In a unanimous decision, the U.S. Supreme Court recently reversed Arthur Andersen's criminal conviction for violating a federal witness tampering statute by encouraging its employees to shred Enron documents pursuant to a document retention policy. *Arthur Andersen LLP v. United States*, 125 S. Ct. 2129, 2005 WL 1262915 (U.S. May 31, 2005). In doing so, the Supreme Court avoided direct evaluation of the conduct that led to the accounting firm's conviction. Instead, the Supreme Court concluded that the jury instructions used during Arthur Andersen's criminal trial had incorrectly identified the level of culpability that must exist for a defendant to be convicted of violating the specific statute at issue in that case.

This Update highlights key issues raised by the Supreme Court's reversal and offers practical guidance.

**Background**

As early as August 2001, Arthur Andersen had reason to suspect that Enron (or even Arthur Andersen itself) might be investigated or charged in connection with the accounting scandals that became public in late 2001. For several months, however, Arthur Andersen management personnel repeatedly urged members of the firm's Enron team to destroy documents consistent with the firm's document retention policy, resulting in what the U.S. Supreme Court would later describe as a "substantial destruction of paper and electronic documents."

When Arthur Andersen's activities came to light, it was charged with violating 18 U.S.C. § 1512(b)(2)(A) and (B), which impose criminal liability on anyone who "knowingly uses intimidation or physical force, threatens or corruptly persuades another person . . . to . . . destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." After ten days of deliberation, the jury concluded that Arthur Andersen had violated this statute and returned a guilty verdict. The Fifth Circuit upheld Arthur Andersen's conviction. The Supreme Court, however, disagreed.

**The Supreme Court's Decision**

The key to the Supreme Court's decision was its conclusion that the trial court had improperly instructed the jury concerning the state of mind that a defendant must have before it can be convicted of violating 18 U.S.C. § 1512(b)(2). The trial court had instructed the jury that it could return a guilty verdict "even if [Arthur Andersen] honestly and sincerely believed that its conduct was lawful." The Supreme Court, in contrast, found that a defendant accused of violating this witness tampering statute must be "conscious of wrongdoing" before it can be said that the defendant "knowingly . . . or corruptly persuade[d]" someone else to destroy a document. Because of the improper jury instruction, the Supreme Court reversed Arthur Andersen's conviction and remanded the case for further proceedings.

**Decision Should Not Affect Document Retention Practices**

This decision has little effect on a corporation's general obligation to suspend document destruction processes when a lawsuit or government investigation is imminent. The Supreme Court's decision may make it more difficult for federal prosecutors to convict companies for witness tampering under the specific statute at issue in the Arthur Andersen case, but the Court's analysis deals primarily with the instructions that the trial court gave the jury. It is entirely possible that Arthur Andersen would be convicted again if it were retried with appropriate jury instructions.

Moreover, the Supreme Court's decision was limited to an analysis of 18 U.S.C. § 1512(b)(2). It does not address the impact of other statutes and rules that require companies to maintain documents when an investigation or legal action is possible. For example, 18 U.S.C. § 1519, which was adopted as part of the Sarbanes-Oxley Act, imposes criminal liability on anyone 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" a government investigation. Similarly, 15 U.S.C. § 78u-4(b)(3)(C), part of the Private Securities Litigation Reform Act, requires parties who have "actual notice of the allegations contained in [a securities] complaint" to maintain all documents, including electronic data, that are relevant to the allegations in the complaint.
Practical Tip

Companies Should Stop Document Destruction Activities Whenever Litigation Appears Likely. Even after the Supreme Court's reversal of Arthur Andersen's conviction, it remains extremely important for companies to exercise caution before destroying documents, even if the documents would ordinarily be destroyed pursuant to an existing document retention policy. This is especially true when a lawsuit or an investigation appears imminent. Arthur Andersen would have been well advised to suspend all document destruction activities when it first concluded that an investigation into Enron might be opened. Even though the firm's conviction has been overturned, Arthur Andersen was effectively destroyed by the indictment itself.

A company should generally stop all document destruction activities whenever litigation appears likely. Nothing in the Arthur Andersen case changes this advice. If companies have questions concerning whether it is appropriate to destroy documents in a specific situation, they should seek the advice of legal counsel before doing so.

Additional Information

This Update highlights key issues in the U.S. Supreme Court's decision in Arthur Andersen LLP v. United States, 125 S. Ct. 2129, 2005 WL 1262915 (U.S. May 31, 2005). You can find discussion of other recent cases and other topics of interest on our website.