

OUTSIDE COUNSEL

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Obstruction for Data Destruction After 'Andersen'

The roller-coaster ride of the criminal case against Arthur Andersen LLP (Andersen) has left many to ponder the legal viability of obstruction of justice prosecutions for destruction of records.¹

But the Supreme Court's decision last year overturning the obstruction conviction of Andersen—while clearly important to the parties and public—was from a longer perspective, dead on arrival. Indeed, the Solicitor General's Office had argued that review was inappropriate precisely because it was of limited import.

Although the Andersen decision has been viewed as a much-needed clarification of the parameters of criminal obstruction of justice, the Court's holding related to an obstruction statute that in practice has been supplanted by the Sarbanes-Oxley Act (SOX).² In other words, the decision addresses the old world order, not the new one.

This article discusses the limited scope of the Andersen decision and the continued vitality of obstruction risks. Ironically, it was the Andersen firm's conduct that spawned congressional enactment of three new data destruction crimes. Those new statutes differ significantly from the statute that formed the basis of the charge in Andersen.

In short, powerful tools remain available to the government and private plaintiffs to allege obstruction for destruction of data subject to a preservation duty.

'Andersen's' Life Expectancy

The starting point for this discussion is Andersen. A jury convicted the firm of corruptly persuading persons to withhold documents from, or alter documents for, an official proceeding, in violation of the obstruction statute, 18 USC §1512(b) in effect in 2000.

The well-known facts underlying this conviction were, in brief, that shortly after Andersen became aware of a "highly probable" regulatory investigation into the accounting machinations of a lead client, Enron, and had



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retained counsel to represent it in anticipated litigation, in-house counsel and the Enron engagement partner instructed staff to comply with a previously largely moribund document policy.³ This instruction was "followed by substantial destruction of paper and electronic documents" at a time when Andersen staff was pressed for time handling an avalanche of

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accounting issues generated by the growing crisis within Enron that would soon spill into public view. The data destruction continued even after Andersen had received a subpoena for documents in connection with a civil suit against Enron and up to the date on which Andersen received a subpoena from the Securities and Exchange Commission (SEC).⁴

The district court instructed the jury that the statutory term "corruptly" means "having an improper purpose," but does not require the government to prove that the defendant knew the conduct violated the criminal law or was "wrong." Thus, the jury was instructed that, "even if [petitioner] honestly and sincerely believed that its conduct was lawful, you may find [petitioner] guilty."

The Supreme Court

The Supreme Court overturned Andersen's conviction because the instructions were insufficient in two respects. First, to "knowingly...corruptly persuade" the jury must find consciousness of wrongdoing. Section 1512(b) has in essence a dual intent requirement: a defendant must intend her conduct and must do the act knowingly "corruptly." The Court altered prior circuit law by finding that a defendant had to know her conduct was "wrong." The Court noted that merely persuading another person to withhold documents from a government proceeding is not "inherently malign." Citing the example of "[d]ocument retention policies," which are created in part to keep certain information from getting into the hands of others, including the Government, as common in business," the Court stated that compliance with such policies "is, of course, not wrongful...under ordinary circumstances."

The parameters of the "consciousness of wrongdoing" requirement under §1512 are unclear. The Court declined to explore the "outer limits of this element." Arguably, this intent element of the crime is less than that required to show "willfulness"—the specific knowledge of the unlawfulness of the conduct—since the statute does not use the term "willful." Yet, more is required than just trying to impede the fact-finding of an official proceeding. Future defendants are likely to argue that at least with respect to conduct that is not malum in se—as the Court intimated is the case for standard document retention policies—"wrong" must be synonymous with "illegal."

Second, the Court found that the jury instructions failed to require a finding of "any nexus between the 'persua[sion]' to destroy documents and any particular proceeding."⁵ This "nexus" requirement was first articulated by the Supreme Court in *United States v. Aguilar*, 515 US 593, 599 (1995), in a prosecution involving the catchall obstruction clause of §1503. In Andersen, the Court overruled prior law by extending the nexus requirement to §1512(b) prosecutions. Although under §1512 the proceeding need not be pending at the time of the obstructive conduct, the law requires that the proceeding "be foreseen" so that the person has "in contemplation" a particular official proceeding in which the shredded documents might be material. This particular requirement has continued to pose problems for the government in obstruction prosecutions under §1512(b).⁶

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What, then, can one conclude from *Andersen* in terms of lessons for corporations seeking to steer well within the bounds of the criminal laws? The decision cannot be viewed as a "safe harbor" from criminal liability for data destruction in accordance with a document retention policy. As one court has noted, "Arthur Andersen was in essence a case about defective jury instructions—most significantly, as to the requisite mens rea of the people who acted on the defendant company's behalf."⁷

For instance, the Court did not address whether the facts proved at trial satisfied the "wrongfulness" and "foreseeability" requirements enunciated by the Court, since it was sufficient to reverse that the instructions did not charge the jury on these points. Indeed, the prudent corporation should note that the Court did not grant Andersen's application to have the Court acquit it outright on the ground that there were insufficient facts to support liability. Further, the *Andersen* Court of Appeals decision found that even if the trial court should have charged a nexus requirement, it was harmless error since Andersen was clearly acting in response to an anticipated SEC proceeding.⁸

SOX Data Destruction Crimes

The tools available to prosecutors to punish obstructive conduct, even before receipt of a formal document demand, were substantially enhanced by SOX. These new data destruction crimes—§§1512(c), 1519 and 1520 of Title 18—have rendered the statute charged in *Andersen* obsolete.⁹ While §1520 applies only to outside auditors of publicly traded companies, the other two data destruction crimes apply more broadly and are not limited to public companies.

Section 1512(c) criminalizes one who "corruptly alters, destroys, mutilates, or conceals a record, document or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding, or otherwise obstructs, influences or impedes any official proceeding." This provision requires proof of two key elements: that the person acted "corruptly" and engaged in destruction with the intent to impair the integrity or availability of the data in an official proceeding. An "official proceeding" means any proceeding before federal judges or federal agencies.¹⁰

Like §1512(b), new §1512(c) does not require that an official proceeding "be pending or about to be instituted at the time of the offense."¹¹ If a person is aware that her activities are under investigation or that a formal proceeding "might well be forthcoming" to which the obstructive acts would be relevant, this would be enough to trigger criminal liability under the statute.¹²

Unlike §1512(b), §1512(c) does not include the word "knowingly," the seeming linchpin for the Court's interpretation that to violate §1512(b), a defendant must "knowingly... corruptly" violate the statute, i.e., the defendant has to know her conduct is "wrong." Nor does §1512(c) require showing corrupt persuasion of another. The new crime reaches the conduct of an "individual shredder" without the need to show that the defendant persuaded another to destroy or withhold documents. Section 1512(c) closes that loophole in §1512(b).¹³

Of note to corporate counsel, civil litigants can invoke §1512(c) as part of a civil RICO charge since section 1512—unlike 1519—is an enumerated predicate offense in the RICO statute. Consequently, 1512(c) violations involving the hiding and falsifying of evidence may provide the basis for a civil Racketeer Influenced and Corrupt Organizations Act (RICO) lawsuit, with the potential for treble damages and the cost of the suit and reasonable attorney's fees.

Section 1519 is the broadest of the SOX data destruction crimes and, consequently, is likely to be most often relied on by prosecutors. It punishes a person who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the

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jurisdiction of any department or agency of the United States or any case filed under Title 11, or in relation to or contemplation of any such matter or case...." Similar to the statute charged in *Andersen* and §1512(c), §1519 does not require the pendency of an official proceeding. The section also applies to informal SEC inquiries, an issue that is unresolved under §1512(b). Notably, unlike old §1512(b) or new §1512(c), §1519 does not require that a defendant acted "corruptly." Thus, it is exceedingly unlikely that the "wrongfulness" holding in *Andersen* could be extended to reach conduct criminalized by this new provision.

Judiciary Committee Report

The scope of the section was deliberately broad. The Senate Judiciary Committee Report explains:

This statute is specifically meant not to include any technical requirement...to tie the obstructive conduct to a pending or imminent proceeding or matter. It is also meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title. ...It also extends to acts done in contemplation of such federal matters, so that the timing of the act in relation to the beginning of the matter or investigation is also not a bar to prosecution.

Concerned about the facial breadth of §1519, the committee report included additional views of some members that the new law "should not cover the destruction of documents in the

regular course of business, even where the person may have reason to believe that the documents may tangentially relate to some future matter within the conceivable jurisdiction of an arm of the federal bureaucracy."¹⁴

The one reported case where §1519 has resulted in a conviction is instructive. The Office of the Comptroller of the Currency requested a part of the audit working papers from Ernst & Young for the 2000 audit of NextCard. The audit partner then added and deleted information in the relevant documents, and re-set the date on the computer where the alterations were made so that the changes appeared to have occurred during the time of the audit, not afterwards. The partner pleaded guilty and admitted that he concealed and covered up a record with the intent to impede, obstruct and influence the investigation. In January 2005, he was sentenced to one year in prison.¹⁵ The conduct, being so blatant, could likely have been prosecuted under both §§1512(b) and 1519. That the government brought the case under §1519 confirms that this will be the statute of choice for future obstruction prosecutions.

Conclusion

The Supreme Court's reversal of Andersen's obstruction conviction provides only cold comfort to civil parties navigating their data preservation obligations in private and regulatory litigation. Criminal obstruction laws continue to have vigor and make it important for counsel to assess carefully the handling of documents, particularly in the time period before receipt of a document demand and litigation has ensued when obstruction law can ensnare the unwary.

1. 544 U.S. , 125 S. Ct. 2129 (May 31, 2005).

2. PL. 107-204 (2002).

3. 125 S.Ct. at 2133.

4. Id. at 2123. Section 1512 covers obstruction of private civil proceedings, but Andersen was only charged with obstructing the SEC.

5. Id. at 2136-37.

6. *United States v. Quattrone*, Docket No. 04-cr-5507, slip op. at 34-37 (2d Cir. March 20, 2006).

7. *In re Adelpia Communs. Corp.*, 327 B.R. 175, 2005 Bankr. LEXIS 1047, *8 (SDNY June 13, 2005).

8. 374 F.3d 281, 298 (5th Cir. 2004).

9. Section 1519 was first proposed in the "Corporate and Criminal Fraud Accountability Act," S. 2010, and §1512(c) was first proposed in the "Corporate Fraud Accountability Act," H.R. 5118. Both proposals sought to ease the government's burden to prosecute the type of shredding widely reported to have occurred at Andersen. Rather than choose between these proposals, the conference committee included both in the final conference report.

10. 18 USC §1515(a)(1).

11. 18 USC §1512(f)(1).

12. See, e.g., *U.S. v. Kelley*, 36 F.3d 1118, 1128 (D.C. Cir. 1994).

13. 148 CONG. REC. S7419 (daily ed. July 26, 2002) (statement of Senator Leahy).

14. Senate Judiciary Comm., "The Corporate and Criminal Fraud Accountability Act of 2002," S. Rep. No. 107-146, at 14-15, 27 (May 6, 2002).

15. www.usdoj.gov/usao/can/press/html/2005_01_27_trauger.html.

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