SEYFARTH SHAW
MANAGEMENT ALERT

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Supreme Court Overturns Arthur Andersen's Criminal Conviction

On May 31, 2005, the United States Supreme Court unanimously overturned the federal government's witness tampering conviction against Arthur Andersen LLP ("Andersen") for its role in the Enron debacle, *Arthur Andersen LLP v. United States*, 04-368 (May 31, 2005). The opinion highlights the responsibilities of corporations, auditors, and their counsel to maintain documents during a government investigation.

Facts

Andersen had served as Enron's auditor throughout its rapid growth in the 1990s, auditing its publicly filed financial statements and providing internal audit and consulting services. Enron's financial performance began to suffer in 2000 and worsened throughout 2001. On August 14, 2001, Jeffrey Skilling, the company's CEO, resigned. Two weeks later, the United States Securities and Exchange Commission ("SEC") opened an informal investigation (although it does not appear to have simultaneously notified Enron). In early September, Andersen formed an Enron "crisis response" team, on which Nancy Temple served as in-house counsel. During an October 9 meeting, Temple wrote in her notes that an SEC investigation was "highly probable."

At an October 10 general training meeting which included several members of the Enron crisis team, Michael Odom, an Andersen partner with supervisory responsibility over the partner in charge of the Enron matter, ordered the attendees to comply with Andersen's document retention policy, stating "if it's destroyed in the course of normal policy and litigation is filed the next day, that's great….[W]e've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable." Temple subsequently e-mailed Odom suggesting that he remind the Enron team of Andersen's document retention policy.

On October 16, Enron released its third quarter results, showing a $1.01 billion charge to earnings. The next day, the SEC notified Enron that it had opened an investigation in August and requested information and documentation. On October 19, Enron forwarded the letter to Andersen. That same day, Temple sent Andersen's document retention policy to one of its accounting experts. The following day, Temple participated in a conference call of the Enron crisis team and instructed everyone to follow the firm's document retention policy. Similar instructions went out in subsequent days. Following these meetings, Andersen engaged in "substantial destruction of paper and electronic documents." On October 30, the SEC notified Enron that it opened a formal investigation and requested accounting documents. On October 31, David Duncan, the Andersen partner primarily responsible for the Enron account, was allegedly seen attempting to destroy a document with the words "smoking gun" written on it.

Enron announced on November 8 that it would issue a comprehensive restatement of its earnings and assets. On the same day, the SEC served Enron with a subpoena for records. On November 9, Duncan's secretary sent an e-mail stating "Per Dave-No more shredding….We have been officially served for our documents." Enron filed for bankruptcy shortly thereafter. Duncan was subsequently fired and later pleaded guilty to witness tampering.

Lower Court Proceedings

In March 2002, Andersen was indicted in Texas federal court for a violation of 18 U.S.C. §§ 1512(b)(2)(A) and (B), which make it a crime to "knowingly us[e] intimidation or physical force, threate[n], or corruptly persuad[e] another person …with intent to .... cause" that person to "withhold" documents form, or "alter" documents for use in, an "official proceeding." The case went to a jury trial. After substantial deliberation, the jury convicted Andersen, and the District Court denied its motion for a judgment of acquittal. The Fifth Circuit Court

of Appeals affirmed the jury's verdict, finding that the jury instructions regarding the meaning of "corruptly persuades" and "official proceeding" were sufficient and that the jury was not required to find consciousness of wrongdoing. The Supreme Court granted certiorari because of a split in authority regarding these issues.

The Supreme Court's Decision

The Court, per Chief Justice Rehnquist, found that the conviction rested on what it meant to "knowingly … corruptly persuade" in an "official proceeding." The Court noted that it has traditionally exercised restraint in interpreting criminal statutes out of respect for Congressional intent and to give the public fair notice of what the law forbids. Such restraint was appropriate in this case, the Court found, because there are several instances when persuading another to withhold information from the government is appropriate. The issue of document retention policies can be such an instance: under normal circumstances, it is entirely appropriate for a manager to instruct his employees to follow the policy even though the policy is designed in part to keep certain information from getting into the hands of others, including the government. The Court noted the key question is what does it mean to "knowingly … corruptly" persuade another?

The Court turned to the dictionary to decipher the phrase. "Knowingly" means with awareness, understanding, or consciousness. "Corrupt" and "corruptly" connote wrongfulness, immorality, depravity, or evil. Thus, the Court concluded that only one who consciously understands that he is doing wrong can be convicted under the statute. Because the jury instructions did not convey this sort of consciousness of wrongdoing ("mens reas"), the Court held that the conviction could not stand. Indeed, the jury instructions were "striking" in that they required "so little culpability" on the part of the offender. The jury was even instructed "even if Andersen honestly and sincerely believed that its conduct was lawful, you may find it guilty."

The government had insisted that the jury need not find that Andersen acted "dishonestly," and that all it needed to show was that Andersen intended to "impede" the government investigation by asking its employees to follow the document retention policy. The district court agreed. However, the Supreme Court found that impeding a government investigation encompassed innocent persuasion of employees, and thus, the instructions were too broad.

Finally, the instructions were flawed because the jury was not required to find a "nexus" between the persuasion to destroy documents and a particular governmental proceeding. The Court agreed that the statute did not require that an investigation must be pending at the time of the criminal act. However, the Court held that "[a] 'knowingly…corrup[t] persuader' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material." As a result of the deficiencies of the jury instructions, the Court unanimously reversed the conviction and remanded the case for further proceedings consistent with the decision.

So Now What?

While Andersen's conviction was overturned, it still faces criminal sanctions if the government can show that it understood that its actions were wrongful in persuading others to destroy documents relevant to a governmental investigation. Indeed, there appears to be evidence in the record that Andersen's attorney believed that an SEC investigation was imminent prior to her issuing reminders to apply the document retention policy. On the other hand, even assuming that the government can show that Andersen was conscious of the likelihood of an SEC investigation, Andersen will escape conviction if the government cannot show the requisite "mens reas" (guilty mind).

Besides Andersen's interest in this case, the Court's opinion is important for corporations in that it explicitly approves the use of legitimate document retention and destruction policies. It also serves as a reminder that consistent application of such policies is the best practice. What is most questionable in the Andersen case is the last second scrambling to remind employees of the policy and the subsequent destruction of documents while trouble was brewing. A consistent approach to a legitimate document retention and destruction policy can avoid the appearance of guilt when a crisis emerges.

On the other hand, the Andersen example shows that a less-than-careful approach to document retention can have far reaching implications, including criminal penalties. First, a subpoena is not necessary to alert a corporation of an investigation. Rather, when a governmental investigation is reasonably foreseeable or imminent, the corporation must be proactive in safe-guarding relevant, material documents, both electronic and paper. Reminders to apply a document retention and destruction policy when a crisis hits, while not conclusive of criminal intent, may certainly be evidence of criminal intent.

The Andersen case is of some comfort to corporations. They will not be held criminally liable for negligent destruction of documents relevant to a governmental investigation. However, it is important for corporations to implement and consistently apply a legitimate document retention and destruction policy before a crisis hits. Further, it is important that employees are trained on the policy and understand what it requires them to do. Finally, putting aside the criminal aspect of this case, courts are becoming less and less forgiving of corporations which unreasonably destroy relevant documents in the civil

litigation context. Thus, while negligent destruction of material documents may not be criminal, in the context of civil litigation, corporations must beware deviations from their document retention and destruction policies.

These issues are even more complicated when dealing with electronic documents. Electronic documents and data are easily created but are also easily destroyed. Finding and accounting for electronic data is no easy task. Many computer systems are set up to automatically delete older data. IT policies on preserving data often conflict with the business policies reflected in a corporation's documents retention plan. Accordingly, we strongly recommend that corporations carefully review their policies, procedures, and practices regarding the retention of electronic data.

If you have questions on this decision or its implications, please contact the Seyfarth Shaw LLP attorney with whom you normally work, or any attorney on our website at www.seyfarth.com.

ATLANTA
One Peachtree Pointe
1545 Peachtree Street , N.E., Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON
Two Seaport Lane, Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
312-346-8000
312-269-8869 fax

HOUSTON
700 Louisiana Street, Suite 3700
Houston, Texas 77002-2797
713-225-2300
713-225-2340 fax

LOS ANGELES
One Century Plaza
2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK
1270 Avenue of the Americas, Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO
400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO
560 Mission Street, Suite 3100
San Francisco, California 94105
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.
815 Connecticut Avenue, N.W, Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS
Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2)647.60.25
(32)(2)640.70.71 fax