

OPINION

■ THE 'ANDERSEN' DECISION ■

Fix the Hyde Amendment

By *Evan T. Barr* SPECIAL TO THE NATIONAL LAW JOURNAL

ON MAY 31, the U.S. Supreme Court reversed the criminal conviction of Arthur Andersen LLP, the giant accounting firm which was found guilty of obstructing justice in June 2002. The justices unanimously ruled that Andersen was denied a fair trial when the jury was instructed that it could convict the firm of witness tampering solely based on the fact that an in-house lawyer had reminded employees to shred notes and drafts of Enron-related records as part of the firm's document-retention policy.

As Chief Justice William H. Rehnquist wrote in his opinion for the court, document-retention policies, which are common in the business world, "are created in part to keep certain information from getting into the hands of others, including the Government." Like a mother who suggests to her son that he invoke his right against self-incrimination, Rehnquist noted, persuading an employee

to withhold information "is not inherently malign."

For corporate America, this is an important ruling, given that just about every major company in the nation is using a document-retention policy similar to Andersen's. But for Arthur Andersen, justice delayed is justice denied. Andersen today is a shadow of its former self, reduced from its once proud status as a \$9 billion member of the Big Five with offices around the world to a rump staff of about 200 employees left to process claims filed in the wake of the firm's collapse.

The government soon will have to decide whether to seek a retrial. But even if the firm is ultimately cleared of wrongdoing, at best such an outcome will only serve to shield former Andersen partners from possible future civil litigation. A legal victory will not restore the careers and livelihoods of hundreds of partners and roughly 26,000 U.S.-based Andersen employees who lost their jobs as a result of a criminal indictment based on an unprecedented extension of existing law and practice governing the conduct of large corporations.

A simple legislative fix

But even if Andersen cannot be saved by the courts, there is a simple legislative fix that might help similarly situated companies in the future, and more

importantly, serve to deter overzealous federal prosecutors from making novel or reckless charging decisions that could bring down an entire firm. Under a federal statute enacted in 1998 commonly referred to as the Hyde Amendment, a "prevailing party" in a federal criminal case (a defendant who is acquitted at trial or whose conviction is reversed on appeal) may be entitled to government compensation for the legal fees and costs incurred in defending itself, provided that a court determines that the position of the prosecution was "vexatious, frivolous, or in bad faith." As the law is generally interpreted by the courts, mere acquittal does not entitle a defendant to compensation: A prosecution must be substantially lacking in sufficient factual or legal basis, or must be motivated by malicious intent, in order to qualify.

As currently drafted, however, the statute applies only to vindicated individuals, and corporations or partnerships with fewer than 500 employees whose net worth does not exceed \$7 million. That lets out Andersen, of course, and just about every publicly traded company in the United States. Why the omission? Most likely, Congress was focused on the plight of the "little guy" forced to defend himself against the monolithic federal government. Its members probably did not even contemplate the devastating potential impact that a criminal

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indictment (or even the threat of such an indictment) could have on a large corporation and, perhaps more importantly, on the thousands of employees and shareholders who make up such an organization.

U.S. v. Arthur Andersen changed all of that. In today's superheated regulatory environment, everybody understands that an aggressive state, local or federal prosecutor has the discretionary power, virtually unchecked, to bring a company to its knees by the mere suggestion of criminal charges. Few companies can survive the loss of clients that inevitably accompanies the announcement that a company is under investigation, and even fewer still have the resources and staying power to survive long enough to be vindicated at trial or on appeal.

Although Andersen actually reported

the document destruction to the authorities, was cooperating with investigators at the outset of the case and was even making efforts to compensate Enron Corp. investors, federal prosecutors insisted Andersen admit guilt, citing a pattern of past behavior in unrelated cases. Andersen refused to plead, was indicted, went to trial and ultimately was sentenced to a relatively meager \$500,000 fine. But long before the jury had spoken, the firm's client base had eroded, and the legal outcome was virtually irrelevant.

The *Andersen* case demonstrated to other companies that resistance is futile. But what if Congress were to change the Hyde Amendment by simply deleting the \$7 million cap and allowing large corporations to seek compensation of costs incurred in defending themselves? Perhaps a zealous federal prosecutor contemplating

the use of an aggressive or untested legal theory to slay a corporate giant will pause just a bit longer to ponder the ramifications if the cost of a mistake included a hefty award coming straight out of the taxpayers' pockets. **NLJ**

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