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COURT DECLINES TO REIN IN RESPONSIBLE CORPORATE OFFICER DOCTRINE

(*Friedman v. Sebelius*)

A divided U.S. Court of Appeals for the District of Columbia Circuit today largely upheld draconian penalties imposed on three pharmaceutical executives after they pled guilty to misdemeanor charges under the "responsible corporate officer" (RCO) doctrine. The decision in *Friedman v. Sebelius* was a setback for the Washington Legal Foundation (WLF), which filed a brief urging that the penalties be set aside. WLF charged that by imposing the penalties and threatening to impose similar penalties in a wide array of cases, officials at the U.S. Department of Health and Human Services (HHS) have completely misunderstood the nature of the RCO doctrine.

The appeals court ruled 2-1 that the executives were properly excluded from the health care industry under a statutes that permits exclusion of an individual who has been convicted of a "misdemeanor relating to fraud." Although the executives were never themselves accused of fraud – indeed, prosecutors who charged them with RCO offenses conceded that they had no knowledge of improper drug promotion that occurred at their company – the court held exclusion was permissible because there was at least *some* relationship between the executive's supervisory responsibilities and the underlying misconduct.

In a partial victory for the executives, however, the appeals court overturned the 12-year exclusion penalty imposed on the executives by HHS. The court held that the decision to exclude for 12 years was "arbitrary and capricious," given the agency's failure to explain why the penalty was three times longer than penalties imposed in comparable cases in the past. The court remanded the case to HHS, with directions that HHS provide a reasoned explanation for any penalty it ultimately chooses to impose.

The appeals court rejected WLF's assertion that imposition of such severe penalties for an RCO misdemeanor conviction – a conviction that requires no showing of *mens rea* and does not constitute a finding that the defendant engaged in conscious wrong-doing – raises serious due process. The court said, "Surely the Government constitutionally may refuse to deal further with senior corporate officers who could have but failed to prevent a fraud against the Government on their watch."

Judge Stephen Williams dissented. He argued that HHS has too broadly interpreted the "relating to fraud" statute under which the executives were excluded. He said that HHS should not be permitted to exercise its exclusion authority without first articulating a meaningful limiting principle for the statute, noting that the phrase "relating to" has no logical limitations if read literally.

As a result of the misdemeanor convictions, HHS has determined that the three executives should be excluded from participation in federal health care programs (including Medicaid and Medicare) for 12 years. Given the advanced age of the executives, the exclusion effectively amounts to a lifetime ban from the pharmaceutical industry. WLF argued that an RCO conviction is a mere status crime: it does not signify that the defendant has engaged in *any* culpable conduct but rather that the defendant held a responsible corporate position at a time when others within the corporation engaged in misconduct. WLF asserted that Congress never intended to permit the exclusion (from federal programs) of individuals who are not blameworthy. The appeals court disagreed, adopting the other side of the on-going debate over the meaning of the RCO doctrine.

"This case takes on added significance in light of recent efforts by prosecutors across the country to force senior pharmaceutical executives to plead guilty to RCO misdemeanors, and in light of statements by FDA officials that they intend to 'get tough' with companies alleged to have engaged in improper promotional practices," said WLF Chief Counsel Richard Samp after the appeal court decision. "The case cries out for further review. Irresponsible officials at HHS's Office of Inspector General have given every indication that they view the draconian penalties imposed in this case as a model for other cases involving allegedly improper promotion. They either don't understand the limited nature of an RCO offense, or they are deliberately acting in violation of their statutory mandate," Samp said.

The case involves three former top executives at Purdue Frederick Co. In May 2007, Purdue Frederick entered a guilty plea to felony charges that some of its lower-level employees (but not the three top executives) had engaged in improper promotion of a powerful painkiller. At the same time, the three executives pled guilty to a misdemeanor charge under the RCO doctrine; they paid a fine and were placed on probation. The basis for the plea was simply that they had been senior executives at the time that the misconduct had occurred (during the 1990s).

WLF regularly appears before federal and state courts to promote a limited and accountable government. WLF filed its brief with the *pro bono* assistance of Michael A. Carvin and Daniel R. Volkmuth of the Washington, D.C. office of Jones Day.

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For further information, contact WLF Chief Counsel Richard Samp, 202-588-0302. A copy of WLF's brief is posted on WLF's web site, www.wlf.org.