

Ignorance Is No Excuse: Criminal Liability In The Produce Industry

By Ryan M. Gembala, Esquire, Martyn & Associates

We've all heard the reports about the salad plant in Springfield, OH that closed as the federal government continues to investigate a listeria outbreak. The phrase "federal investigation" should be enough to send chills down any produce executive's spine. While no one yet knows what the government's investigation at the Springfield, OH salad plant will yield, it wouldn't be the first time a produce executive faces criminal charges — and a possible prison sentence — following a food-borne illness outbreak.

If you're a food industry executive, you may be saying to yourself, "That couldn't happen to me; I'm miles away from the facility and can't know for certain what happens there on a day-to-day basis." You're wrong. The days of the federal government limiting its investigations to civil penalties or on-site managers are over. The government's new tactics to deal with contamination issues are fraud and conspiracy charges for executives. These charges carry real penalties, including prison time.

In large measure, the framework for the government's criminal cases against executives has been around for more than 40 years. In 1975, the U.S. Supreme Court in *United States v. Park* announced what has come to be known as the Park Doctrine. In a nutshell, the Doctrine states that executives can be criminally liable where they "should have known" about an employee's wrongdoing or violation of federal law.

In *Park*, the issue was rodent contamination in a supermarket warehouse in violation of the Food, Drug, and Cosmetic Act (FDCA). A supermarket executive was criminally charged, and while he conceded that he was responsible for company operations, he argued that addressing warehouse conditions were the duties of other, dependable subordinates. The Supreme Court disagreed, reasoning that his position of authority within the company and his level or responsibility for its overall operations made him someone who could be criminally liable for the statutory violation.



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You may be wondering: if The Park Doctrine has been around for 40 years, why should I worry about it now? The answer is FSMA and the regulations implementing it have expanded the potential for criminal liability. While written in 2011, enforcement of the statute and regulations has more recently begun in earnest. The failure to comply with FSMA's Produce Safety Regulation or Food Defense Regulation can result in criminal penalties. So too can operating a facility which does not satisfy the FSMA Preventative Controls Regulations, or importing the food of an importer who is not in compliance with the FSMA Foreign Supplier Verification Program Regulation. Failing to comply with an FDA recall order, or the willful failure to comply with the consumer recall notification requirements, can also result in criminal charges. FSMA has also triggered enforcement of the Sanitary Food Transportation Act Regulation.

At first blush, it may seem like the employees directly involved with these particular operations would be the only ones risking criminal prosecution. However, when the statutes and regulations are read in conjunction with The Park Doctrine it means that executives also have criminal exposure.

For a real-world example, one needs look no further than Eric and Ryan Jensen of Jensen Farms in Colorado. Jensen Farms supplied cantaloupes to some of the largest retailers in the world. As the primary owners of Jensen Farms, the Jensens were responsible for the operation of the conveyor system that cleaned and packed cantaloupes which came directly from the farms. At some point, the Jensens installed a cleaning system that did not include a chlorine spray, which would have reduced the risk of packing contaminated fruit.

Unfortunately, in a story making national headlines, Jensen Farms distributed cantaloupes contaminated with listeria that the federal government argued killed 33 people and injured more than 100 others. What was less widely reported was that Eric and Ryan Jensen ended up ***pleading guilty*** to crimes which resulted in five years of probation and six months of home detention, to avoid the risk of real prison time. Significantly, the federal government presented no evidence that the Jensens knew that the cantaloupes were contaminated, but instead simply argued that the Jensens should have known the cantaloupes ***could be*** contaminated since they knew there was no chlorine in use on the conveyor.

So, what can a produce executive do to protect himself from criminal charges? While there is no cure-all, there are some steps that should help mitigate the risk.

- Get educated! Know what FSMA requires, both the statute and the regulations. Read the requirements of the FDCA and understand how to satisfy them.

- Get ahead of any problems before they develop. Institute a compliance program which includes employee training, regular, preventative inspections, and procedures for effectively resolving issues. It is a good practice to follow even stricter food safety standards (either developed in-house or by a third-party) that exceed mere compliance with the federal statutes and regulations.
- Finally, if you become aware of a problem (or even just a potential problem), don't ignore it or try to cover it up. Face the issue head-on and take all steps to contain contaminated product, recall contaminated product, and eliminate the source of the contamination. While this obviously won't prevent the contamination, it will exhibit to the government that you've done your best to eliminate the risk to the public.

With the government's ever expanding arsenal — including criminal charges for things you *should have* known — a produce executive would be wise to understand the laws, know what's going on at their facilities, and preach compliance and safety as the top priorities. What you don't know *can* hurt you, so review your policies and determine if you need to consult with an experienced food industry lawyer knowledgeable about the FSMA, the FDCA, and the risks of criminal liability.

About The Author

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