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White Collar Crime / Criminal Defense Andersen: Future Impact?

Recently, the Supreme Court unanimously overturned the obstruction of justice conviction of heretofore, but now defunct, accounting giant Arthur Andersen, LLP. In this highly publicized case, many no doubt have vivid memories of news pictures of hurried large-scale shredding of Enron-related accounting documents. Accordingly, a casual observer might well assume reversal of the Andersen criminal conviction somehow established judicial approval of what to many seemed patently wrongful, or at least in the light most favorable to Andersen, highly questionable conduct.

Such a conclusion would be mistaken. In fact, the high court's opinion does not substantively address the issue of shredding at all. Rather, it focuses more narrowly on deficiencies in the trial court's jury instructions, and more specifically, on what a jury must find before it may conclude that a defendant acted with criminal intent. Narrow though it is, the Court's opinion is nonetheless instructive, dealing with the evidentiary standard that must be met before a jury may properly find criminal culpability. In that regard, not only does this decision impact Andersen but also it potentially impacts other federal prosecutions in which jury instructions regarding whether a person "knowingly" violated a federal criminal statute effectively eliminate any requirement that there be proof of mens rea, or a "guilty mind."

THE FACTUAL AND LEGAL ISSUES UNDER CONSIDERATION

In the wake of the Enron debacle, an imminent SEC investigation of Enron and its accounting practices

loomed on the horizon. Senior members of the Andersen audit team promptly encouraged (some might say directed) its personnel to destroy documents, purportedly pursuant to an established document retention policy. This activity resulted in Andersen's indictment under a federal obstruction of justice statute applicable to one who in somewhat all-encompassing language "knowingly . . . corruptly persuades another person . . . with the intent to . . . cause or induce any person to . . . destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding."

At trial, Andersen contended that the statutory use of the word "knowingly" in context with "corruptly" obligated the government to prove specifically that Andersen knew its conduct was "wrongful," that is, specifically knew it was violating the statute. The government maintained that it need only prove Andersen through its shredding intended to prevent the government from obtaining information—in short, that Andersen's specific motivation was irrelevant, and, of course, that ignorance of the law is no defense.

Over Andersen's objection, the trial court opted for the government's expansive interpretation. In so doing, the jury was then instructed that Andersen could be convicted even if it "honestly and sincerely believed that its conduct was lawful." In the face of the instruction, the jury found Andersen guilty.

THE POTENTIAL IMPACT OF THE SUPREME COURT RULING

In reversing Andersen's conviction, the Supreme Court determined the trial court's jury instructions were fatally flawed, and more specifically that this instruction failed to convey the requisite consciousness of wrongdoing that a jury must find before a criminal conviction can be sustained. The Court opined that the use of "knowingly" taken in juxtaposition with the "corruptly" wordage in the statute mandated reversal because the government interpretation and the instruction by the trial court did not establish the requisite mens rea (or guilty mindset) that must be the motivating factor in a criminal statute that punishes knowing violations of the law. Not only is this a ringing reaffirmation of mens rea as it relates to the shredding of documents, but it also arguably reinforces the need to assure that any instruction to a jury regarding the knowledge required for a felony conviction under federal statute must preserve that essential mens rea requirement.

Perhaps of somewhat lesser prominence in the opinion, the Court additionally held that the trial court's jury instructions were infirm because "[t]hey led the jury to believe that it did not have to find any nexus between the 'persua[sion]' to destroy documents and any particular proceeding." The Court, again dealing with the "knowing" language, held that one could not be a "knowingly ... corrup[t] persuade[r]" for encouraging others to shred documents without having it be established "in contemplation of a particular official proceeding in which those documents might be material."

As can be seen, the reach of this decision, its high visibility notwithstanding, in no way exonerated Andersen's conduct, but merely reflects that the jury was improperly instructed as to the law; thus, the conviction could not stand. Indeed, Andersen could be retried, although at this point, for a variety of reasons it is problematic that this will occur. Yet the Court's discussion of "knowingly" not only in context with "corruptly" but in its own right as well could impact future interpretation of other criminal statutes that use such similar "knowingly" verbiage, and thus

clarify standards for acting "knowingly" in a statutory context. In short, it may be far less likely that one could or would be charged criminally in future cases absent a well-established/provable guilty mindset.

Accordingly, it may be instructive to consider, for example, how future criminal prosecutions for environmental crimes could be impacted where the "knowingly" language is prevalent. All of the major environmental statutes addressing the handling of a variety of hazardous substances and wastes contain felony provisions premised on a statutory provision expressly requiring that a defendant "knowingly violated" some aspect of the law. Over the years, the government has sought, and often obtained, jury instructions which, unlike Andersen, have been affirmed on appeal at the Circuit Court level that: (a) do not require knowledge of the law; (b) do not require any actual knowledge of what the substance is or that it is actually regulated; (c) do not require actual knowledge that the illegal conduct occurred if the defendant is a "responsible corporate officer;" and (d) do not require any proof of bad motive or intent. In short, such jury instructions have effectively eliminated any requirement that the defendant have a "guilty mindset." The impact, if any, of the Andersen decision respecting such jury instructions remains to be seen.

Finally, it should be noted though that the Andersen decision may be of limited future significance in the context of obstruction of justice given a recent statutory enactment (part of the Sarbanes-Oxley legislation) passed subsequently to the Andersen conduct at issue. This new legislation in arguably clearer language makes such shredding and other obstructing conduct illegal if done "with the intent to impede, obstruct, or influence" any official proceeding or "in relation to or in contemplation of" any such proceeding. The government has stated its intention to proceed under this statute in future cases rather than the one under which Andersen was charged. How that will affect the government's position on jury instructions in cases involving the new statute remains to be seen.

CONCLUSION

No one should take from this decision, whether in reliance on the old or new obstruction statute, that shredding of documents in the face of a government investigation has in any way received a favorable judicial imprimatur. Rather, as Chief Justice Rehnquist speaking for the Court in Andersen's case cogently stated, a jury instruction that fails to set forth "the requisite consciousness of wrongdoing" is fatally flawed. Accordingly, one can take comfort that future prosecution will not be predicated on conduct where a defendant may be convicted even though honestly believing that the questioned conduct is lawful. That is, criminality should only attach where a guilty mindset is clearly established.

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