
CORPORATE CRIME REPORTER

NYU LAW PROFESSOR JENNIFER ARLEN ON CORPORATE GUILTY PLEAS VERSUS DEFERRED PROSECUTIONS

An interesting split is occurring within the burgeoning field of corporate criminal law.

On one side, those who believe that in most cases, corporate criminals should be forced to plead guilty when they commit serious crimes.

On the other side, those who believe that in most cases, corporate criminals should be given deferred and non prosecution agreements.

In the first camp is David Uhlmann, Professor of Law at the University of Michigan. Last month, Uhlmann penned an op-ed for the *New York Times* titled - "Justice Falls Short in GM Case."

In it, he writes -- "A glaring oversight in the Justice Department's new policies on corporate crime is the lack of any limits on the use of deferred prosecution and non prosecution agreements. It is long past time for the department to amend its policies to make clear that criminal convictions must be sought in egregious instances of corporate crime like the GM case. If the department is serious about corporate crime, it needs to stop sending the mixed message that corporations can avoid criminal liability by admitting they were wrong and promising not to do it again."

In the second camp is Jennifer Arlen of the NYU School of Law.

"I disagree with David on that point," Arlen told Corporate Crime Reporter in an interview last week. "I agree wholeheartedly with the idea that the Department of Justice has to make sure that corporate wrongdoing results in formal conviction of the people responsible for the crime. But I believe that means that the focus has to be on convicting the people, the individuals truly responsible for the crime. And one should try to go as far up the firm as possible to identify those responsible. Those individual convictions place blame and the criminal sanction on the people who actually caused it to happen."

"Corporate liability places the pain of the conviction on dispersed shareholders -- pension funds -- who had very little to do with the crime. We personify corporations for all sorts of reasons.

But at the end of the day, if we ask who pays a corporate criminal fine, the answer is -- the shareholders. It is really important to put the blame where it belongs -- on the people who caused it."

"There is a role for corporate liability. But the primary purpose is to get the firm to help the government deter and detect and to make sure that individuals are convicted. I too have problems with the GM deferred prosecution agreement but that's because so far no individuals have been convicted. If it is the case that no individuals are convicted at the end of the day, then one of two things has to be true, given that this was in part a wire fraud conviction."

"Either the prosecutors had evidence against the individuals and decided not to pursue them -- this would be seriously problematic -- or they didn't have enough evidence that any one individual at GM actually committed wire fraud. And if they didn't have enough evidence that any individual committed wire fraud, then in fact the deferred prosecution agreement against GM for wire fraud would be inappropriate. GM should not be held vicariously liable for a crime if no employee committed a crime."

What separates those who believe there should be more corporate guilty pleas from those who believe there should be more deferred prosecutions? "People who teach corporate law tend to take my perspective," Arlen says. "We have spent a lot of time thinking about the agency costs within the firm, the fact that firms are run by managers but owned by shareholders who have no control over the firm. If much of your scholarly life is focused on how difficult it is for shareholders to control what goes on in the firm, it would cause you to be more inclined to place responsibility for criminal behavior on the people who did it and to try and use corporate liability to induce firms to help the government out."

(See ARLEN, page three)

(ARLEN, from page one)

“People who take the other perspective tend to come out of criminal law and treat the corporation as a coherent person. The corporation commits crimes. And it benefits from crimes. There isn’t as much focus on the fact that corporations are nexuses of people that have conflicting interests. And the owners of the firm have a hard time controlling what goes on inside the firm. Part of it is the different perspective and whether or not one views the corporation as a single person. And I don’t.”

There are news reports that the Justice Department has appointed as compliance counsel Hui Chen, Standard Chartered’s former head of anti-bribery and corruption compliance and a former assistant general counsel at Pfizer.

What is that position? And what is the controversy about?

“The people within the Fraud Division decided that it would be useful for them to have someone who is an expert in compliance -- an expert whose expertise developed within corporations so they know what compliance works and what doesn’t work,” Arlen said. “Most prosecutors don’t have business experience. And they don’t have first hand knowledge of what mechanisms firms put into place that are paper compliance and what mechanisms really work. They have a lot less experience on where does crime come from -- how would you spot it?”

“The idea was to bring someone in who could be useful in advising the Department. I believe there was a thought that this person could do some up front assessment of different firms. Instead of waiting for a problem to walk into the Department’s door, there is a possibility that this compliance expert could do an audit of the compliance programs of firms doing business in country X to see whether their compliance programs are effective and help advise them on making them effective. And make it more difficult for firms that have ineffective compliance programs.”

“And then the idea was that when a firm comes in to the Department, there would be an expert to help evaluate the firm’s claim that it had an effective compliance program and this crime happened not for any fault of the firm but because of a rogue employee. The hope is that this person would provide additional expertise on how effective was the program.”

“In some cases, you won’t need the expertise.”

Justice Department Fraud Section chief Andrew Weissman put forth this proposal. When he was in private practice, he had the Chamber of Commerce as a client and he tried to get Congress to pass a corporate compliance defense.

Is the compliance counsel a backdoor way to get a corporate compliance defense?

“My sense is that this is not a backdoor way of pushing a corporate compliance defense. I certainly hope it isn’t,” Arlen says.

“If a corporate compliance defense is defined as I’ve seen it -- if you have an effective compliance program, the firm isn’t criminally liable at all -- I’m strongly opposed to it. It is likely to be too easy to pretend to have an effective compliance program and not have one. I am concerned about paper compliance. Second, even the best compliance program will not deter crime particularly when there are other features outside compliance that encourage crime.”

“For example, a firm that has an effective compliance program on the one hand and a promotion compensation program that encourages risk taking, that firm is likely to have employees commit quite a lot of crime. And yet it might be able to say that it has an effective compliance program if that is defined narrowly.”

“I don’t want to focus on the inputs like compliance. It’s very difficult for prosecutors to figure out what is truly effective and what isn’t. I’d rather focus on the outputs like -- did the firm commit a crime, did it detect it, and did it report?”

“An effective compliance program should not only deter crime, but detect it. I would like to give the firm serious credit -- insulate it from conviction -- if it self reports. If it self reported and fully cooperated, it would allow us to convict the people responsible. I’m not worried that credit for self-reporting and full cooperation would mean that people could commit crimes and get away with it.” “With a compliance defense, the firm knows that even if it doesn’t self report, it is off the hook. And it doesn’t have to fully cooperate. So the firm may not be liable and the individuals may not be liable.”

(For the complete Interview with Jennifer Arlen, see page 12.)