

FOCUS: CORPORATE CRIME

Businesses in the bull's-eye

Area companies increasingly find themselves in court as criminal defendants

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There was a time when your average white-collar criminal was the trusted investment adviser who scammed his clients, or the longtime bookkeeper who embezzled from her boss.

These days, the realm of likely defendants is expanding and, more and more, prosecutors are going after big corporate names such as Tonawanda Coke, Severson Environmental and Acquest Development.

A recent spate of high-profile investigations into well-known local companies has prosecutors saying it's simply coincidence and defense lawyers suggesting it's part of a new reality for employers.

"We've seen an uptick in white-collar investigations of businesses," said Daniel C. Oliverio, a former federal prosecutor who does a lot of defense work on behalf of companies. "And I think it's because the government has a bigger playing field these days."

Lawyers such as Oliverio look at the Tonawanda Coke trial, the failed prosecution of Acquest and the ongoing tax investigation of Severson, as well as several other court cases involving smaller companies, and they see a newfound focus on targeting businesses.

He thinks the government is seizing on an opportunity to raise revenue through fines and restitution, and is being aided in that effort by changes in the law that make it easier to criminalize the conduct of company executives.

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Harry Scull Jr./Buffalo News

Prominent business lawyer Carol E. Heckman, a former U.S. magistrate judge, says businesses today face more liability than they have in the past.



PROSECUTING BUSINESSES

Here are four recent cases of criminal charges brought against local companies:

Tonawanda Coke:

A jury found the company guilty of 14 separate criminal charges after a month-long trial in which federal prosecutors suggested the company is more interested in profits than in public health and safety.

Acquest Development:

Prosecutors accused the prominent developer in both civil and criminal proceedings of violating the federal Clean Water Act, but a federal judge recently tossed out the criminal charges.

Severson Environmental:

The president of one of Niagara Fall's oldest and biggest employers and several other high-ranking company executives are accused of overseeing a scheme to cheat the Internal Revenue Service.

Johnson Contracting of WNY:

This small Buffalo firm is one of three that have gone out of business after being indicted on criminal charges related to asbestos-removal projects in Buffalo.

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"What I've seen is a great expansion in the amount of liability that businesses are facing," said Carol E. Heckman, a former U.S. magistrate judge and prominent business attorney.

Like Oliverio, Heckman attributes the recent spate of local prosecutions involving corporations to a regulatory environment that has become more complex and demanding because of significant changes in state and federal law.

The landscape, in Heckman's eyes, is changing fast enough that her firm, Harter, Secrest & Emery, recently created a "Government and Internal Investigations" group with 15 lawyers.

"We saw this as a growth area," Heckman said, "and an area where we could really add value to our client services."

Federal prosecutors reject any suggestion that their recent criminal prosecutions are part of a larger trend or a grand strategy to exploit what could be a bountiful source of money, in terms of fines and restitution.

U.S. Attorney William J. Hochul Jr. says his office has always gone after businesses engaged in wrongdoing and that wealth, title or status will never be a factor in whom his office prosecutes.

"We're just going to follow the facts and apply the law wherever necessary," Hochul said.

More than any other one case, the monthlong trial of Tonawanda Coke cast a spotlight on the government's prosecution of local employers.

The jury in the case deliberated less than a day before finding the company and Mark L. Kamholz, its environmental controls manager, guilty of multiple criminal charges related to polluting the air and ground at its Town of Tonawanda plant.

The company and Kamholz face possible fines of more than \$200 million, and Kamholz could get up to 75 years in prison when they're sentenced in July.

"In the end," Hochul said at the time of the verdict, "this was all about Tonawanda Coke and Mark Kamholz putting profits ahead of people."

Rodney O. Personius, the Buffalo lawyer who represented Kamholz, thinks the government's criminal prosecution of the company, as well as of Acquest and Severson, has a lot to do with the fact that each of those companies is led by executives who felt compelled to fight the government's initial allegations against them.

"They're all extremely successful at what they do because they're independent thinkers and risk takers," Personius said. "I think that says volumes about why they were prosecuted."

Heckman thinks the trial, believed to be only the second criminal prosecution in the nation involving the federal Clean Air Act, is a case that in the past

would have been handled administratively by the federal and state agencies investigating Tonawanda Coke.

She also says it's an example of the more aggressive business-oriented prosecutions coming out of Hochul's office.

"I do think there have been aggressive enforcement efforts locally," she said. "It's extraordinary that they went after Tonawanda Coke criminally."

While Heckman and Oliverio stop well short of suggesting the Tonawanda Coke prosecution was out of bounds, they do view it as unusual and a sign of a changing environment.

In their eyes, the same type of aggressive enforcement was used in the government's prosecution of Acquest Development, an environmental case that, unlike Tonawanda Coke, has not gone the government's way.

In late 2011, a federal grand jury indicted Amherst developer William Huntress and his company, Acquest, on allegations that they improperly cleared an undeveloped parcel of land on Transit Road in Amherst and, among other things, illegally filled in wetlands and removed trees.

Huntress, who has a reputation for going toe to toe with residents and public officials, countered with a civil suit of his own that accused the U.S. Environmental Protection Agency of being "overly zealous."

"He's one of the few who can fight back," said Paul J. Cambria Jr., Huntress' attorney, of his client. "Most of the people who run afoul of the federal government don't have the resources to fight back. He does."

Cambria thinks the Acquest case is significant for several reasons, including a federal judge's recent dismissal of the indictment.

In dropping the charges, Chief U.S. District Judge William M. Skretny ruled that prosecutors interfered with the grand jury that indicted Huntress and his company. The judge's ruling means the government's criminal case against Huntress is dead unless the government appeals or reindicts him.

The government also has the option of dropping the criminal case and pursuing Huntress as part of two separate civil cases involving the EPA and alleged violations of the Clean Water Act.

Cambria said Huntress is ready to fight those as well.

"A number of entities have criticized the EPA for being overly zealous and overly critical," he said. "I think it's about time the courts started scrutinizing their actions."

The prosecutions of Acquest and Tonawanda Coke are just two of the many criminal cases pending against local companies.

The defendants range from small mom-and-pop businesses to the executives at Severson,

one of the biggest and oldest companies in Niagara Falls. It employs about 700 people, 300 of them in Niagara County.

In the Severson case, the company's president, Michael A. Elia, and two of his brothers, Laurence and Richard, are accused of conspiring with other Severson executives to avoid paying taxes on deferred bonus compensation.

The defendants, who are accused of working together to defraud the government of \$310,000, have denied the allegations and promised to fight them in court.

Another local company, International Technology Group of Orchard Park, also is under a federal indictment in connection with an alleged scheme to defraud the government of \$10 million.

Prosecutors allege that the company worked with others to smuggle prohibited magnesium in from China for use in military flares designed to protect U.S. fighter pilots from heat-seeking missiles.

In two other cases, the government has indicted four local companies involved in asbestos removal. Three of the four have since gone out of business.

"The criminalization of things by the federal government is getting too broad," said Michael T. Kelly, an attorney for S.D. Specialty Services, one of the companies that recently closed.

The business, which is owned by former Buffalo Bill Sean Doctor, is accused of illegally storing asbestos at several job sites and at its offices on Grand Island.

Kelly said a good part of the government's case against Doctor, especially the allegations of improper asbestos handling, could have been dealt with administratively. "They're criminalizing things that shouldn't be criminalized," he said.

Three other companies involved in asbestos removal also face federal charges, two of them in connection with the Kensington Heights public housing complex on Buffalo's East Side.

Those two contractors, Johnson Contracting of WNY and JMD Environmental Inc., are accused of working with others as part of a conspiracy to violate the Clean Air Act.

"These are very serious charges," Hochul said at the time of the indictment. "Asbestos is a highly dangerous substance."

Oliverio and Heckman say the criminal prosecutions are just one consequence of the government's increased scrutiny of companies, unions and other large institutions. More and more, they say, companies are being investigated, audited and evaluated by the government.

"Any company," Oliverio said, "that doesn't get out in front of these compliance issues is foolish."

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