fraud, unlike the criminal statute. An HHS Departmental Appeals Board upheld the exclusion but reduced the period from 20 to 12 years. The executives appealed from this ruling first to a federal district court and now to the D.C. Court of Appeals.

The Purdue executives appealed on the grounds that: (1) their misdemeanor convictions are not an excludable offense under debarment provisions of the Social Security Act, and (2) HHS abused its discretion and acted in an arbitrary and capricious fashion when it meted out the 12-year exclusion period. The executives cite as support the fact that their convictions were based merely on their status as “responsible corporate officers” and not on a showing of intent or actual knowledge of wrongdoing by them.

The government filed its appellate brief on October 5, 2011. It makes an argument in two steps. First, the government notes that the Social Security Act authorizes the Secretary to exclude persons found guilty of a crime “relating to” fraud or the unlawful distribution of a controlled substance. 42 U.S.C. § 1320a-7(b)(1), (3). The government then notes that the failure of Purdue Executives to

prevent and detect misbranding of OxyContin by their company “related to” fraud in the ordinary sense of that term regardless of whether they lacked personal knowledge of their employees’ fraudulent scheme or embraced their employees’ bad intent.

The government also asserts that the appeal represents a collateral attack on the RCO convictions, and urges the Court of Appeals not to provide the executives with a “forum for questioning the fairness or reasonableness of federal prosecutors’ decision to prosecute the Purdue Executives as responsible corporate officers.”

Oral argument in the U.S. Circuit Court of Appeals for the D.C. Circuit is set for December 6, 2011. The Purdue executives will likely submit a reply brief in the coming weeks.

Avoiding Blind Trust: Exercising Due Diligence in Selecting and Working with a Title Insurance Company

By Charles N. Curlett, Jr. and Sarah F. Lacey

Do you trust your title insurance provider? If your answer is “yes,” what is the basis of that trust? In the past, you may have selected a title insurance provider without much serious evaluation. Perhaps you presumed that the provider’s size or number of years in business adequately guaranteed that your transaction would be handled properly. As the unfortunate case of Brian H. Madden illustrates, greater scrutiny in selecting and supervising your title insurance provider may be required.

Madden misappropriated over \$2.2 million in client funds through his company Liberty Title Agency, LLC and its subsidiary LLCs, Skyline Title and GNY Liberty Abstract. Madden pleaded guilty to charges of wire fraud and insurance fraud, and in September 2011 he was sentenced to serve 41 months in federal prison followed by two years of supervised release. Judge Robert W. Sweet of the U.S. District Court for the Southern District of New York also ordered Madden to pay restitution, forfeit

four pieces of real estate, and repay more than \$1.8 million in funds.

Madden managed the day-to-day business operations of Liberty Title, Skyline Title, and GNY Liberty. Federal agents investigating the case found that he effectively exercised exclusive control over the finances of all three companies and freely transferred money among the companies’ accounts as well as to his personal accounts. From 2002 through 2009, Madden made increasingly larger withdrawals from the subsidiary companies’ accounts to cover transfers from the parent company’s accounts, despite the fact that the operating agreements between the parent and subsidiary companies barred such transfers. In the winter of 2008-2009, as Liberty Title’s funds vaporized into Madden’s personal accounts, Madden also blocked the issuance of checks to pay recordation and transfer taxes and refused to comply with a client’s request to transfer its escrow account to another agency.

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How can you or your client avoid becoming the victim of a scheme like Madden's? First, exercise diligence upfront by actively participating in the selection of your title insurance provider:

- Go beyond evaluating the potential provider's general reputation for service and reliability. Ask what systems are employed to prevent the misappropriation of escrowed funds. Investigate whether the provider has ever been the subject of a criminal or civil complaint related to its handling of client funds and how such complaints, if any, were resolved.
- Inquire into the potential provider's management practices. For example, who has access to client funds? Does one person have unfettered and unsupervised control? Is that person responsible for the management of any other title companies? If practicable, interview more than one person in management to gain a better understanding of the provider's operations and verify that they are as described.
- If the potential provider is also title insurance agent, as Liberty Title was, request information on the agent's relationship with the underwriter. Determine what procedures are in place to protect client funds at the agent's level and whether the underwriter will cover any shortfall caused by the agent.

Once you complete your due diligence, you will need an escrow agreement. But again, the best escrow agreement in the world will not provide protection unless you continue to exercise diligence during the escrow period. For example, you should:

- Closely review account statements and monitor your account electronically to ensure that balances are correct and that only authorized disbursements have been made. Keep paper records and immediately follow up with the provider if any errors or discrepancies appear.
- Verify that all transactions, such as the recording of a deed, have in fact occurred. This generally is the responsibility of the title insurance provider, which should be able to provide stamped receipts and endorsed copies. As in the Madden case, a delay in recording documents after all preconditions have been met may indicate that the provider has a cash flow problem.

Unfortunately, even the best due diligence cannot guarantee protection from fraud. The very nature of the beast is the abuse of client trust and concealment. Nevertheless, careful selection and diligent oversight provide the best means for protecting real estate escrow funds.

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