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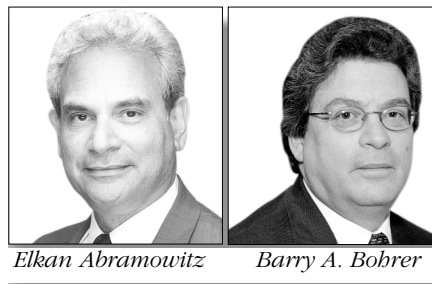
WHITE-COLLAR CRIME

BY ELKAN ABRAMOWITZ AND BARRY A. BOHRER

Andersen Jury Instruction: A New Collective Corporate Liability?

Shortly before announcing its verdict in the Arthur Andersen obstruction of justice trial last month, the jurors presented District Judge Melinda Harmon with the perplexing question of whether they had to be unanimous as to which Andersen employee acted with corrupt intent in obstructing the SEC investigation into the collapse of the Enron Corp. Because, as indicated on the special verdict form, the jury ultimately reached a unanimous decision on the identity of the corrupt actor, Judge Harmon's decision that the jury need not be unanimous on this question may never be ruled on by an appellate court. The jury's question, however, raises important issues about corporate criminal liability that warrant further consideration and exploration.

The Andersen jury asked "If each of us believes that one Andersen agent acted knowingly and with corrupt intent, is it for all of us to believe it was the same agent? Can one believe it was agent A, another



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believe it was agent B, and another believe it was agent C?" Recognizing that the question posed was one of first impression, Judge Harmon responded that each juror had to find that one Andersen employee had the specific intent to impede an official investigation, but that the jurors need not agree as to which employee had that intent.

As discussed below, this response tipped the balance in favor of the prosecution, and could have implications not just in the Andersen case, but in many criminal prosecutions against corporate actors.

Corporate Criminal Liability

Corporations, as fictional entities, can be held criminally liable through the actions of their agents and employees acting within the scope of their employment. Courts have long recognized that corporate criminal liability extends not just to the physical acts of its agents, but to their mental states as well.¹ Application of these principles in the context of a single corporate employee is relatively straightforward, imputing the knowledge of corporate employees to the corporation,² and permit-

ting a finding of corporate criminal liability based purely on that employee's intentional acts, without requiring proof of any dereliction by corporate management.³

But, a corporation's potential criminal liability extends beyond simple vicarious liability for the criminal acts of individual employees. Courts have developed a theory of collective liability that aggregates the mental states of corporate employees to permit conviction of the corporation where no single employee could be found to have violated the law. In *United States v. Bank of New England*,⁴ the defendant bank was convicted of money laundering in connection with failure to comply with currency reporting requirements, based on the collective knowledge of its employees. The trial court had instructed the jury that as an institution, the bank's knowledge was "the sum of the knowledge of all of the employees," and that if one employee knew of one aspect of the reporting requirements, and another employee knew another aspect of those requirements, the bank possesses the combined knowledge of its employees. In upholding this instruction, the First Circuit recognized that "[c]orporations compartmentalize knowledge, subdividing the elements of specific duties and operations into small components." The court went on to hold that "[i]t is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation."

The Bank of New England concept of

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collective corporate mental state does not apply neatly to the Andersen case, however, because the mental state at issue in Andersen was not knowledge, as was the case in *Bank of New England*, but one of “corrupt intent” to impede an official investigation. In contrast to knowledge, which is divisible, corrupt purpose is inherently indivisible, and cannot be aggregated. Accordingly, Andersen’s guilt would have to be predicated on the intent of at least one employee. Judge Harmon’s instruction to the jury is consistent with this principle, inasmuch as she directed that each of the jurors had to find that one employee intended to impede the official investigation.

Jury Unanimity

Judge Harmon’s instruction thus required each juror to find that at least one Andersen employee possessed the requisite criminal intent, but that they need not be unanimous as to the identity of the criminal actor. It is axiomatic that a criminal jury must agree unanimously that the government has proved each element of a crime beyond a reasonable doubt, but that the jury need not be in complete agreement “which of several possible sets of underlying brute facts make up a particular element.”⁵ With only scant guidance from the Supreme Court, lower courts and commentators have long grappled with how to determine which facts are “elements” of a particular crime, requiring unanimity, and which are mere “means” used to commit an element of the crime, upon which the jury may disagree and still convict.

In 1898, the Supreme Court held that a jury considering murder charges against a sailor accused of shooting a man and then throwing him overboard, need not reach unanimous agreement as to whether the victim died by drowning or shooting. It reasoned that it was not material “whether the vital spark had fled before the riddled body had struck the water, or lingered till extinguished by the waves.”⁶ Almost a century later in *Schad v. Arizona*, the Supreme

Court upheld a conviction under a state murder statute defining first-degree murder as a killing that is premeditated or, alternatively, committed during the course of a robbery. A sharply divided Court rejected the defendant’s challenge that the alternative murder definitions could have permitted his conviction with half of the jurors believing that the killing was premeditated while the other half thought that it occurred during a robbery. The plu-

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rality in *Schad* framed its decision as one concerning the limits on a state’s ability to define criminal conduct, ultimately deciding that so long as alternate definitions of a particular crime “reasonably reflect notions of equivalent blameworthiness or culpability” a jury need not be unanimous as to which of the alternatives satisfies the necessary elements of the crime.

‘Richardson v. United States’

Most recently, in *Richardson v. United States*, the Court considered the question of jury unanimity in the context of the Continuing Criminal Enterprise (CCE) statute, which provides harsh penalties for narcotics offenders who are engaged in a “continuing series of violations.” The Court held that a conviction under the CCE statute required not just that the jury agree that the defendant had engaged in three federal narcotics offenses (the “series”), but that it be unanimous as to the specific offenses proven by the government. The court relied, in part, on the language of the statute, holding that the term “violation” connotes more than mere conduct and refers to conduct that violates the

law. Noting our “tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law,” the Court concluded that each violation required by the CCE statute constituted a separate element, necessitating unanimity as to each component violation.

The Richardson Court looked beyond the narrow definition of “violation,” broadening its inquiry to take into account potential unfairness from divergence within the jury on the question of what violations were in fact committed. It observed that the breadth of conduct that falls within the universe of possible violations, coupled with the likelihood that the government would introduce evidence of numerous possible violations created a danger that the jury might avoid discussion of specific factual details, covering up possible disagreement as to what the defendant did or did not do. In these circumstances, the Court found a “significantly aggravated risk” that unless required to focus on detail, the jurors would conclude that the defendant was guilty on the theory that “where there is smoke there must be fire.”

Similar concern over possible juror confusion or disagreement was the driving force behind the Third Circuit’s decision in *United States v. Beros*.⁷ The defendant in that case had been convicted of embezzlement of labor union funds in connection with travel expenses he purportedly incurred while on union business. The government presented evidence at trial of a number of improper expenditures of union funds in connection with a trip to Florida, ostensibly on union business, including the purchase of an air ticket for his wife; purchase of accommodations for himself and his wife in the hotel’s most expensive suite; and remaining in Florida at union expense after his business was completed. The Third Circuit reversed his conviction, finding that the trial court’s failure to instruct the jury that it had to be unanimous as to the act or acts defendant had committed left open the possibility that the jury might have disagreed as to which act supported his guilt,

“given the range of possibilities by which the jury could have reached its verdict.”

Complex Statute, Evidence

Other courts have also focused on the complexity of the statute and the evidence presented in determining whether a specific unanimity charge is required.⁸ For example, in *United States v. Verrecchia*,⁹ the First Circuit held that there was no need for juror unanimity on the question of which particular firearms the defendant had possessed in order to convict him of violating the statute prohibiting a felon from possessing firearms. Although the government had presented evidence that the defendant had possessed more than 20 guns, the court reasoned, in reliance on *Richardson*, that because each possession was equally serious, there was little likelihood of juror disagreement about which firearms were possessed. It further held that where the sole issue to be determined was whether the defendant had possessed a gun or guns, the jury would be “less likely to ignore the underlying factual detail than one presented with ... massive and complicated evidence,” such as was at issue in *Richardson*.

Close Questions

These considerations present a close question when applied in the context of the obstruction of justice charges brought against Arthur Andersen. In fact, in ruling on this question, Judge Harmon observed that every case cited by either side could be distinguished on some basis. The jury’s question in and of itself demonstrates the potential for disagreement over what conduct each juror found violated the statute. Hindsight (in the form of post-verdict jury interviews) also tells us that the jury convicted under a completely different theory than the one under which both the government and the defense were operating. The parties were focused on whether the massive destruction of Enron-related documents was part of legitimate compliance

with Andersen’s document retention policy or part of an effort to obstruct the SEC investigation, while the jury was apparently focused on a single instruction to revise a particular memo.

Separate and apart from the actual verdict in this case and the fact that the jury seems to have resolved for itself confusion or disagreement over the identity of the corrupt Anderson employee, resolution of the jurors’ query presents a close question. On the one hand, the particular way in which a document was destroyed or altered may in some sense be characterized as more of a “means” rather than a distinct element of the crime of obstruction. Judge Harmon appears to have accepted the government’s argument analogizing this situation to one in which a crime is committed with a gun, but the jury cannot decide which gun is used. That argument, however, ignores the complexity of the evidence presented to the jury, and the fact that the primary issue to be determined by the jury turned on the intent of the Andersen employees. It also fails to take into account the unique qualities of a corporate defendant.

In previous cases considering the question of juror unanimity, there was no dispute as to the identity of the criminal actor and, similarly, no dispute concerning the basic contours of the crime. Where there is a dead body, and one individual defendant charged with murder, the question of the particular means the defendant used to commit that murder may well be immaterial to a finding of guilt. But in the Andersen case, there was a host of potential criminal actors, engaged in wide variety of allegedly criminal conduct. These circumstances certainly created the substantial risk that the jury would disagree as to the particular act or acts that constituted criminal obstruction, calling into question the fundamental fairness of a verdict based on a lack of consensus. Similarly, the danger noted in *Richardson*, that the jury might conclude that “where there is smoke, there must be fire,” was certainly present in the Anderson case, where the jurors could have concluded

that with so much evidence relating to Andersen’s treatment of the Enron documents, there must have been obstructive conduct.

In holding that the jury need only be unanimous in its conclusion that someone at Andersen acted with the intent to obstruct an official investigation, Judge Harmon theoretically permitted the jury to convict the corporation based on 12 different actions by 12 different employees, where no more than one juror was persuaded by any particular theory.

Conclusion

By declining to require any concurrence either on the actor or the acts resulting in Andersen’s convictions, Judge Harmon essentially created a new form of collective corporate liability, under which the prosecution need only convince each juror individually that someone within the company acted with improper purpose. If left undisturbed, this decision will have far-reaching consequences in the spate of investigations of corporate activity that loom.



(2) See, e.g., *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719 (5th Cir. 1964).

(3) See, e.g., *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d Cir. 1989) (reasonable diligence on part of corporation no defense to criminal contempt where employee wilfully violated antitrust consent decree).

(4) 821 F.2d 844 (1st Cir. 1987).

(5) *Richardson v. United States*, 526 U.S. 813, 817 (1999), citing *Schad v. Arizona*, 501 U.S. 624 (1991) and *Andersen v. United States*, 170 U.S. 481 (1898).

(6) *United States v. Andersen*, 170 U.S. 481.

(7) 833 F.2d 455 (3d Cir. 1987).

(8) See, e.g., *United States v. Williams*, 166 F. Supp. 2d 286 (E.D. Pa. 2001).

(9) 196 F.3d 294 (1st Cir. 1999).

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