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# CORPORATE CRIME REPORTER

## DAVID ROSNER ON THE CRIMINAL PROSECUTION OF WORKER DEATH CASES

In 2000, Columbia University Professor David Rosner wrote an article for the *American Journal of Public Health* asking the question – “When Does a Worker’s Death Become Murder?”

Rosner reviewed what were at the time a growing number of manslaughter and even murder charges brought against corporations and their executives in cases involving worker deaths.

Rosner looked at earlier periods in American history when worker deaths were considered a form of homicide. He looked at the social forces that shape how we define a worker’s death – as an accidental, chance occurrence for which no individual is responsible, or as a predictable result of gross indifference to human life for which the corporation and top executives bear criminal responsibility.

“In a theme that would appear repeatedly, reformers compared the toll of industrial accidents to that of an undeclared war, sometimes a war on workers themselves,” Rosner wrote. “In 1904, for example, *The Outlook*, a mass-circulation magazine, commented on the horrendous social effects of industrialization.”

“The frightful increase in the number of casualties of all kinds in this country during the last two or three years is becoming a matter of the first importance. A greater number of people are killed every year by so-called accidents than are killed in many wars of considerable magnitude. It is becoming as perilous to live in the United States as to participate in actual warfare.”

“The magazine demanded that the states begin counting industrial accidents and deaths “in order that the people of the United States may face the situation and understand how cheap human life has become under American conditions.”

But today, we are back to square one. There are very few criminal prosecutions for workplace deaths. If the government prosecutes, they prosecute against smaller entities, not against large corporations and their executives.

This double standard was crystallized last month when the Justice Department brought

criminal charges against a small Alabama company in the death of a worker (the company pled guilty) but has refused to open a criminal investigation against Caterpillar for the death of Steven Dierkes, who was annihilated when he fell into a vat of molten metal at a plant in Illinois. (See “The Thermal Annihilation of Steven Dierkes, 37 *Corporate Crime Reporter* 5, January 30, 2023).

OSHA is reporting that the number of deaths on the job is beginning to tick upwards. Part of it has to do with the fact that the government has been unable to deter this kind of egregious wrongdoing through the kinds of criminal prosecution you laid out in your article in 2000.

You get the death of Steven Dierkes at the Caterpillar facility when he falls into a vat of molten metal. The families are calling for criminal prosecution of the company.

Since you wrote that article, there have been very few criminal prosecutions sending executives to jail. The amazing thing about your article is that it was a one off. You don’t see that kind of article coming from the schools of public health. Is there active co-optation?

“There is actual co-optation,” Rosner told *Corporate Crime Reporter* in an interview last week. “Schools of public health actually accepted tobacco money. Schools of public health are social institutions. They are built around social values of the moment. And right now, schools of public health often look for factors in the individual’s lifestyle that create the susceptibility to disease rather than try to assign blame to one specific factor.”

That fits very well with the political program of the big corporations.

“Yes. And you can see in the history of public health the institutions have moved away from any confrontation with political issues. In the 19th century, public health was an implicitly political issue.”

(See ROSNER, page three)

(ROSNER, from page one)

“You had to fight the forces that didn’t want to put street cleaning, sewer systems, or water supplies, and charge landlords to put clean water into their buildings or bathrooms and plumbing. These were all fought for and gained through political reforms. These were public health political movements.”

“When public health moved into the universities, public health became a profession and was removed from the world of politics. They view that they were scientists and objective and removed from the political scene became part of the identity of the science of public health. We are now evidence based researchers. We want policy to come out of evidence. We don’t want to be advocates.”

“And public health came to support industrial conservatism and did not confront the powers that are causing the problems.”

What percentage of public health academics fall into that camp?

“It’s hard to say. The people in public health are very decent human beings. When you go to a school of public health, you are not going to find anyone who wants to harm someone. They believe they are doing good. But the idea of objectivity and being removed from political decisions and only depending on research -- it all becomes a means of allowing yourself to be co-opted.”

“It’s not like they are consciously colluding.”

There is also conscious collusion. There are public health academics who consult with major corporations.

“There are. That’s a real problem. There are consulting companies that hire people to present information.

I was reading the transcript of the family members of those killed in the two Boeing crashes. And they want responsible Boeing executives to go to jail. And same for the family of Steven Dierkes who was incinerated in that vat at the Caterpillar facility in Illinois. At the same time, the elites at the Department of Justice and the big law firms and in academia – they are perfectly fine with no criminal prosecution of corporate executives. It’s a class thing. If you are victimized by a major corporation, you are in a totally different situation from someone who is studying it from afar.

“The class issue is real. Where do schools of

public health get their reinforcement? They work with the cultural and social elite. You don’t have much contact with workers. You don’t have daily experience in a plant. You are working at a university and your prestige comes from occasionally being asked to speak to some political body or being courted as an important person, going to the right dinners. You don’t have your daily contact with the people who are adversely affected by industry.”

“I was involved in a lawsuit in Texas years ago. This changed my whole life in some sense. I wrote a book in 1991 about the history of silicosis, a very obscure disease now. But back in the 1930s, it was considered the king of occupational diseases. The book was called – *Deadly Dust: Silicosis and the On-Going Struggle to Protect Workers' Health*. I thought a few scholars would read it. But it was picked up by lawyers who were dealing with silicosis in mining communities and oil refineries around the country.”

“I was down in Odessa, Texas testifying in front of a jury about this poor Mexican immigrant worker who had been sandblasting storage tanks during the OPEC crisis without any masks, without any protection. He was cleaning off the inside of a tank because suddenly Texas oil became valuable. And he developed this horrifying disease that was killing him. During one of the breaks, the wife and daughter of this man came up to me. I was sitting in the hallway outside of the courtroom waiting for some kind of a decision on my testimony. And they came up to me to thank me. And I had to tell them that I was looking at the jury and I knew that this jury had no sympathy for this man – no sympathy at all. They saw him through the lens of the various prejudices they had about Mexicans coming up and taking their jobs. You could just see it on their faces.”

“I said to this poor woman’s daughter – thank you very much for her kind words. But I hate to tell her, there is not going to be a monetary reward. I could tell from the faces of the jury. So tell her she shouldn’t be hopeful of some kind of monetary reward. The daughter talks to the mother and then the mother talks to her. And the daughter says to me – my mother doesn’t care about the money. She wants to thank you because you came all the way from New York City to defend her husband and to tell the jury and the world that his life was worth something.”

"I virtually burst into tears at that moment. She said it wasn't about the money, it was about the immorality of the situation, about the fact that her husband had been so dehumanized and his life was considered so worthless and there she was trying to bring some justice. She wanted a public hearing about the value of her husband's life."

"I was taught that these court cases were about money. I incorporated the arguments about shyster lawyers and money grubbing lawyers. But it's not about that. It's about social justice. I go to these court cases because I feel it's more than about getting monetary awards. It's about human dignity. It's about our responsibilities as professionals. It's about American culture and society and how we treat people who do the work for us, for my class of people. And we don't know it."

"The faculty at schools of public health are well meaning. But they don't get the experience of the working people. They don't have the internal emotional sympathy. They might have intellectual sympathy. But they don't know that world."

Your point of view seems to be a minority view in the field of public health.

"If you speak with them it's not. But if you watch their actions, you can see that they don't want to be part of a big debate. They want to run their labs, do their research, do their work without having to feel like their intellectual life is being compromised or being sullied by participation in social struggles. They don't see themselves as activists. They don't see themselves as reformers. They see themselves as scientists."

In the story we ran on Steven Dierkes, the man who was annihilated at a Caterpillar factory, we reported on no criminal prosecution. This despite the fact that there was an OSHA wilful violation citation. The issues you raised in your 2000 article on criminally prosecuting these egregious cases seem to have been ignored.

"I don't understand why these cases end up in civil court. They should be in criminal court. I've said that to juries. I've said - I don't understand why I'm here. Why isn't this in criminal court? Lead poisoning, asbestosis - why aren't we in criminal court?"

How do you answer that question?

"Throughout our history we have avoided the issue of responsibility for industrial production. Industry is so central to our economy. The industrials have enormous sway, enormous power,

enormous political influence. It's almost impossible to get to criminal court."

Who are young and upcoming activists in the field of public health?

"I don't see it coming from inside the field right now," Rosner says.

The field of public health is dead?"

"It's not quite dead. But it's on life support."

*(For the complete Interview with David Rosner, see page 12.)*

## **FIFTY-TWO DOLLAR STORES IN NORTH CAROLINA FINED FOR PRICE SCANNING ERRORS**

The North Carolina Department of Agriculture and Consumer Services' Standards Division last week said that it had collected fines from 52 stores in 33 counties because of excessive price-scanner errors.

"Our Standards Division continues to see about a quarter of all price scanner inspections fail and many stores are failing multiple inspections," said Agriculture Commissioner Steve Troxler. "Overcharges cost consumers so we remain vigilant in inspecting stores in order to protect consumers. Remember it is always a good practice to check your receipt as well as the price on the shelf to make sure you are paying the correct amount and alert managers if the prices don't match."

The department conducts periodic, unannounced inspections of price-scanner systems in businesses to check for accuracy between the prices advertised and the prices that ring up at the register.

If a store has more than a 2-percent error rate on overcharges, inspectors discuss the findings with the store manager and conduct a more intensive follow-up inspection later. Undercharges are also reported, but do not count against a store.

Penalties are assessed if a store fails a follow-up inspection. In addition to the penalties paid, the store will be subject to re-inspection every 60 days from the last inspection until it meets the 2-percent-or-less error rate.

Additional penalties may be assessed if a store fails a reinspection.

Fourteen of the 52 stores were assessed penalties of \$10,000 or more.

A Family Dollar in Winston-Salem paid

\$17,515 in fines. An initial inspection in February 2022 found an error rate of 16 percent based on eight overcharges in a 50-item lot. The store also failed four follow-up inspections between April and November. The store will be reinspected.

A Family Dollar in Aulander paid \$10,000 in fines. An initial inspection in August 2022 found an error rate of 14 percent based on seven overcharges in a 50-item lot. The store has failed follow-up inspections in September and November and will be reinspected.

A Family Dollar in Windsor paid \$10,000 in fines. An initial inspection in August 2022 found an error rate of 32 percent based on 16 overcharges in a 50-item lot. The store has failed follow-up inspections in September and November and will be reinspected.

A Family Dollar in Winston-Salem paid \$17,515 in fines. An initial inspection in February 2022 found an error rate of 16 percent based on eight overcharges in a 50-item lot. The store also failed four follow-up inspections between April and November. The store will be reinspected.

A Family Dollar in Rural Hall paid \$13,950 in fines. An initial inspection in June 2022 found an error rate of 16 percent based on eight overcharges in a 50-item lot. The store has failed three follow-up inspections and will be reinspected.

A Dollar General in Stoval paid \$18,580 in fines. An initial inspection in September found an error rate of 16 percent based on eight overcharges in a 50-item lot. The store also failed five follow-up inspections. The store passed its December inspection with an error rate of 1.33 percent.

A Family Dollar in Ahoskie paid \$10,000 in fines. An initial inspection in August found an error rate of 24 percent based on 12 overcharges in a 50-item lot. The failed two follow-up inspections in September and October. The store also failed a December inspection with an error rate of 31.67 percent based on 95 overcharges in a 300-item lot and was assessed an additional \$5,000 fine.

A Family Dollar in Charlotte paid \$15,000 in fines. An initial inspection in March 2022 found an error rate of 40 percent based on 20 overcharges in a 50-item lot. The store also failed three follow-up inspections from June through October. The store also failed a December inspection with an error rate of 12.33 percent based on 37 overcharges in a 300-item lot and was assessed a \$5,000 fine.

A Dollar General in Vass paid \$22,995 for six

failed inspections since November of 2021. An initial inspection in October of 2021 showed an error rate of 26 percent based on 13 overcharges in a 50-item lot. The store passed inspection in December 2022 with an error rate of 1 percent based on three overcharges in a 300-item lot.

A Family Dollar in Hertford paid \$17,685 in fines. An initial inspection in January 2022 found an error rate of 28 percent based on 14 overcharges in a 50-item lot. The store also failed four follow-up inspections between March and November. The store will be reinspected.

A Family Dollar in Norwood paid \$18,740 in fines. An initial inspection in January 2022 found an error rate of 16 percent based on eight overcharges in a 50-item lot. The store has failed five follow-up inspections between February and November. The store will be reinspected.

A Dollar General in Henderson paid \$16,365 in fines. An initial inspection in November of 2021 showed an error rate of 42 percent based on 21 overcharges in a 50-item lot. The store failed four follow-up inspections and passed inspection in December 2022 with an error rate of 1.67 percent based on five overcharges in a 300-item lot.

A Walmart Neighborhood in Cary paid \$11,970 in fines. An initial inspection in March 2022 found an error rate of 10 percent based on five overcharges in a 50-item lot. The store failed three follow-up inspections from April to August. The store passed inspection in October with a one overcharge in a 300-item lot.

A Dollar General in East Bend paid \$13,155 in fines for three failed inspections since July 2022. An initial inspection in June 2022 found an error rate of 8 percent based on four overcharges in a 50-item lot. The store will be reinspected.

## THROWING EXECES UNDER BUS IN EXCHANGE FOR CORPORATE LENIENCY

*“Sitting here where I am would like to see you prosecute GT [Gregoire Tournant] – would like to help you do that but may not have anyone at AGI US to help you do that if guilty plea.”*

*–Excerpt from the Government’s Notes of a March 1, 2022 Statement of Mr. Tournant’s Former Personal Counsel to the United States Attorney*

In early June 2021, Gregoire Tournant, the chief investment officer for an Allianz U.S. unit, met with his lawyers to prepare for his impending testimony before the Securities and Exchange Commission (SEC) in connection with matters that led to Tournant’s indictment last year on fraud charges.

“The lawyers at one of the firms representing him would later reveal every word of Tournant’s answers to their increasingly probing questions to the United States Attorney’s Office for the Southern District of New York,” Tournant’s lawyers argued in a brief filed in federal court in New York last week. “The law firm knew before that meeting – but did not raise and resolve with Tournant – that a conflict of interest had developed that made it impossible for it to continue to represent his interests as well as those of its other client, Allianz.”

“That law firm would go on to switch sides and act, in its own words, as the ‘back office’ to the USAO in the investigation of Tournant, all for the benefit of Allianz, which found itself in a life-or-death situation brought on by the investigations and the government’s onerous corporate cooperation policy. Counsel’s actions, in dereliction of their professional obligations and engagement agreement with Tournant, are the direct result of the government’s overwhelming influence such that the government bears responsibility for them.”

Tournant was expressing the view of low level corporate managers around the country and increasingly across the globe – that the Justice Department’s corporate crime policy is increasingly throwing those executives under the bus in exchange for leniency for the corporation.

The two corporate law firms – Sullivan & Cromwell and Ropes & Gray – ended up representing both Allianz and Tournant.

The indictment against Tournant stemmed from a joint investigation by the Justice Department and the SEC into a series of private investment funds managed by Allianz Global Investors U.S. (AGI) that suffered substantial losses during the market displacement that resulted from the COVID-19 global pandemic.

AGI and its parent entity Allianz SE hired the two law firms to represent Allianz in connection with the investigation and related civil lawsuits.

Allianz also made the strategic decision to allow those two law firms to represent Tournant and other Allianz employees personally in connection with the matters.

Those attorneys ultimately concluded that the government’s investigation presented “an existential threat to Allianz.”

Allianz was facing the “corporate death penalty.”

“In an effort to stave off a possible indictment against Allianz, counsel made the choice to misuse their attorney-client relationship with Tournant to obtain additional statements from him about the subject matter of this case, which they subsequently disclosed to the government,” Tournant’s lawyer Seth Levine argued in federal court last week. “They then advocated for the government to prosecute Tournant in lieu of prosecuting Allianz.”

“Unfortunately for Tournant, counsel’s gambit worked. The government adopted the narrative – which will ultimately be shown to have been wildly misleading, though it is not at issue on this motion – that counsel presented as to Tournant, and Allianz obtained a favorable plea deal in which Allianz SE completely avoided indictment and AGI agreed to plead guilty to only one count of securities fraud.”

“In light of the government’s knowledge of Tournant’s former attorneys’ betrayal, the Justice Department should have thrown them out of its office when they first disclosed Tournant’s client confidences and advocated for his indictment.”

“But it did no such thing. Rather, it encouraged counsel to provide more and more information concerning their former client, including verbatim readings from counsel’s notes of their privileged communications with Tournant. The attorneys’ betrayal was a direct result of the government’s onerous policies pertaining to the charging of business entities.”

“These policies condition cooperation credit –

which Allianz and its attorneys deemed essential to avoid the “fatal” result of a guilty plea – on a company’s willingness to build the government’s case against employees.”

“As applied here, these policies left Allianz in the desperate position of needing to scapegoat Tournant in an attempt to avoid indictment, and they coerced Tournant’s former counsel to turn on one client in order to save another.”

“At its core, the American adversary system is based on the premise that justice can be secured only where each litigant has a champion – an attorney committed to zealously advocating on that litigant’s behalf based on the unique attorney-client relationship. This motion is based on the misconduct of prosecutors who deprived Tournant of this most basic right in inducing his former counsel’s betrayal and disclosure of client confidences.”

In a slide presentation to the government, lawyers for Allianz argued that “a (corporate) guilty plea is unnecessary because Department of Justice action against individuals will satisfy the goals of federal prosecution.”

“The Department of Justice will have a strong case against the wrongdoers, in part because of AGI US cooperation.”

In another slide presentations, the Allianz lawyers quoted from comments of Deputy Attorney General Lisa Monaco, emphasizing that the government should prosecute Tournant in lieu of Allianz as the government’s “first priority in corporate criminal matters is to prosecute the individuals” (not corporations).

It wasn’t the first time that corporate executives have argued that the Department’s corporate crime enforcement policy favors corporations over executives.

Last month two executives of Cognizant argued in federal court that the Department of Justice was outsourcing their corporate criminal investigations to private corporate criminal defense law firms.

## **UE DEMANDS PUBLIC OWNERSHIP OF RAILROADS**

The UE unions General executive board last week unanimously endorsed a statement demanding that Congress “immediately begin a process of bringing our nation’s railroads under public ownership.”

The statement notes that “the private owners of our nation’s Class 1 railroads have shown themselves utterly incapable of facing the challenge of the climate crisis, dealing fairly with their own workers, or even meeting the most basic needs of their customers.”

Jessica Van Eman, a rail crew driver and president of UE Local 1477, decried the effects of longer trains on small communities like hers, where the longer and longer trains demanded by the railroads’ “endless thirst for profit can block access to crucial emergency services.”

“Just in our little town of Belen, New Mexico, we’ve had three people die because they could not get to the other side of the tracks,” she said. “These rail yards are not made for 20,000-foot trains.”

In 2021, UE launched the Green Locomotive Project, which aims to encourage the railroads to upgrade their locomotive stock to cleaner and more efficient “Tier 4” locomotives, and to adopt zero-emissions technology for use in rail yards. This would significantly reduce both the pollution around rail yards and their carbon footprint, while creating good, union jobs — a concrete example of what a Green New Deal could accomplish.

“The emissions from old, polluting diesel locomotives are harmful to the people who work in rail yards and they’re harmful to the communities around rail yards,” said Scott Slawson, the president of UE Local 506. “We are committed to getting all locomotives out there to Tier 4 or better.” Local 506 members manufacture locomotives for Wabtec in Erie, Pennsylvania.

## **WALGREENS PAYS \$7 MILLION TO SETTLE FALSE CLAIMS ACT CHARGES**

Walgreens paid \$7 million to the United States and the State of Tennessee to resolve allegations that it violated the False Claims Act by submitting claims to TennCare – the Medicaid program for the State of Tennessee – and knowingly retaining overpayments for specialty Hepatitis C medications dispensed to TennCare enrollees who did not meet TennCare’s clinical criteria for coverage and payment.

Walgreens operates retail pharmacies throughout Tennessee. TennCare pays prescription drug benefits for a variety of covered prescription drugs, including drugs prescribed for enrollees with Hepatitis C. Prior to 2019, TennCare required prior authorization based on clinical eligibility criteria related to disease severity and substance use before approving coverage for certain Hepatitis C direct-acting antiviral (DAA) medications.

The False Claims Act prohibits a pharmacy from knowingly submitting claims for payment for medications dispensed to patients who do not meet Medicaid coverage and payment requirements, and from knowingly retaining payments that were improperly made in violation of such requirements.

Federal and state officials alleged that from October 2014 through December 2016, a former pharmacist and store manager at Walgreens’ specialty pharmacy in Kingsport, Tennessee falsified prior authorization requests and supporting clinical records for 65 TennCare enrollees who failed to meet TennCare prior authorization requirements for the DAAs.

The complaint alleged that Walgreens improperly billed TennCare for DAAs dispensed to the TennCare enrollees based on the falsified requests, and that Walgreens knowingly retained the resulting overpayments after the misconduct of its former store manager came to light.

## **THIRD CIRCUIT RULING REOPENS COURTHOUSE DOORS FOR TALC-ASBESTOS CLAIMS**

Thousands of women and family members whose talc-related legal cases against health care giant Johnson & Johnson have been on hold for a year can move forward now, following a ruling last week by the U.S. Court of Appeals for the Third Circuit.

In its ruling, the court found that the bankruptcy of Johnson & Johnson’s shell subsidiary, LTL, was not filed in good faith, that LTL was not in financial distress deserving bankruptcy protection, and the bankruptcy petition should be dismissed.

This decision will result in the lifting of an injunctive stay that had put on hold 38,000 legal cases while the health care giant pursued a strategy centered around bankruptcy.

The opinion dismantles the federal bankruptcy court rulings supporting the injunction and will allow plaintiffs to move forward with lawsuits alleging that the company knew for years that its Johnson’s Baby Powder and Shower to Shower products were potentially contaminated with carcinogenic asbestos. Evidence produced during years of trials shows the company repeatedly denied or covered up the scientific evidence of the association of the product to ovarian cancer.

The injunction, issued in November 2021, had stopped all litigation based on J&J’s use of a bankruptcy strategy known as the “Texas Two-Step” to consolidate all talc litigation liabilities in a shell corporation, protecting billions of dollars in assets of its consumer division and corporate parent.

While the ruling was critical of the strategy, the court remanded the case to federal bankruptcy court in New Jersey for dismissal.

“This is a landmark ruling that clearly upholds the Seventh Amendment’s right to a jury trial and confirms that every individual has the right to pursue a claim through the tort system,” says Leigh O’Dell of the Beasley Allen Law Firm, which represents several thousand ovarian cancer victims.

“With the bankruptcy to be dismissed and the resulting stay lifted, we will immediately seek to efficiently schedule and conduct trials in state and federal courts, and establish the liability of Johnson & Johnson for the deaths and disease suffered by thousands of women.”



The Texas Two-Step strategy has raised eyebrows in Congress, where representatives have begun discussing potential changes to the bankruptcy laws that would prevent this sort of legal strategy and the associated consumer harm in future cases.

Earlier this year, Johnson & Johnson announced a halt to future sales and distribution of talc-based products worldwide, citing the legal claims brought by ovarian cancer and mesothelioma victims.

Numerous scientific studies spanning decades have established the carcinogenic effects of cosmetic talc, while U.S. and Canadian governmental regulators have called for enhanced testing techniques for products containing the mineral, particularly after independent testing by the U.S. Food & Drug Administration revealed asbestos in consumer samples of talc-based powders.

### **SEC ISSUES \$28 MILLION AWARD TO JOINT WHISTLEBLOWERS**

The Securities and Exchange Commission last week announced an award of more than \$28 million to joint whistleblowers who provided critical information and assistance in an SEC enforcement action.

The joint whistleblowers' detailed information prompted the opening of the SEC staff's investigation and significantly contributed to the success of the action. They provided substantial analysis and ongoing assistance, which resulted in the return of millions of dollars to harmed investors.

"Whistleblowers play an instrumental role in helping the SEC detect and prosecute wrongdoing and in protecting investors and the capital markets," said Creola Kelly, Chief of the SEC's Office of the Whistleblower.

"Whistleblowers perform an incredible public service, as reflected by this award."

Payments to whistleblowers are made out of an investor protection fund, established by Congress, which is financed entirely through monetary sanctions paid to the SEC by securities law violators. No money has been taken or withheld from harmed investors to pay whistleblower awards.

Whistleblowers may be eligible for an award when they voluntarily provide the SEC with original, timely, and credible information that leads

to a successful enforcement action. Whistleblower awards can range from 10 to 30 percent of the money collected when the monetary sanctions exceed \$1 million.

### **UK GAMBLING COMMISSION FINES INTOUCH \$7.6 MILLION**

A gambling business will pay a \$7.6 million penalty after a UK Gambling Commission investigation revealed social responsibility and money laundering failings.

In Touch Games – which operates 11 websites including bonusboss.co.uk, cashmo.co.uk, drslot.co.uk, jammymonkey.com and slotfactory.com – failed a compliance assessment last March.

Failures included not interacting with a customer until seven weeks after they had been flagged for interaction for erratic play patterns and extended periods of play, accepting a customer's word that they earned \$7,300 a month without verifying this information after the customer account was flagged due to customer spend and gambling during unsociable hours, not adequately taking account of the risk of a customer being a beneficiary of a life insurance policy, having links to high-risk jurisdictions or being a politically exposed person (PEP), family member of a PEP or known close associates of a PEP, within its money laundering and terrorist financing risk assessment, not having policies, procedures and controls in place to address the risk factors, not sufficiently considering the Commission's money laundering and terrorist financing risk assessment or the Commission's guidance, and not ensuring its policies, procedures and controls were implemented effectively – for example not following its own policy to request source of funds information from customers who had deposited and lost £10,000 in a 12-month period.

This is the third time ITG have faced regulatory action - in 2019 it paid a \$2.7 million settlement for regulatory failures and in 2021 it received a \$4.2 million fine and warning for further failures.

"Considering this operator's history of failings we expected to see significant improvement when we carried out our planned compliance assessment," said Commission director of operations Kay

Roberts. “Disappointingly, although many improvements had been made, there was still more to do. This fine shows that we will take escalating enforcement action where failures are repeated and all licensees should be acutely aware of this.”

### **RECORD NUMBER OF LAWSUITS AGAINST BOARDS OF DIRECTORS IN 2022**

Last year set another record for lawsuits faulting boards of directors for failing to adequately oversee corporate operations, a third consecutive year of acceleration. Mounting evidence suggests the trend is here to stay.

That’s according to a report from William Savitt, a partner at Wachtell Lipton in New York. (*Caremark Exposure – And What to Do About It*, by William Savitt, NYU Compliance and Enforcement, January 30, 2023.)

“Corporate litigation when things go wrong is of course nothing new,” Savitt wrote last week. “When manufactured products prove to be harmful, or services prove defective, or customers are injured, the class action bar has always responded, demanding payment for alleged tort victims. And so after a 2015 listeria outbreak linked to Blue Bell Creameries’ ice cream was linked to three deaths and infections in four states, substantial tort litigation ensued, successfully seeking compensation for the victims from Blue Bell.”

“In 2019, however, in a case arising from the same tragic facts, the Delaware Supreme Court approved a further avenue for broad-sweeping recovery: a derivative action brought by Blue Bell stockholders seeking damages from Blue Bell’s directors for inadequately supervising the company’s food safety program.”

“Although the court invoked the traditional ‘duty to monitor’ framework – often called the Caremark doctrine after the 1996 decision that conceived it – it reversed the trial court’s order dismissing the claim and applied that framework in a way that appeared to liberalize it.”

“The plaintiffs’ bar certainly saw it that way. Caremark claims spiked immediately and have continued to mount. As important, since the Blue Bell decision, the courts have sustained these claims far more frequently. Caremark claims previously survived a motion to dismiss only very rarely. Now

one out of three survive motions to dismiss—acquiring enormous settlement value, without regard to the ultimate merits of the claim or the difficulty of showing any damages to stockholders. As a result, any announcement of adverse corporate news or regulatory exposure should now be expected to trigger not only tort claims from victims, but Caremark claims by stockholders.”

### **VAST MAJORITY OF APPLIANCE COMPANIES KEEP REPAIR MANUALS UNDER WRAPS**

As the Federal Trade Commission (FTC) considers requiring manufacturers to disclose appliance repair instructions, repair advocates last week released an investigation that found the vast majority of appliance manufacturers (86%) do not share repair manuals with users.

The investigation, submitted to the FTC by PIRG, iFixit and Repair.org, surveyed 50 appliance makers, 37 appliance technicians, industry experts and reviewed a wide range of academic research on the topic of appliance repair.

“The manufacturers that make our home appliances have an incentive to either monopolize repair or discourage it so that their customers are forced to buy new products,” said Nathan Proctor, senior director of PIRG’s Right to Repair campaign. “People are fed up. It shouldn’t be so hard to access a repair manual. We want dishwashers and refrigerators that are easy to fix and last a long time.”

The survey found that of the 50 appliance manufacturers examined, just seven made service manuals available while 86% of the companies did not provide full repair instructions.

Even for appliance repair professionals, accessing necessary information proved challenging: 89% of technicians reported having trouble accessing service manuals.

Expensive software service tools are sometimes required to fix appliances: GE, for example, charges \$919 per year for software tools, which effectively prices out “do-it-yourself” repair and drives up repair costs.

“Even professional appliance repair technicians are struggling to access the information they need to do their jobs,” said Elizabeth Chamberlain, director

of Sustainability at iFixit. “Consumers who want to fix their own stuff are completely out of luck. Appliance repair is in a dismal state, and the FTC has an opportunity to make repair more accessible and affordable for everyone.”

Last October, the FTC announced that it would be updating the rules for the EnergyGuide appliance rating program, pending public comments, to make it easier to repair covered products by improving access to repair information.

The proposed reforms represent a huge advance for allowing consumers and independent repair technicians to fix appliances, such as dishwashers, refrigerators and washing machines, the groups said.

“Appliance repair manuals, like car repair manuals, are one of the five key requirements of right to repair, without which repairs are functionally impossible,” said Gay Gordon-Byrne, executive director of Repair.org, which represents repair shops including appliance technicians. “A requirement to share manuals opens the door to more repair options, better informed customers and shows all of us how the things we use are designed to work.”

The aim of the familiar yellow EnergyGuide label is to help consumers save money and reduce the environmental impact of their appliance usage. The investigation underscores crucial role of repair for protecting the environment – significant portion of an appliance’s total energy consumption — and as much 50% of lifetime greenhouse emissions – happen before the product reaches the showroom floor.

Replacing individual components in an appliance is far more energy efficient than replacing the entire unit. Many commonly replaced components account for less than 3% of an appliance’s overall environmental impact.

“The FTC would do well to include access to repair information directly on the EnergyGuide label, through QR codes, URLs, or both,” the report recommended. “Wider public access to appliance repair information would boost the feasibility of do-it-yourself repair, increase competition in the repair market, and ultimately benefit both the environment and consumers’ wallets.”

## **REPORT: UPMC MEDICAL CENTER MONOPOLY POWER HARMS WORKERS AND PATIENTS**

The American Economic Liberties Project last week released a report – *Critical Condition: How UPMC’s Monopoly Power Harms Workers and Patients* – that examines how the University of Pittsburgh Medical Center (UPMC) has used its power to drive down wages, working conditions, and the quality of care in Western Pennsylvania, and includes a robust policy agenda for reducing that power and reintroducing competition into the local health care market.

“UPMC employed a slew of anticompetitive and anti-labor tactics to consolidate its power in Western Pennsylvania, and then used that power to degrade pay and working conditions, prevent workers from unionizing, box out competitors, and ultimately lower the quality of care available to local residents,” said Pat Garofalo, Director of State and Local Policy at the American Economic Liberties Project. “Lawmakers at all levels – federal, state, and local – have tools available to rein in UPMC and ensure that Western Pennsylvania workers, patients, and taxpayers are no longer propping up a system that doesn’t serve them at all.”

The paper was released with Congresswoman Summer Lee and Pennsylvania State Representative Sara Innamorato, who are co-conveners of the Pittsburgh Hospital Workers Taskforce. The taskforce held a hearing in September at which dozens of Pittsburgh hospital workers testified about the severity of the workforce crisis in the region.

Policy recommendations include items directly reining in UPMC’s anti-competitive behavior and pricing power, along with ensuring state and federal enforcers can adequately address labor market consolidation, that workers have a voice on the job and the freedom to seek better employment options, and that UPMC lives up to its legal obligations as a non-profit.

**INTERVIEW WITH DAVID ROSNER,  
COLUMBIA UNIVERSITY,  
NEW YORK, NEW YORK**

In 2000, Columbia University Professor David Rosner wrote an article for the American Journal of Public Health asking the question – *When Does a Worker's Death Become Murder?*

Rosner reviewed what were at the time a growing number of manslaughter and even murder charges brought against corporations and their executives in cases involving worker deaths.

Rosner looked at earlier periods in American history when worker deaths were considered a form of homicide.

He looked at the social forces in the early part of the 20th century that shape how we define a worker's death – as an accidental, chance occurrence for which no individual is responsible, or as a predictable result of gross indifference to human life for which the corporation and top executives bear criminal responsibility.

"In a theme that would appear repeatedly, reformers compared the toll of industrial accidents to that of an undeclared war, sometimes a war on workers themselves," Rosner wrote.

"In 1904, for example, *The Outlook*, a mass-circulation magazine, commented on the horrendous social effects of industrialization. 'The frightful increase in the number of casualties of all kinds in this country during the last two or three years is becoming a matter of the first importance.'"

"A greater number of people are killed every year by so-called accidents than are killed in many wars of considerable magnitude. It is becoming as perilous to live in the United States as to participate in actual warfare.'"

"The magazine demanded that the states begin counting industrial accidents and deaths "in order that the people of the United States may face the situation and understand how cheap human life has become under American conditions."

We interviewed David Rosner on January 30, 2023.

**CCR:** You graduated from Harvard University with a PhD in public health in 1978. What have you been doing since?

**ROSNER:** I have a masters in public health. But I graduated from Harvard with a PhD in the history of science. I'm both a historian and a public health

person.

I went into the history of science after running into various forms of frustration in the field of public health.

My first job after getting my PhD was at the City University of New York. I taught both history and public health policy. I was publishing books. I was promoted to professor. I was there until 1998.

In 1998, I was asked whether I'd be interested in a job at Columbia at the School of Public Health. I asked them to fund a Center for the History and Ethics of Public Health.

That's a joint effort of both the History Department and the School of Public Health. It was an effort to train public health people in the values and importance of understanding history.

And we wanted to train historians about the value of understanding public health, that disease and health are absolutely critical issues in understanding how we developed as a nation.

I've been writing books and articles on occupational and environmental disease. I'm working on a book titled *Building the World that Kills Us* with Gerald Markowitz (Columbia University Press) that will be out sometime later this year or next year.

It's a book about occupational, environmental and public health from colonial times to present. It's about how disease reflects the world we have built and how these diseases are emblematic of that world.

It's pretty close to complete. It's a way of understanding American history. We look at the ways we create conditions in which different people carry the burdens of our culture and our society.

And it's about how different groups are burdened with death and disease as a cost of creating an American history filled with inequalities and injustice.

**CCR:** In 2000, you wrote an article titled – *When Does A Worker's Death Become Murder?* In this article you lay out a number of cases where state prosecutors charge companies and executives with homicide and manslaughter.

The article was written 23 years ago. There have been very few such prosecutions since. Why is that the case?

**ROSNER:** The Occupational Safety and Health Administration (OSHA) and the National Institutes of Occupational Safety and Health (NIOSH) were formed in 1970.

It was a response to the reality that we had no federal ways of regulating industries that were killing people. It was the result of labor activism to make sure workers had some kind of protection.

The passage of the OSHA Act and the creation of the Environmental Protection Agency (EPA) brought to light the fact that these industries had largely gone unregulated in any way.

They were rampaging through American culture creating disease. Asbestos and lead and other toxins produced by industries were affecting workers and consumers.

After OSHA and the EPA were created, the industries responded. They began to try to counteract.

They saw these institutions as a threat to their ability to do what they wanted. Until then, there were no agencies that had the right to go into factories to see what was going on.

The industries got organized. They set up a system to counteract the change that was occurring around them. They established think tanks. They started attacking OSHA.

They created a strong conservative movement to convince people that somehow OSHA was a giant intrusion on people's lives, the rights of industry and free enterprise.

In the 1970s, there was a concerted effort to make OSHA the whipping boy. OSHA was the reason we had inflation and why we had an economic crisis.

Lewis Powell, before he was appointed to the Supreme Court, writes a memo and in it he says, in effect – these environmentalists and worker advocates are part of an effort to destroy America. And we have to counteract it.

One of the goals was to take over the Supreme Court, to set up think tanks, to use industry's power to lobby and not be scared of these environmentalists. It's a poignant document. It was a blueprint for what was going to happen over the next ten years.

Ronald Reagan became popular. He convinced people that government was a bad thing. He was elected in 1980 with the support of big industries and the conservative movement.

And one of the goals of the Reagan years was to shrink government and make government irrelevant. One of the expressions one of his advisers used at the time was something like – we don't want to get rid of the government, we just want to shrink it to a

size so we can drown it in a bathtub.

And that's been a dominant theme of conservative and Republican politics. Government is never a source of goodness. It's only good for stymying industry creativity.

If you look at the OSHA web site today, there is basically an apology for the fact that they haven't been able to establish any new standards.

They say – don't follow our standards. They are irrelevant. We haven't been able to revise them for decades.

**CCR:** Is that a question of resources?

**ROSNER:** No it's a question of politics. Every time they tried to set a standard, they were sued by the industry.

**CCR:** OSHA is reporting that the number of deaths on the job is beginning to tick upwards.

Part of it has to do with the fact that the government has been unable to deter this kind of egregious wrongdoing through the kinds of criminal prosecution you laid out in your article in 2000.

You get the death of Steven Dierkes at the Caterpillar facility when he falls into a vat of molten metal. You get 346 innocents dying in the two most recent Boeing crashes.

The victims are calling for criminal prosecution of the company and the responsible executives.

Since you wrote that article, there have been very few criminal prosecutions sending executives to jail.

The amazing thing about your article is that it was a one off. You don't see that kind of article coming from the schools of public health. Is there active co-optation?

**ROSNER:** There is actual co-optation. Schools of public health actually accepted tobacco money. Schools of public health are social institutions. They are built around social values of the moment.

And right now, schools of public health often look for factors in the individual's lifestyle that create the susceptibility to disease rather than try to assign blame to one specific factor.

**CCR:** That fits very well with the political program of the big corporations.

**ROSNER:** Yes. And you can see in the history of public health, the institutions have moved away from any confrontation with political issues. In the 19th century, public health was an implicitly political issue.

You had to fight the forces that didn't want to put street cleaning, sewer systems, or water

supplies, and charge landlords to put clean water into their buildings or bathrooms and plumbing. These were all fought for and gained through political reforms. These were public health political movements.

When public health moved into the universities, public health became a profession and was removed from the world of politics.

They viewed themselves as scientists and objective and removed from the political scene. They became part of the identity of the science of public health.

We are now evidence based researchers. We want policy to come out of evidence. We don't want to be advocates.

And public health came to support industrial conservatism and did not confront the powers that are causing the problems.

**CCR:** What percentage of public health academics fall into that camp?

**ROSNER:** It's hard to say. The people in public health are very decent human beings. When you go to a school of public health, you are not going to find anyone who wants to harm someone.

They believe they are doing good.

But the idea of objectivity and being removed from political decisions and only depending on research – it all becomes a means of allowing yourself to be co-opted.

It's not like they are consciously colluding.

**CCR:** There is also conscious collusion. There are public health academics who consult with major corporations.

**ROSNER:** There are. That's a real problem. There are consulting companies that hire people to present information. I got an email a number of years ago.

I was involved in a giant lead poisoning case. Sheldon Whitehouse, who is now a Senator from Rhode Island, had brought a lawsuit against the Sherwin Williams Company.

The company introduced this toxin, lead, onto the walls of homes around the entire state. And it was poisoning thousands of children every year. He sued the manufacturers.

He wanted to hold them responsible to clean up the mess. He wanted to make sure there was no more lead on the wall. He wanted to make sure that these paint companies were held responsible for putting it on the wall and he wanted the companies to remove it from the walls.

It took seven years of preparation for that

lawsuit. During that time, I get these emails from a consulting company called The Round Table Group. They are asking me – how much would it cost them to hire me to refute myself. They didn't know it was me.

They were looking for historians who would present the history of the companies in a positive light. They said that I didn't have to know anything about the subject.

All I had to do was come in with my credentials, my appointment at Columbia, my status as an author and present a story to the jury.

They wanted to know my rates. And they wanted to talk to me about it. They were looking for somebody who would refute my testimony. They had deposed me.

They knew what I was going to say. They were searching for anybody who could be bought. They didn't really care what I knew. They were willing to fill me in on what I needed to say.

**CCR:** When was that?

**ROSNER:** That was in 2005.

**CCR:** It says on the Round Table Group web site that it's formerly Thomson Reuters Expert Witness Services.

**ROSNER:** They say they have thousands of academics from all sorts of disciplines that are part of their stable.

**CCR:** Your article about prosecuting worker deaths as murder was written 23 years ago.

In the 23 years since that article was published, have you come across anyone else in your field who has raised this issue?

**ROSNER:** I'm always amazed that that article fell into the ether. I know that scientists being bought is a big issue when it comes to tobacco and asbestos.

Finally after a big battle in the early 2000s, in which there was some real dissent, we decided as a faculty that nobody could take tobacco money. That was a big battle and that was so obvious.

**CCR:** But that leaves the door open for all kinds of other money, including junk food money?

**ROSNER:** Yes. But schools of public health are rife with contradictions.

We have these luncheons to discuss obesity and there we are drinking glasses of Coke and eating these big fat sandwiches that are served to us.

We are human beings too. Faculty like drinking Coke.

It's a systemic issue of industry collusion and takeover of the academy. But it's also a human issue

of individuals living in a society doing things they know are unhealthy.

We have faculty saying that they love going to Europe because in Europe you are not stigmatized if you want to smoke a cigarette.

**CCR:** I was reading the transcript of the family members of those killed in the two Boeing crashes. And they want responsible Boeing executives to go to jail.

And same for the family of Steven Dierkes who was incinerated in that vat at the Caterpillar facility in Illinois.

At the same time, the elites at the Department of Justice and the big law firms and in academia – they are perfectly fine with no criminal prosecution of corporate executives.

It's a class thing. If you are victimized by a major corporation, you are in a totally different situation from someone who is studying it from afar.

**ROSNER:** The class issue is real. Where do schools of public health get their reinforcement? They work with the cultural and social elite. You don't have much contact with workers. You don't have daily experience in a plant.

You are working at a university and your prestige comes from occasionally being asked to speak to some political body or being courted as an important person, going to the right dinners.

You don't have your daily contact with the people who are adversely affected by industry.

I was involved in a lawsuit in Texas years ago. This changed my whole life in some sense. I wrote a book in 1991 about the history of silicosis, a very obscure disease now.

But back in the 1930s, it was considered the king of occupational diseases. The book was called – *Deadly Dust: Silicosis and the On-Going Struggle to Protect Workers' Health*.

I thought a few scholars would read it. But it was picked up by lawyers who were dealing with silicosis in mining communities and oil refineries around the country.

I was down in Odessa, Texas testifying in front of a jury about this poor Mexican immigrant worker who had been sandblasting storage tanks during the OPEC crisis without any masks, without any protection.

He was cleaning off the inside of a tank because suddenly Texas oil became valuable. And he developed this horrifying disease that was killing

him.

During one of the breaks, the wife and daughter of this man came up to me. I was sitting in the hallway outside of the courtroom waiting for some kind of a decision on my testimony.

And they came up to me to thank me. And I had to tell them that I was looking at the jury and I knew that this jury had no sympathy for this man – no sympathy at all.

They saw him through the lens of the various prejudices they had about Mexicans coming up and taking their jobs. You could just see it on their faces.

I said to this poor woman's daughter – thank you very much for her kind words.

But I hate to tell her, there is not going to be a monetary reward. I could tell from the faces of the jury.

So tell her she shouldn't be hopeful of some kind of monetary reward. The daughter talks to the mother and then the mother talks to her. And the daughter says to me – my mother doesn't care about the money.

She wants to thank you because you came all the way from New York City to defend her husband and to tell the jury and the world that his life was worth something.

I virtually burst into tears at that moment. She said it wasn't about the money, it was about the immorality of the situation, about the fact that her husband had been so dehumanized and his life was considered so worthless and there she was trying to bring some justice.

She wanted a public hearing about the value of her husband's life.

I was taught that these court cases were about money. I incorporated the arguments about shyster lawyers and money grubbing lawyers. But it's not about that.

It's about social justice. I go to these court cases because I feel it's more than about getting monetary awards. It's about human dignity.

It's about our responsibilities as professionals.

It's about American culture and society and how we treat people who do the work for us, for my class of people. And we don't know it.

The faculty at schools of public health are well meaning. But they don't get the experience of the working people. They don't have the internal emotional sympathy.

They might have intellectual sympathy. But

they don't know that world.

**CCR:** Your point of view seems to be a minority view in the field of public health.

**ROSNER:** If you speak with them it's not. But if you watch their actions, you can see that they don't want to be part of a big debate.

They want to run their labs, do their research, do their work without having to feel like their intellectual life is being compromised or being sullied by participation in social struggles.

They don't see themselves as activists.

They don't see themselves as reformers. They see themselves as scientists.

**CCR:** In the story we ran on Steven Dierkes, the man who was annihilated at a Caterpillar factory, we reported on no criminal prosecution. This despite the fact that there was an OSHA wilful violation citation.

The issues you raised in your 2000 article on criminally prosecuting these egregious cases seem to have been ignored.

**ROSNER:** I don't understand why these cases end up in civil court. They should be in criminal court. I've said that to juries. I've said – I don't understand why I'm here. Why isn't this in criminal court? Lead poisoning, asbestosis – why aren't we in criminal court?

**CCR:** How do you answer that question?

**ROSNER:** Throughout our history we have avoided the issue of responsibility for industrial production. Industry is so central to our economy.

The industrials have enormous sway, enormous power, enormous political influence. It's almost impossible to get to criminal court.

When OSHA was first formed, there was a loophole. In the founding legislation, it says that OSHA was meant to protect the workforce with standards to the extent that it is economically and socially feasible.

That is a giant loophole. So since OSHA was formed, industry has gone about dismantling any proposed standards OSHA tries to set.

They sue every time a new regulation comes in. OSHA has to prove that it is not going to be putting people out of work, they are not going to affect the economy.

NIOSH has come out with very strong recommendations. But when OSHA tries to implement those recommendations, they run into industry lawsuits.

I used to go down to OSHA in the early 1980s, when the Reagan revolution hadn't taken hold.

I would go into the Frances Perkins Building in the Department of Labor where OSHA is located. I would go in there and wonder up to see somebody I had made an appointment with to talk about silica, which I was writing about at that time.

And it was relatively easy.

By 1993 when I went to OSHA, you had to go to a desk and say who you wanted to see. And they would send you to the lawyer's office.

The first person we had to see when we went to OSHA wasn't the person we made the appointment with but with an OSHA lawyer, who wanted to know what we were investigating and why.

It wasn't mean. But the world had changed. They saw all activities as possibly threatening them. They wanted to clear it with a lawyer.

They were worried about my being a muckraker or something.

People were depressed about what they were doing. Many of these people came in when OSHA was formed with extraordinary excitement.

They thought they were going to make the world better for workers. Prior to OSHA, the only job you could get if you were a chemist or a geologist was to work for an industry.

Your world was confined to the industrial world.

OSHA attracted young professionals who wanted to work for good. They could do it morally.

They felt they could protect the workforce. President Carter appointed Eula Bingham to head OSHA. Her own father had lost his arm in an accident.

She was passing all sorts of regulations about benzene exposures and lead exposures. And she was doing this great work.

When Reagan came in, he puts in Thorne Auchter. And his job is literally to dismantle OSHA. His belief is that the government is a heavy hand on industry. And we have to loosen these hard regulations that Eula Bingham imposed.

**CCR:** Who are the young upcoming David Rosners?

**ROSNER:** I don't see it coming from inside the field right now.

**CCR:** The field of public health is dead?

**ROSNER:** It's not quite dead. But it's on life support.

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