

## Enron: 10 Years Later

Law360, New York (December 01, 2011, 3:38 PM ET) -- Ten years ago, Enron Corporation — having enjoyed a long reputation of corporate success — became a symbol of corporate greed, excess and corruption. Practically overnight, Enron went from Fortune 50 to bankrupt. In the aftermath, a remarkable law enforcement story unfolded. That story remains pertinent today, especially in light of the financial crisis.

Today, some look back on Enron’s prosecutorial history and suggest that it set a high-water mark in law enforcement rigor and zeal and that current prosecutorial efforts addressing the financial crisis pale in comparison. As a biased observer — having been part of the U.S. Securities and Exchange Commission team that investigated Enron — I do not quibble with those who suggest that the Enron enforcement efforts were exceptional. They were.

The passage of time, however, has caused some of the facts surrounding the Enron case to fade into the background. As with many historical events, a certain, not exactly accurate, nostalgic gloss now drapes the factual record.

Although some now tout the success of the Enron prosecution as reason for encouraging more enforcement actions today, a review of the Enron record, without the nostalgic gloss, suggests that many of the so-called “success stories” were not necessarily as successful as some suggest. Indeed, careful review of the Enron record reveals that care and caution are appropriate when considering enforcement proceedings in the context of highly complicated and complex circumstances like Enron and the current financial crises.

### The Cases

The Enron collapse was met with a massive response from law enforcement, consisting largely, but not exclusively, of efforts by the SEC’s Enforcement Division and the U.S. Department of Justice’s Enron Task Force.

A review of publicly available information chronicles these enforcement efforts. At the end of the day (or more accurately, at the end of several years), the SEC brought civil enforcement actions against 39 individuals and four corporate entities. The DOJ filed criminal charges against 33 individuals and three corporate defendants. As a result, hundreds of millions of dollars in sanctions were paid, and decades of jail time were imposed.

## Results

Unsurprisingly, the vast majority of those facing enforcement actions resolved them by agreement: by settlement of the SEC actions and pleas in the criminal cases. Of the 39 individuals subject to SEC action, 31 settled. All of the corporate defendants likewise settled. On the criminal side, 20 of the individual defendants entered plea agreements, and two of the three corporate entities reached deferred prosecution agreements.

There are many reasons why these actions were resolved by agreement. Perhaps most importantly, the evidentiary record in these cases was powerful. When the evidence against a party is compelling, he or she is more likely to settle or enter a plea agreement. Additionally, several practical factors — such as the cost of mounting a defense, tolerance of sanctions, reduction of risks, and finality, among others — often motivate people to settle.

Thus, while all of the resolved cases represent government success stories, we cannot know whether the government would have prevailed at trial, and it is difficult to draw many conclusions about the precedential value of these cases and their underlying legal theories because none were ever considered by independent fact finders.

For those who did not settle or enter a plea, the government's results are decidedly mixed.

On the SEC side, seven of the eight cases involving individuals who did not settle remain in legal limbo pending the final resolution of criminal matters that are still ongoing. The other was dismissed due to the death of the defendant. For a variety of reasons, it is unlikely that any of these outstanding enforcement actions will result in significant sanctions.

The same is true with the criminal cases. Of the 13 individuals and one corporate defendant who proceeded to trial, only one resulted in a conviction that withstood appellate review. In addition, two of the 20 individuals who pled guilty successfully withdrew their pleas. The trial results were as follows:

### 1. Arthur Andersen, Enron's auditor

- conviction vacated on appeal

### 2. Daniel Bayly, Merrill Lynch & Co. Inc.

- conviction vacated and remanded on appeal; government did not retry

3. Daniel Boyle, Enron

- convicted of obstruction; no appeal

4. James Brown, Merrill Lynch

- conviction vacated and remanded on appeal; government did not retry

5. Christopher Calger, Enron

- successfully withdrew plea; charges later dismissed

6. David Duncan, Arthur Andersen LLP

- successfully withdrew plea; charges later dismissed

7. William Fuhs, Merrill Lynch

- conviction vacated on appeal

8. Robert Furst, Merrill Lynch

- conviction partially vacated on appeal; later entered into deferred prosecution agreement

9. Joseph Hirko, Enron Broadband Services

- conviction vacated and remanded on appeal; later pled to reduced charges

10. Kevin Howard, Enron Broadband Services

- conviction vacated and remanded on appeal; later pled to reduced charges

11. Sheila Kalanek, Enron

- acquitted at trial

12. Michael Krautz, Enron Broadband Services

- mistrial at first trial; acquitted at second trial

13. Kenneth Lay, Enron

- conviction vacated due to death

14. Rex Shelby, Enron Broadband Services

- hung jury and partial acquittal at first trial; later pled to reduced charges

15. Jeffrey Skilling, Enron

- portion of conviction vacated on appeal; resentencing pending

16. F. Scott Yaeger, Enron Broadband Services

- hung jury and partial acquittal at first trial; government did not retry

In total, 10 of these 16 defendants were eventually acquitted of all charges, and four pled guilty to reduced charges or entered into a deferred prosecution agreement. Today, just two of the trial convictions stand: one where the defendant decided not to appeal, and one where the defendant's conviction was vacated in part.

## **Conclusion**

What does all of this mean — that the Enron prosecutors were overly aggressive or that they could have done a better job making their convictions less susceptible to an appeal? From my perspective, the answer to these questions is unequivocally no. My experience is that the vast majority of prosecutors are (and all of the Enron prosecutors were) smart, hard-working and, perhaps most importantly, dedicated to fairness and due process.

The point, particularly with respect to prosecutions related to the financial crisis, is that law enforcement, especially criminal prosecution, is hard — it's supposed to be. It carries an enormous burden of proof because it carries such great consequences. This burden is particularly challenging in securities fraud cases because the legal and factual issues are often complex, the element of intent is essential and elusive, and novel areas of the law are frequently involved. To that end, any comparison of Enron and the financial crisis must take into account that Enron, despite dizzyingly complex transactions and structures, was simple in comparison to the full array of issues present in the financial crisis.

In light of these complexities, succumbing to the understandable, but highly charged, demands for “heads to roll” can further give rise to a host of negative consequences. Indeed, the complications and controversy surrounding the crisis not only increase the likelihood of unsuccessful prosecutions — which diminish government resources and credibility — such prosecutions inflict incredible personal and financial harm on those who are ultimately found legally innocent of any wrongdoing.

But more importantly, especially in light of the havoc caused by both Enron and the financial crisis, the ultimate goal is to avoid these types of problems altogether. To this end, law enforcement is largely inadequate — it only comes into play after the harm (often irreparable) has occurred.

To avoid the problems, we need a combination of good corporate governance, rigorous compliance regimes, renewed emphasis on corporate ethics, and a smarter, more efficient regulatory environment. Law enforcement is certainly a part of this and can have a powerful deterring effect, but it is not a cure all. It is a last resort, not the first, and most assuredly, it should not be the only resort.

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