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EXECUTIVES ON TRIAL


Judge Tosses Out A Sarbanes Count In Scrushy Trial

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A U.S. District Court judge in Birmingham, Ala., threw out part of the first major fraud case brought under the federal government's corporate-corruption law known as Sarbanes-Oxley, ruling that prosecutors in the trial against HealthSouth Corp. founder Richard M. Scrushy had failed to show the "stringent level of proof" needed for a particularly aggressive element of the case.

Judge Karon O. Bowdre also dismissed four additional counts of perjury and money laundering against Mr. Scrushy, the ousted chief executive of HealthSouth, but agreed after a hearing to let stand 50 other counts, including two other Sarbanes-Oxley charges and counts of securities fraud, money laundering and conspiracy. Mr. Scrushy's lawyers began their defense yesterday, following nearly three months of prosecution witnesses. The Sarbanes-Oxley counts carry potentially much longer prison sentences than many other white-collar crimes.

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Richard M. Scrushy

Mr. Scrushy is accused of leading subordinates on a \$2.7 billion fraud that went undetected for nearly seven years. Sarbanes-Oxley requires chief executives and finance chiefs to certify the accuracy of financial documents submitted to the Securities and Exchange Commission.

The three Sarbanes-Oxley counts, as listed in the indictment brought against Mr. Scrushy, alleged that he knowingly signed a false SEC filing on Aug. 14, 2002, that he coerced a subordinate into signing another filing that same year, and that in another instance in 2003 he attempted unsuccessfully to have his chief financial officer at the time sign a false filing.

Judge Bowdre didn't accept arguments from Mr. Scrushy's attorneys that prosecutors failed to show Mr. Scrushy either knew about the fraud or understood the new law. Judge Bowdre said that judgment was for jurors to make.

The judge dismissed the second Sarbanes-Oxley charge, agreeing with the defense that no evidence was presented during the trial to show that Mr. Scrushy caused or exercised any effort to get the other executives to sign the filing. "I don't see that the evidence is sufficient here to justify submitting this count to the jury," Judge Bowdre said. The government also argued, more broadly, that since Mr. Scrushy allegedly was engaged in the conspiracy behind the fraud, he could be held liable for the actions of other co-conspirators. But Judge Bowdre ruled that no language in the Sarbanes-Oxley Act supports such broad interpretations.

Judge Bowdre said she would rule at a later point in the trial on the defense's challenge to the third Sarbanes-Oxley count.

The dismissed Sarbanes-Oxley count surprised Sarbanes-Oxley expert Larry Soderquist, a Vanderbilt law-school professor closely following the trial. In taking their aggressive, coercion-of-others approach to the second Sarbanes-Oxley count, prosecutors had given themselves "a real hurdle to get over," he said, "but I'm surprised the judge did not find enough evidence for it to go to the jury."

The defense kicked off its case with Mr. Scrushy's lead counsel, James Parkman III, pulling on rubber gloves and flapping around a large plastic baggie as he questioned the methods of a Federal Bureau of Investigation agent in the investigation.

Mr. Parkman showed FBI Special Agent Gerald Kelly a key document -- a notebook that contained evidence of the fraud that was allegedly shown to Mr. Scrushy by a HealthSouth finance executive in 1999 -- and asked him why he never preserved the document for further analysis or checked it for fingerprints. Mr. Kelly said two witnesses said that Mr. Scrushy looked at the notebook, and that the FBI rarely checked documents for fingerprints in "a case such as this."

Mr. Parkman also questioned Mr. Kelly about secretly recorded tapes of conversations between Mr. Scrushy and a finance chief, William T. Owens. Mr. Kelly said Mr. Owens didn't "tinker" with the recording device; the defense has argued that there are unexplained gaps in the recording.

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