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## Execs' Prison Terms Spark Legal, Food Industry Debate

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Federal prison terms recently upheld by the Eighth Circuit may help protect consumers from tainted food and other products (United States v. DeCoster, 2016 BL 216013, 8th Cir., Nos. 15-1890, 1891, 7/6/16).

But significant questions remain about the decision and its effect on future cases, lawyers and food safety advocates tell Bloomberg BNA.

Whether the July 6 ruling should be considered worrisome, welcome, or good fodder for further appellate review depends on who you ask.

“What's scary about this decision is its affirmation of the government's legal theory that a corporate manager can be sentenced to a prison term for the actions of an employee of which he or she had no knowledge,” Ilya Shapiro, a senior fellow at the Cato Institute, told Bloomberg BNA.

The Cato Institute, based in Washington, D.C., is a think tank with an individual liberty and free market orientation. It filed a friend of the court brief urging reversal of the convictions.

The court “hedged that issue a bit” by finding the executives negligent instead of vicariously liable, “but federal courts need to make a clear statement that a high level of intent is required for prison terms,” said Shapiro, who co-authored the brief for the institute and the National Association of Manufacturers (31 TXLR 480, 5/19/16).

But plaintiffs' lawyer Bill Marler of Marler Clark in Seattle said the disposition of the case was fair.

“I think given the scope of the problem—2,000 sickened, 500 million eggs recalled—the three months and a \$7 million fine is appropriate,” said Marler, who frequently represents consumers sickened by food products.

### Three-Month Sentences Upheld

The “relatively short” three-month sentences imposed on Austin and Peter DeCoster violated neither their Eighth Amendment nor their due process rights, the court said in the 2-1 decision (31 TXLR ???, 7/14/16).

The DeCosters' commercial farm in Iowa was linked to salmonella-tainted eggs that sickened thousands in 2010. The federal government pursued criminal charges against Quality Egg LLC and the DeCosters, and in 2014 they pleaded guilty under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§331(a) and 333(a)(1).

The statute makes executives criminally liable for failing to prevent or remedy “the conditions which gave rise to the charges against them,” the court said.

The “responsible corporate officer” doctrine makes executives criminally liable by virtue of their oversight of company activities—without proof of intent to commit the company's underlying strict liability crimes.

Here, the DeCosters were liable “for negligently failing to prevent the salmonella outbreak,” and not because of their vicarious liability for the acts of their employees, the court said.

### **‘Personally Culpable.’**

That distinction is significant, according to Cory Andrews, an attorney with the Washington Legal Foundation.

WLF, a public interest law firm with a free-market orientation, is based in Washington, D.C.

“The Eighth Circuit appears to reject the basic premise that an executive can be convicted and incarcerated based not on blameworthy conduct but rather on being the head of an organization that did bad things,” Andrews told Bloomberg BNA.

“In particular, the concurrence seemed to base its affirmance on the district court's conclusion that the DeCosters were actually, personally culpable,” said Andrews, who co-authored a friend of the court brief urging the Eighth Circuit to overturn the convictions.

Andrews referred to the concurring opinion of Judge Raymond W. Gruender, who said “imprisonment based on vicarious liability would raise serious due process concerns.”

But in this case, Gruender said, the district court's finding that the DeCosters were negligent “does not implicate those concerns.”

“As a matter of legal doctrine, that view—that a prison term requires proof of actual blameworthiness—undoubtedly will be welcomed by food industry executives who are named as defendants in cases where the responsible corporate officer doctrine is the only legal theory of criminal prosecution,” Andrews said.

### **‘Aggressive Stance’ Validated**

But David Plunkett, a senior staff attorney for the Center for Science in the Public Interest, said food industry executives should take away a different message from the Eighth Circuit.

“The decision is good news for consumers and a clear warning to food company executives,” Plunkett said.

CSPI, based in Washington, D.C., is a consumer organization focused on research and advocacy programs in health and nutrition.

“More importantly, it validates and supports the aggressive stance taken by” the Food and Drug Administration and the Department of Justice “with regard to pursuing criminal cases against executives of companies whose food products cause harm to consumers,” said Plunkett, who focuses on food safety issues.

Patty Lovera, assistant director of Food & Water Watch, an environmental advocacy organization in Washington, D.C., said the decision reflects the influence executive decisions can have on public health.

“This is a big one, and it wasn't their first brush with food safety issues,” Lovera recently told Bloomberg BNA.

“People in food safety are still trying to figure out what this means, but these guys are running huge operations,” she said. “Decisions are made by a small set of executives, and what they decide can make a big difference.”

### **Rehearing Request Next?**

Noah Feldman, a law professor Harvard University in Cambridge, Mass., told Bloomberg BNA the dissent of Judge C. Arlen Beam provides fodder for a rehearing request before the three-judge panel—or the entire membership of the U.S. Court of Appeals for the Eighth Circuit. It also could provide a good basis for a possible petition for review by the U.S. Supreme Court.

Beam said the evidence failed to show the “guilty mind” on which prison sentences must be based.

“The court generally doesn't take error correction cases,” Feldman said, but he noted the unusual imposition of prison terms for misdemeanor convictions might catch the high court's eye.

It would be a “plausible” petition for review, Feldman said.

The DeCosters asked for additional time to file a petition for rehearing before the Eighth Circuit, which the court granted July 7.

The petition is due August 3 under the court's order.

Neither the Department of Justice nor counsel for the DeCosters responded to requests for comment.