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IN ENRON'S WAKE: CORPORATE EXECUTIVES ON TRIAL

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There may never have been a worse time to be a corporate criminal.[1]

I wish we had never heard of Bernie Ebbers.[2]

I. INTRODUCTION

It was December, 2001—a few months after Enron CEO Ken Lay was warned of an "elaborate accounting hoax"[3] that had disguised fraud on a magnificent scale, and not long after Enron had publicly disclosed record fourth quarter shortfalls. Notwithstanding these dire financial straits, Enron executives behaved like pigs at the trough, doling out more than $100 million in bonuses to themselves and delivering the checks by plane on the eve of the largest corporate bankruptcy filing in United States history.[4] It soon became evident that Enron's collapse was only the first in a wave of accounting fraud scandals that would inflict huge financial losses and erode public confidence in the nation's financial markets.

Fast forward to December, 2005. Ken Lay and two other top Enron executives, former President and CEO Jeff Skilling and Chief Accounting

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[1] Shawn Young & Peter Grant, *More Pinstripes to Get Prison Stripes*, WALL ST. J., June 20, 2005, at C1.

[2] Suzanne Craig, *Citigroup Quells Investor Claim over Research: Panel Rejects Charge That Analyst Misled Client on WorldCom Stock; Victory Highlights Trend on Street*, WALL ST. J., Dec. 8, 2005, at C1 (quoting Citigroup CEO Charles Prince).

[3] Anonymous Memorandum from Sherron Watkins, Vice President of Corporate Development, Enron, to Kenneth Lay, Chairman, Enron (Aug. 15, 2001) [hereinafter Anonymous Watkins Memorandum] (on file with author).

[4] Official Employment-Related Issues Comm. of Enron Corp. v. Arnold (*In re* Enron Corp.), No. 01-16034, at 20 (Bankr. S.D. Tex. Dec. 9, 2005) (Mem.) (on file with author). The bankruptcy court later determined that many of these transfers were fraudulent and ordered the money returned. *Id.* at 98.

Officer Richard Causey, were then under indictment and only a month away from their criminal trial.[5] But here, the customary pretrial courtroom maneuvers were embellished by Lay's strategic effort to regain public relations momentum.

Speaking before a group of 500 Houston business and academic leaders, Lay blamed Enron's downfall on a handful of bad apples[6] and—perhaps borrowing a leaf from Mark Twain's album[7]—claimed that most of what had been said about Enron's demise was either "grossly exaggerated" or just plain wrong.[8] Moreover, he charged, the Enron Task Force, which spearheads Enron-related investigations and prosecutions, had unleashed a "wave of terror" through the relentless pursuit of innocent businessmen, the bullying of witnesses, and a host of other prosecutorial excesses.[9]

Following closely on the heels of Lay's highly charged speech, co-defendant Rick Causey rearranged the legal landscape for the trial by striking a deal with the prosecutors and agreeing to cooperate.[10] Former

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[5] The charges against Lay were far more limited than those against his co-defendants and former colleagues Jeff Skilling (former Enron President and CEO) and Rick Causey (former Enron Chief Accounting Officer). *See* Indictment, United States v. Causey, CRH-04-25 (S.D. Tex. Jan. 21, 2004) (on file with author).

[6] But for "the illegal conduct of less than a handful of employees," he charged, Enron would not have needed to seek protection in bankruptcy. Kenneth L. Lay, Speech, "Guilty, Until Proven Innocent" (Dec. 13, 2005) [hereinafter Lay Speech] (on file with author).

[7] After the American press mistakenly published his obituary, Twain sent a cable from London declaring that "reports of my death are greatly exaggerated." THE NEW DICTIONARY OF CULTURAL LITERACY 137 (E.D. Hirsch, Jr. et al. eds., 2002).

[8] "Most of what was and is still being said . . . is either grossly exaggerated, distorted, or just flat out false." Lay Speech, *supra* note 6.

[9] *Id.* In taking this stance, he joined a chorus of other Justice Department critics who had been caught up in the prosecutorial net. *See, e.g.*, Jonathan D. Glater, *Indictment Broadens in Shelters at KPMG*, N.Y. TIMES, Oct. 18, 2005, at C1 (quoting defense lawyers representing two of seventeen defendants in the KPMG tax shelter prosecution, who charged that prosecutors are taking "a misguided, overly aggressive, unprecedented view of a complicated legal area" and are "seriously overreaching" in bringing the charges); *HealthSouth: Scrushy Enters Not Guilty Plea to Charges He Bribed Governor*, CHI. TRIB., Oct. 29, 2005, at C2 (reporting that Richard Scrushy's lawyer claimed that Scrushy's indictment for political bribery was a product of overzealous prosecutors); Gretchen Ruethling, *Four Additional Charges for Black in Hollinger Case*, N.Y. TIMES, Dec. 16, 2005, at C4 (quoting Conrad Black's lawyer, who characterized new charges against his client as "unfounded" and "a blatant example of overreaching by the prosecutor"); Press Release, Arthur Andersen, LLP, Statement by Arthur Andersen, LLP (Mar. 14, 2002) (asserting that prosecution of the accounting firm would be unjust and "an extraordinary abuse of prosecutorial discretion") [hereinafter Andersen Mar. 14 Press Release] (on file with author).

[10] John R. Emshwiller & John M. Biers, *Enron Prosecutors Gain New Ally: Causey Plea May Offer Look into Top Officers' Actions Before Company's Collapse*, WALL ST. J., Dec. 29, 2005, at A3.

Enron Treasurer Andy Fastow, who was widely credited with engineering much of the Enron fraud, had already pled guilty and been cooperating for more than a year.[11] Causey's last minute defection, while not widely anticipated, was not without precedent. Surprise plea agreements reached on the eve of the Rite Aid trial, for example, left Rite Aid's Chief Legal Officer holding the bag.[12]

It is axiomatic that most criminal cases are resolved through guilty pleas, and the recent corporate fraud prosecutions are no exception. And, like Fastow and Causey, most corporate executives who have pled guilty have also become cooperating witnesses, agreeing to help the government build criminal cases against their former colleagues and friends.

I have written elsewhere about this building block technique and how it facilitates charging higher-ups like Skilling and Lay.[13] But this article turns to that rarer phenomenon of post-Enron prosecutions—cases that have actually gone to trial.

We know relatively little about the corporate fraud trials because executives on trial have been relatively few and far between. It has taken roughly three years for these prosecutions to reach the trial stage and yield enough trial-related data to report and analyze.[14] Thus, until now, our

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[11] Lay publicly placed most of the blame for Enron's woes at Fastow's feet. Lay Speech, *supra* note 6. Since Fastow had been accused of reaping enormous profits from the fraud and Causey had not, the addition of Causey to the prosecution's team was a strategic government home run. In addition, there was some suggestion that the defense lawyers would try to smear Fastow in the jury's eyes by introducing evidence of pornography habits "so extensive that when his computer files were seized they were submitted to the FBI for criminal investigation." Carrie Johnson, *Lawyers Take Aim at Enron Witnesses*, WASH. POST, Jan. 10, 2006, at D3 (quoting unspecified court filings submitted by the defense).

[12] *See infra* Appendix 1, at Rite Aid; *see also Ex-Chief Pleads Guilty in RiteAid Case*, N.Y. TIMES, June 18, 2003, at C10; *2 Defendants in Rite Aid Case Expected to Plead Guilty Today*, N.Y. TIMES, June 26, 2003, at C6; *Former Rite Aid Office Pleads Guilty*, N.Y. TIMES, June 6, 2003, at C4; Mark Maremont, *Rite Aid's Former Vice Chairman Doesn't Plead Guilty as Expected*, WALL ST. J., June 27, 2003, at A8; Mark Maremont, *Rite Aid's Ex-CEO Pleads Guilty: Grass Is First Executive Held Criminally Liable in Major Accounting Fraud*, WALL ST. J., June 18, 2003, at A3; *cf. Ex-Lawyer for Rite Aid Is Found Guilty*, N.Y. TIMES, Oct. 18, 2003, at C2; *Rite Aid Ex-Counsel Is Convicted: Guilty Verdict Marks First by a Jury in Current Crop of Corporate Scandals*, WALL ST. J., Oct. 20, 2003, at C8.

[13] Kathleen F. Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221, 263-75 (2004) [hereinafter Brickey, *Enron's Legacy*]; Kathleen F. Brickey, *From Enron To WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 370-75 (2003) [hereinafter Brickey, *Enron to WorldCom and Beyond*].

[14] In Brickey, *Enron's Legacy*, *supra* note 13, at 275, I examined the criminal enforcement environment and explored some of the principal characteristics of major corporate fraud prosecutions, including parallel civil and criminal enforcement activity, charging practices in criminal cases, and disposition of criminal charges. As few cases had

knowledge about these trials has been largely anecdotal. But after a brief hiatus following Arthur Andersen's obstruction of justice conviction in 2002,[15] high profile executives began to find themselves in the dock—beginning with Adelphia CEO John Rigas (guilty), WorldCom CEO Bernie Ebbers (guilty), HealthSouth CEO Richard Scrushy (not guilty),[16] and Enron CEOs Jeff Skilling and Ken Lay (currently on trial).

Now that we are deeply enough into the prosecution cycle that major cases have been tried, jury verdicts returned, and sentences imposed, this seems an opportune time to take a closer look at these prosecutions through the prism of newly compiled data on the trials. Although the number of cases is relatively small, the data set provides the most comprehensive picture of executives on trial available to date.

Part II of this article addresses a range of questions about corporate fraud trials and verdicts. Which and how many cases have gone to trial, who has been tried, and what is a typical outcome? Does the government enjoy a high degree of success at trial, or are high-profile executives more likely to win juries over to their side? Part II addresses these and other core trial-related questions.

Part III then turns to the flip side of the coin—cases that have ended in mistrials—and considers whether mistrials have been major government setbacks. How often have mistrials been declared? What factors come into play when a trial ends without a verdict? Were cases that ended in mistrials flawed from the outset? Are prosecutors' decisions about whether to retry a defendant a reliable gauge of the relative strength of the case? Are decisions to retry accompanied by discernable shifts in trial strategy? Part III provides a framework for taking a preliminary look at this intriguing set of issues.

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yet gone to trial at that time, the dispositions consisted primarily of guilty pleas, with a smattering of verdicts, mistrials, and dismissals.

[15] After a month-long trial, Andersen was convicted on the single count indictment charging the firm with violating 18 U.S.C. § 1512(b)(2) (2000). United States v. Arthur Andersen, LLP, 374 F.3d 281, 284 (6th Cir. 2004), *rev'd*, 125 S. Ct. 2129 (2005); *see* Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 WASH U. L.Q. 917 (2003). The Supreme Court later reversed, holding that the trial court's instructions did not correctly inform the jury of the mens rea required to prove a violation of 18 U.S.C. § 1512(b). Arthur Andersen, LLP v. United States, 125 S. Ct. 2129, 2136-37 (2005). The government ultimately decided not to retry the now-defunct firm and did not object to a motion made by David Duncan, the government's star cooperating witness in the Andersen case, to withdraw his guilty plea. John R. Emshwiller, *Andersen Figure Files to Withdraw His Guilty Plea*, WALL ST. J., Nov. 23, 2005, at C3.

[16] Scrushy has since been indicted on unrelated federal political bribery charges and is now awaiting trial. Milt Freudenheim, *Scrushy Faces New Charges of Bribing State Officials*, N.Y. TIMES, Oct. 27, 2005, at C18.

II. CORPORATE FRAUD TRIALS AND VERDICTS

A. TRIAL DATA

The data set used in this article covers the period March 2002 through January 2006 and is derived from my ongoing study of major corporate fraud prosecutions.[17] Although the full data base is far more comprehensive, this article extrapolates data relating to fraud cases that had gone to trial as of January 31, 2006,[18] and tracks trials relating to scandals at seventeen major companies and firms (Table 1). As of the end of January 2006, forty-six defendants had gone to trial in twenty-three separate prosecutions.

As a general rule, prosecutors typically charge multiple defendants in corporate fraud cases,[19] and this charging pattern is apparent in the cases that have gone to trial. More than two-thirds of the trials included in Table 1 had multiple defendants. Although four or more defendants were jointly tried in a handful of cases,[20] in most instances, no more than two defendants went to trial.

Table 1 does not, however, convey the full scope of the government's charging practices because it does not include co-defendants who bargained with prosecutors and did not go to trial. When those who entered guilty pleas are added to the mix, prosecutors charged three or more defendants in a third of the cases they tried. And when we include co-defendants who pled guilty while their colleagues went to trial, the total number of individuals charged in these cases will increase to sixty.

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[17] An earlier version of the complete data set was published in Brickey, *Enron To WorldCom and Beyond, supra* note 13, app. A, at 382-401. The earlier iteration, which tracked nearly sixty prosecutions arising out of fraud scandals at seventeen major corporations, covered the period March 2002–August 2003. As many of the cases charged multiple defendants, the database tracked charges against more than ninety defendants. I updated and analyzed much of that data in a more recent article, *Enron's Legacy*. *See* Brickey, *Enron's Legacy*, *supra* note 13, at 225-28, 245-75.

[18] A table containing the extrapolated data appears *infra* Appendix 1.

[19] *See* Brickey, *Enron to WorldCom and Beyond, supra* note 13, app. A, at 382-401.

[20] Four defendants were on trial in the Adelphia and Qwest trials. *See* United States v. Rigas, *infra* Appendix 1, at Adelphia; United States v. Graham, *id.* at Qwest. In the three Enron-related trials that had multiple defendants, six defendants were jointly tried in one case, *see* United States v. Bayly, *id.* at Enron, five went to trial in another, *see* United States v. Rice, *id.*, and two went to trial in the other, *see* United States v. Causey, *id.*

Table 1
Trials

Company	Number of Cases Tried[21]	Number of Defendants Tried
Adelphia	1	4
Cendant	1	2
CSFB	1	1
Duke Energy	1	2
Dynegy	1	1
Enron[22]	4	14
HealthSouth	3	4
ImClone[23]	2	3
Impath	1	1
McKesson HBOC	1	1
NewCom	1	1
Ogilvy & Mather	1	2
Qwest	1	4
Rite Aid	1	1
Tyco[24]	1	2
Westar Energy	1	2
WorldCom	1	1

Guilty pleas are critical to the government's successful pursuit of corporate fraud cases in two important respects. First, they are numerically significant. In a baseline study of prosecutions completed between March

[21] Table 1 does not include retrials following mistrials, *see infra* Table 6 and text accompanying notes 95-97, but includes other trials currently in progress.

[22] Three of the four Enron-related trials had multiple defendants. *See* United States v. Bayly, *infra* Appendix 1, at Enron; United States v. Rice, *id.*; United States v. Causey, *id.*

[23] Only one of the ImClone trials had multiple defendants. *See* United States v. Stewart (Martha), *id.* at ImClone.

[24] Tyco is the only state prosecution included in the trial data base.

2002 and July 2004, for example, charges against eighty-seven defendants were resolved.[25] But while more than ninety percent of the outcomes were convictions, only about ten percent of the convictions were products of jury verdicts. Simply put, these cases were overwhelmingly resolved through guilty pleas (Table 2).

Table 2

Disposition of Charges in Federal Corporate Fraud Prosecutions[26]
March 2002 – July 2004

Guilty Plea	Conviction	Acquittal	Hung Jury	Dismissal	Awaiting Trial
73	8	4	2	2	43

Second, guilty pleas are strategically significant. Virtually all of the defendants who pled guilty during that two-year period became cooperating witnesses[27] who assisted the government in developing cases against their peers.[28]

In the current study, while guilty pleas were less prevalent in the twenty-three cases that went to trial, one or more co-defendants entered guilty pleas in nearly a third of those cases. With only a few exceptions,[29] the defendants who pled guilty became cooperating witnesses.

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[25] This figure excludes two trial defendants whose juries had deadlocked.

[26] Table 2 includes criminal charges in the following fraud investigations: Adelphia, Cendant, Charter Communications, Credit Suisse First Boston, Dynegy, Enron, HealthSouth, Homestore, ImClone, Kmart, McKesson HBOC, NewCom, NextCard, PurchasePro, Qwest, Rite Aid, Symbol Technologies, Tyco (federal charge only), and WorldCom (federal charges only). Table 2 was originally published as Table 6 in Brickey, *Enron's Legacy*, *supra* note 13, at 264.

[27] The defendants included in Table 2 who pled guilty but did not enter into cooperation agreements are ImClone President and CEO Sam Waksal, *see* United States v. Waksal, *infra* Appendix 1, at ImClone; Enron Treasurer Ben Glisan, *see* United States v. Glisan, *id.* at Enron; and two executives in the NewCom prosecutions, *see* United States v. Kahn, *id.* at NewCom. Enron's Glisan, who is serving a five-year term, is reportedly cooperating from prison. Mary Flood, *The Fall of Enron: Prisoner Goes to See Grand Jury; Enron Ex-Official Likely Cooperating*, HOUS. CHRON., Mar. 5, 2004, Bus. Sec., at 1.

[28] For a more extended discussion of how prosecutors have used cooperating witnesses to build cases against higher-ups in the corporation, see Brickey, *Enron's Legacy*, *supra* note 13, at 263-75.

[29] The two defendants in the NewCom case who entered guilty pleas did not enter into cooperation agreements. *See* United States v. Khan, *infra* Appendix 1, at NewCom. Similarly, the defendant who pled guilty in the Impath case does not appear to have agreed to cooperate. *See* United States v. Adelson, *id.* at Impath.

Table 3
Cases Tried with Guilty Pleas by Co-Defendants

Company	Guilty Verdicts	Not Guilty Verdicts	Mistrials[30]	Guilty Pleas by Co-Defendants
Adelphia	2	1	1	1
Duke Energy	0	1	1	1
Dynegy	1	0	0	2
Enron[31]	0	0	5	3
Impath	1	0	0	1
NewCom	2	1	0	2
Rite Aid	1	0	0	3

This does not, however, portray the full importance of cooperating witnesses in these trials. There are numerous separate but related cases in which defendants pled guilty and agreed to help prosecutors develop cases against, among others, defendants who ultimately went to trial (Table 4).

Given the prevalence of guilty pleas and their pivotal role in these investigations, the question then becomes who actually goes to trial? Prosecutors have been chided for not aiming high enough and being content to charge mid-level managers whose guilt is easier to prove. But is it true that those in the middle are relegated to the role of scapegoat while the higher-ups enjoy a free pass? If the trial data are a reliable indicator, quite the opposite is true. Most of the defendants on trial have been high-level executives who held positions of responsibility and authority within their respective organizations.[32]

[30] By number of defendants affected. Includes partial acquittal accompanied by hung jury on other charges; does not include or reflect disposition after mistrial was declared.

[31] Only two of the Enron prosecutions that have gone to trial (United States v. Rice, *see infra* Appendix 1, at Enron, and United States v. Causey, *id.*) had co-defendants who became cooperating witnesses. But, in another, Enron Treasurer Ben Glisan, who pled guilty in a separate case but did not enter into a cooperation agreement, was granted immunity in exchange for his testimony in United States v. Bayly, see *id.*; *10 Enron Players: Where They Landed After the Fall*, N.Y. TIMES, Jan. 29, 2006, § 3, at 10, and in the trial of Skilling and Lay. Alexei Barrionuevo, *Ex-Treasurer Testifies Skilling Left Enron in Weak Shape*, N.Y. TIMES, Mar. 22, 2006, at C3.

[32] This conclusion is fully consistent with an earlier sampling from the data base that was not limited to defendants who elected to go to trial. *See* Brickey, *Enron's Legacy*, *supra* note 13, at 255-56.

Table 4

Cooperating Witnesses in Separate but Related Prosecutions

Company	Related Cases With Cooperating Witnesses	Cooperating Witnesses
Adelphia	1	1
Cendant	3	3
CSFB	0	0
Duke Energy	0	0
Dynegy	1	4
Enron		
Case 1[33]	1	1
Case 2[34]	2	2
Case 3[35]	1	1
HealthSouth		
Case 1[36]	12	15
Case 2[37]	2	2
Case 3[38]	4	4
ImClone		
Case 1[39]	1	1
Case 2[40]	0	0

[33] United States v. Arthur Andersen, L.L.P. *See infra* Appendix 1, at Enron.

[34] United States v. Rice, *id.*

[35] United States v. Bayly, *id.* Enron Treasurer Ben Glisan, who pled guilty in a separate case but did not enter into a cooperation agreement, was granted immunity in exchange for his testimony in *Bayly*.

[36] United States v. Scrushy, *id.* at HealthSouth.

[37] United States v. Thomson, *id.*

[38] United States v. Crumpler, *id.* These numbers are derived from reports of others who pled guilty and testified against the defendant. Because the underlying fraud in this case is intertwined with the overall fraudulent scheme, it is possible that other defendants who were cooperating witnesses in *United States v. Scrushy (Case 1)*, *id.*, also assisted in developing the case against the defendant in *Crumpler*.

[39] United States v. Stewart (Martha), *id.* at ImClone.

Table 4 (continued)

Cooperating Witnesses in Separate but Related Prosecutions

Company	Related Cases With Cooperating Witnesses	Cooperating Witnesses
McKesson HBOC	2	2
NewCom	1	1
Ogilvy & Mather	0	0
Qwest	1	1
Rite Aid	2	2
Tyco	0	0
Westar Energy	0	0
WorldCom	4	5

Of the forty-six defendants who have gone to trial, twelve held the title of Chief Executive Officer, Chief Operating Officer, President, Chairman of the Board or, in the case of a partnership, Senior Partner.[41] Defendants on trial also included five Chief Financial Officers[42] and an assortment of other financial and accounting executives.[43] There were also seven Executive or Senior Vice presidents, five Investment Advisors, a Chief Legal Officer, and a Vice President for Legal Affairs.[44] Only one entity, Arthur Andersen, has gone to trial to date.[45]

[40] United States v. Stewart (Larry), *id.*

[41] Those in this group were high level executives at Adelphia, Cendant, Enron Broadband Services, HealthSouth, Impath, Martha Stewart Living Omnimedia, Ogilvy & Mather (Senior Partner and Executive Group Director), Tyco, Westar, and WorldCom. *See infra* Appendix 1.

[42] They were CFOs of Adelphia, McKesson HBOC, NewCom, Ogilvy & Mather, and Qwest. *See infra* Appendix 1.

[43] Among the accounting and financial executives were three vice presidents, a controller and an assistant controller, and officers who held the titles of Director of Internal Reporting, Accountant and Senior Division Director, and Senior Director of Transactional Accounting. The breakdown and affiliations of these defendants is shown in fuller detail *infra* Appendix 1.

[44] The breakdown and affiliations of these defendants is shown in fuller detail *infra* Appendix 1. The remaining defendants who are not mentioned in the previous enumeration of defendants who went to trial include two vice presidents and a Secret Service Lab employee who was charged with lying when he testified as an expert witness for the government in Martha Stewart's trial.

[45] *See supra* note 15.

B. VERDICTS

The trials tracked in this study have produced surprisingly mixed results. Juries have convicted eighteen defendants, acquitted eleven, and deadlocked on charges against fifteen others. Thus, at first blush, the government's trial record does not reflect overwhelming success and appears to validate—or at least provide support for—the criticism that prosecutors have overreached by trying to find crimes where none really exist.[46]

Introduction of another variable—how juries function when defendants are jointly tried—may help to flesh out the picture and provide a baseline for assessing the strength of cases the government takes to trial. Do juries tend to accept or reject the government's case in its entirety when defendants are jointly tried? That is, do they tend to convict or acquit all of the defendants on trial? If so, that signals that the prosecution's case, *in toto*, was relatively strong or weak. Or, in the alternative, do juries tend to hand down split verdicts (i.e., some combination of guilty, not guilty, or deadlocked) when multiple defendants are on trial? If so, do the split verdicts shed light on the overall merits of the case? Table 5 sets the stage for analyzing these points.

[46] *See, e.g.*, Kathy M. Kristof & Josh Friedman, *KPMG Tax Case Grows: Ten More People Are Indicted over Alleged Fraudulent Shelters Promoted by the Firm*, L.A. TIMES, Oct. 18, 2005, at C1 (reporting that one defendant's lawyer said the prosecutors were "seriously overreaching in this case"); Andersen Mar. 14 Press Release, *supra* note 9 (asserting that prosecution of the accounting firm would be unjust and "an extraordinary abuse of prosecutorial discretion"); John R. Emshwiller, *An Ambitious Enron Defense: Company's Moves Were All Legal; with $40 Million War Chest, Skilling Calls on Lawyer with Business Expertise; Hiring a Sociology Professor*, WALL ST. J., Jan. 20, 2006, at A1 (reporting that defense lawyers will argue that the indictment of Skilling and Lay targets what in reality are ordinary business and accounting decisions); Lay Speech, *supra* note 6 (claiming that the Enron Task Force failed to meet its projected time table for bringing all Enron-related indictments, not because the cases were complicated, but "because it is complicated to find crimes where they do not exist").

Table 5
Verdicts[47]

Company	Convictions	Acquittals	Mistrials
Adelphia	2	1	1
Cendant	1	0	1
CSFB	0	0	1
Duke Energy	0	1	1
Dynegy	1	0	0
Enron			
Case 1[48]	1	0	0
Case 2[49]	5	1	0
Case 3[50]	0	0	5
HealthSouth			
Case 1[51]	0	1	0
Case 2[52]	0	2	0
Case 3[53]	1	0	0
ImClone			
Case 1[54]	2	0	0
Case 2[55]	0	1	0
Impath	1	0	0
McKesson HBOC	0	1	0

[47] Table 5 does not include verdicts obtained in retrials following a mistrial. Nor does it include *United States v. Causey (Enron Case 4)*, *see infra* Appendix 1, at Enron, which began while this article was in press and was expected to last another three months.

[48] United States v. Arthur Andersen, L.L.P, *id.*

[49] United States v. Rice (Enron Broadband Services prosecution), *id.*

[50] United States v. Bayly (Nigerian barge deal prosecution), *id.*

[51] United States v. Scrushy, *id.* at HealthSouth.

[52] United States v. Thomson, *id.*

[53] United States v. Crumpler, *id.*

[54] United States v. Stewart (Martha), *id.* at ImClone.

[55] United States v. Stewart (Larry), *id.*

Table 5 (continued)
Verdicts[56]

Company	Convictions	Acquittals	Mistrials
NewCom	0	1	0
Ogilvy & Mather	2	0	0
Qwest	0	2	2
Rite Aid	1	0	0
Tyco			
Case 1[57]	0	0	2
Case 2[58]	0	1	0
Westar Energy	0	0	2
WorldCom	1	0	0

As seen in Table 5, juries arrived at split verdicts in half of the cases in which multiple defendants were tried. As an initial matter, the verdicts in the Qwest and Duke Energy trials suggest that the cases were relatively weak. The juries in both trials split down the middle, acquitting half of the defendants and deadlocking on the rest. But the picture is incomplete until we know the ultimate disposition of the charges on which the juries hung. In the Qwest case, for example, rather than going through the rigors of a second trial, the two remaining defendants pled guilty and became cooperating witnesses. Thus, when all was said and done, the government ultimately prevailed against all four Qwest defendants. Duke Energy, in contrast, went the opposite way when the prosecutor decided to drop the remaining charges rather than retry the case.

In two other split verdict cases, Adelphia and Cendant, the juries convicted half of the defendants and either acquitted or deadlocked on the others. And in Enron Case 2, five of the six defendants were found guilty while only one was acquitted. In two of the multiple defendant trials that did not end with split verdicts, ImClone Case 1 and Ogilvy & Mather, the juries convicted all of the defendants. In the three remaining non-split

[56] *See supra* note 47.
[57] State v. Kozlowski, *see infra* Appendix 1, at Tyco.
[58] State v. Belnick, *id.*

verdict trials, hung juries resulted in mistrials for all of the defendants on trial.[59]

The government's record was equally mixed in cases in which only one defendant went to trial. Juries in those cases convicted six defendants, acquitted five, and deadlocked on one.

What explains this mixed trial record? As is true in other contexts, issues of complexity, witness credibility, juror sophistication, and myriad unquantifiable factors—including luck—can influence the outcome of a trial.[60] To illustrate just what can go wrong and how, let's consider what is perhaps the government's biggest loss to date.

In what once appeared to be one of the strongest fraud cases against a high-level corporate executive,[61] the prosecution of HealthSouth CEO Richard Scrushy totally collapsed. While other factors undoubtedly contributed to the jury's verdict of acquittal, one that clearly stands out is the indictment itself. Sweeping in its breadth, the more than eighty-count indictment (later pared down to thirty-six) included multiple charges of conspiracy, mail and wire fraud, securities fraud (under two different statutes), false statements, certification of false financial statements (including attempt), money laundering, obstruction of justice, and perjury.[62] After five months of sometimes mind-numbing testimony during a leisurely-paced trial, and after weeks of equally leisurely deliberations, the jury acquitted Scrushy on all counts.

Beyond the issues of complexity and juror boredom in the Scrushy case lurked the government's heavy reliance on the testimony of former executives who had pled guilty.[63] Once thought to be a plus because all five former CFOs were among the cooperating witnesses,[64] reliance on witnesses who had pled guilty proved to be a liability at trial. In addition to

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[59] United States v. Rice (Enron Case 3), *id.* at Enron; State v. Kozlowski (Tyco Case 1), *id.* at Tyco; United States v. Wittig (Westar Energy), *id.* at Westar Energy Inc.

[60] These and other related factors that appear to have contributed to mistrials in corporate fraud prosecutions are considered in Part III.

[61] Reed Abelson & Jonathan Glater, *A Style That Connected With Hometown Jurors*, N.Y. TIMES, June 29, 2005, at C1; Kyle Whitmire, *Jurors Doubted Scrushy's Colleagues*, N.Y. TIMES, July 2, 2005, at C5 [hereinafter Whitmire, *Jurors Doubted Scrushy's Colleagues*]. By the time Scrushy went to trial, fifteen HealthSouth executives, including all five former CFOs, had pled guilty and become cooperating witnesses.

[62] Abelson & Glater, *supra* note 61; Dan Morse et al., *HealthSouth's Scrushy Is Acquitted: Outcome Shows Challenges for Sarbanes-Oxley Act: SEC Suit Still Ahead; No Job Offer From Company*, WALL ST. J., June 29, 2005, at A1; Kyle Whitmire, *Determined to Find Guilt, But Expecting Acquittal*, N.Y. TIMES, June 29, 2005, at C5.

[63] Morse et al., *supra* note 62; Whitmire, *Jurors Doubted Scrushy's Colleagues*, *supra* note 61.

[64] *See supra* note 61.

doubting those witnesses, who had something to gain because of their plea deals with the prosecutors, jurors further questioned the credibility of one who was a tax cheat,[65] of another who took antidepressants, and of yet another who cheated on his wife.[66] Prosecutors were also disadvantaged by the lack of a paper trail directly linking Scrushy to the fraud,[67] an unfortunate choice of venue,[68] Scrushy's waging of an effective public relations campaign before and during the trial,[69] and—believe it or not—the lack of fingerprint evidence.[70]

The Scrushy trial exemplified the adage that if something can go wrong, it will. But the combination of factors that contributed to Scrushy's acquittal cannot, standing alone, explain why the government has won so few cases at trial.

III. MISTRIALS

Prosecutors want—and often rightly expect—to win cases, and it goes without saying that convictions are wins and acquittals are not. But what about mistrials? When a jury is deadlocked and cannot decide whether to convict or acquit, should this be counted as a serious loss for the prosecution? Or is it merely a draw?

According to conventional wisdom, mistrials are defeats for the government, particularly in high-profile prosecutions. When the jury deadlocked in the obstruction of justice case against former CSFB star banker Frank Quattrone, for example, observers called the mistrial "a

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[65] Morse et al., *supra* note 62.

[66] *Id.*; Whitmire, *Jurors Doubted Scrushy's Colleagues*, *supra* note 61.

[67] Abelson & Glater, *supra* note 61.

[68] Morse et al., *supra* note 62.

[69] Whitmire, *Jurors Doubted Scrushy's Colleagues*, *supra* note 61. For the latest bizarre twist on the public relations front, see Evan Perez & Corey Dade, *Scrushy Denies Trying to Buy Support: HealthSouth Ex-CEO Paid PR Firm, Writer and Pastor During His Criminal Trial*, WALL ST. J., Jan. 20, 2006, at A12, and Simon Romero & Kyle Whitmire, *Writer Says Scrushy Paid Her to Write Favorable Articles*, N.Y. TIMES, Jan. 20, 2006, at C3.

[70] Abelson & Glater, *supra* note 61; Morse et al., *supra* note 62; Simon Romero & Kyle Whitmire, *Former Chief of HealthSouth Acquitted in $2.7 Billion Fraud: Case Fails to Sway Jury in Scrushy's Hometown*, N.Y. TIMES, June 29, 2005, at A1; Chad Terhune & Dan Morse, *Why Scrushy Won His Trial and Ebbers Lost*, WALL ST. J., June 30, 2005, at C1; Kyle Whitmire, *Determined to Find Guilt, but Expecting Acquittal*, N.Y. TIMES, June 29, 2005, at C5; Whitmire, *Jurors Doubted Scrushy's Colleagues*, *supra* note 61; *cf.* Linda Deutsch, *"CSI" and "Law & Order" Lead Jurors to Great Expectations*, ST. LOUIS POST-DISPATCH, Jan. 30, 2006, at D1 (describing how *"CSI"* effect has given jurors unrealistic expectations of high-tech forensic evidence in run-of-the-mill cases where such evidence is rare).

serious setback" for the prosecution team.[71] Similarly, the hung jury in the Enron Broadband trial was termed a "big zero" for the government that would provide "a major confidence boost" to defense lawyers in coming high profile trials, including that of Enron's Jeff Skilling and Ken Lay.[72] Others called the Broadband mistrial a setback and a "second blow" for the Enron prosecutors,[73] coming as it did on the heels of the Supreme Court's reversal of Arthur Andersen's obstruction of justice conviction.[74]

Thus we turn to the question of how many and which of the government's cases ended in mistrials and what the mistrials signify. Let's begin with a thumbnail sketch of the eight prosecutions that resulted in a mistrial on at least some of the charges.

• **Adelphia:** Adelphia founder John Rigas, his sons Timothy and Michael, and Michael Mulcahey—all Adelphia executives—were charged with looting the company of more than $100 million.[75] The jury found John and Timothy guilty, Mulcahey not guilty, and deadlocked on the charges against Michael Rigas.

• **Cendant:** Cendant Chairman of the Board Walter Forbes and Executive Vice President and Vice Chairman Kirk Shelton were accused of inflating revenue at CUC International[76] by $500 million. The jury convicted Shelton but could not reach a verdict on the charges against Forbes.

• **CSFB:** Frank Quattrone, Head of CSFB's Global Technologies Group, was tried on three counts of obstruction of justice for ordering the destruction of files. A hung jury resulted in a mistrial.

• **Duke Energy:** Three Duke energy trading executives were charged with manipulating the company's gas and power trades and falsifying its books to increase reported profits. One defendant, who pled guilty and became a cooperating witness, did not go to trial. Of the two who were tried, the jury acquitted one on all charges, but returned a partial verdict for

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[71] Andrew Ross Sorkin, *Hung Jury Ends Trial of Banker: Setback for Prosecution of Misconduct on Wall St.*, N.Y. TIMES, Oct. 25, 2003, at A1.

[72] John R. Emshwiller, *Federal Jury Declines to Convict at an Enron Trial*, WALL ST. J., July 21, 2005, at C4.

[73] Mary Flood, *Broadband Trial: The Outcome; No Guilty Verdicts in Latest Enron Case; Results of Fraud Case Spell Trouble for Prosecutors in Future Trials, Legal Experts Say*, HOUS. CHRON., July 21, 2005, at A1 [hereinafter Flood, *No Guilty Verdicts*].

[74] *See supra* note 15.

[75] The defendants were accused of treating the company like a "private piggy bank." Peter Grant et al., *Prosecutors Say Rigases Stole from Adelphia*, WALL ST. J., Mar. 2, 2004, at C4.

[76] CUC merged with HFS Inc. to form Cendant. Both defendants were high-level executives at CUC as well.

the other, acquitting him on some charges but deadlocking on others. The judge declared a mistrial on the unresolved charges.

• **Enron:** The government charged seven executives of Enron Broadband Services with misrepresenting the value and business capabilities of the internet venture. Two of the seven pled guilty and became cooperating witnesses, while the other five went to trial. The jury returned partial verdicts of acquittal for three of the defendants, but could not reach a verdict on the remaining charges against them. The jury also deadlocked on all of the charges against the remaining two defendants.

• **Qwest:** Four executives of Qwest Communications were accused of inflating the company's revenue by more than $100 million. The jury acquitted two of the executives but deadlocked on charges against the other two.

• **Tyco:** The six-month trial of Tyco CEO Dennis Kozlowski and CFO Mark Swartz for looting the company of $600 million ended in a mistrial.

• **Westar Energy:** The jury could not reach a verdict in the trial of Westar's CEO and its Executive Vice President for looting the utility company.

Conventional wisdom holds that cases ending in mistrials are marginal to begin with.[77] But how do prosecutors view them? On the one hand, it seems safe to assume that prosecutors would think twice before devoting scarce resources to retrying cases they thought they would lose. On the other hand, if these cases are not necessarily weak to begin with, how can we explain why more than a third have ended in mistrials?

To put this question in context, let's look first at the circumstances surrounding the inconclusive results in the Tyco, Enron Broadband, and CSFB trials.

Juror Publicity: Technically speaking, Tyco ended in a mistrial because of publicity surrounding a courtroom incident in which a juror reportedly gave an "O.K." sign to the defense table.[78] I say "technically"

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[77] Michael Graczyk, *Jury Acquits Former Enron Execs of Some Charges and Deadlocks on Others*, ST. LOUIS POST-DISPATCH, July 21, 2005, at C3 (noting that the jury's inability to reach a verdict "tells us something of the government's use of its resources in this case" (quoting Barry Pollack, a lawyer for one of the defendants)); Thor Valdmanis, *Quattrone Mistrial Doesn't Bode Well for Future Cases*, USA TODAY, Oct. 26, 2003, *available at* http://www.usatoday.com/money/industries/brokerage/2003-10-26-quattrone_x.htm (predicting that the government's decision whether to retry Quattrone would signal that prosecutors would be "less aggressive" in pursuing questionable cases (quoting Jack Sylvia, a partner at Mintz Levin, who was not involved in the case)).

[78] David Carr & Adam Liptak, *In Tyco Trial, an Apparent Gesture Has Many Meanings: Publicity to Prompt Mistrial Motion*, N.Y. TIMES, Mar. 29, 2004, at C1; Mark Maremont & Kara Scannell, *Tyco Jury Resumes Deliberating: Defense Fails in Mistrial Bid Based on*

because the atmosphere during jury deliberations had become "poisonous,"[79] and it appeared that the juror would be a holdout in any event.[80] But the contentious deliberations were partly a byproduct of a failed prosecution strategy that allowed the six-month trial to be dominated at times by lavish lifestyle evidence that had little to do with proving the charges against Kozlowski and Swartz,[81] and at other times to become bogged down in complexity.[82] In what must have been a mind-numbing experience, the jury heard testimony from forty-eight witnesses and considered some seven hundred exhibits.

Truncated Deliberations: The Enron Broadband trial ended in a mistrial when the jury declared itself deadlocked after only four days of deliberations.[83] Over those four days, the jury had reached not guilty verdicts on twenty-four counts of the indictment, but declared itself deadlocked on the remaining 168 charges. To some observers, declaring a mistrial so early in deliberations that followed a lengthy, complex case with nearly two hundred charges against five defendants seemed a bit "quick on

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Media Coverage of Juror, but Incident Could Fuel Appeal, WALL ST. J., Mar. 30, 2004, at C1.

[79] Mark Maremont et al., *Mistrial Scuttles Possible Guilty Verdicts in Tyco Case: Jurors Criticize Prosecution, Defense for Clumsy Tactics; Lessons Learned for Retrial*, WALL ST. J., Apr. 5, 2004, at A1.

[80] Andrew Ross Sorkin, *Juror No. 4 Says No O.K. Sign and No Guilty Vote*, N.Y. TIMES, Apr. 7, 2004, at A1.

[81] Mark Maremont & Chad Bray, *Tyco Trial Jurors Say Defendants Weren't Credible: Conviction of Kozlowski, Swartz Highlights Risk of Executives' Testifying*, WALL ST. J., June 20, 2005, at A1 [hereinafter Maremont & Bray, *Tyco Defendants Weren't Credible*]. The evidence included video tapes of a bacchinale-like birthday bash in Sardinia (underwitten in part by Tyco) and a virtual tour of a posh New York apartment (also paid for by Tyco) equipped with exotic furnishings that included a now notorious $6,000 shower curtain. John Schwartz, *I Don't Want to Calculate the Cost to Matriculate*, N.Y. TIMES, Oct. 9, 2005, § 3, at 26.

[82] Pete McEntegart, *One Angry Man: A Juror Gives An Inside Account of Why the Tyco Trial Fell Apart*, TIME, Apr. 12, 2004, at 47 (noting that the jury heard testimony from 48 witnesses, that more than 700 exhibits had been introduced, and that the testimony produced more than 12,000 pages of transcript). Maremont & Bray, *Tyco Defendants Weren't Credible*, *supra* note 81. Both men were later sentenced to lengthy prison terms. Andrew Ross Sorkin, *Ex-Tyco Officers Get 8 to 25 Years: 2 Sentenced in Crackdown on White-Collar Crime*, N.Y. TIMES, Sept. 20, 2005, at A1 (reporting that Kozlowski and Swartz were both sentenced to serve 8 1/3 to 25 years in prison). The two men were remanded to custody immediately after they were sentenced, and the judge refused to release them on bail pending appeal. *Bail Denied to Two Tyco Executives*, N.Y. TIMES, Oct. 4, 2005, at C2.

[83] John R. Emshwiller, *Federal Jury Declines to Convict at an Enron Trial*, WALL ST. J., July 21, 2005, at C4. Not surprisingly, the prosecutors strenuously objected to such an early end to the deliberations.

the trigger."[84] Indeed, the judge's abrupt halt to the deliberations prompted one defense lawyer to complain that "[t]here was no logic to this at all."[85]

Witness Credibility: In the CSFB trial, although three jurors steadfastly held out for an acquittal, others vacillated on the question of guilt.[86] After the mistrial was declared, one juror posited that the only reason Frank Quattrone had not been acquitted was his decision to take the stand. The credibility of his testimony was seriously compromised during cross-examination, when the government produced e-mails that contradicted his testimony in chief.[87] "He did a bad job going up there. . . . I heard a lot of jurors say if he hadn't been a witness, it would have been 'not guilty' the first day."[88] Thus, in contrast with the Tyco trial, in which the prosecutors' trial strategy may have backfired with the jury, the defense decision to put Quattrone on the stand appears to have been a pivotal strategic mishap in the jury's eyes.[89]

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[84] Flood, *No Guilty Verdicts*, *supra* note 73 (quoting Robert Mintz, a frequent legal commentator on high profile white collar trials). *But see Vioxx Case Leads to Hung Jury: Retrial Planned in 2001 Death*, WASH. POST., Dec. 13, 2005, at A10 (mistrial declared in first federal Vioxx trial after jury had just begun fourth day of deliberations; judge had admonished jury to reach a verdict in a "reasonable time" and declared that "[i]t has now been a reasonable time [and w]e cannot get a verdict"); Alex Berenson, *A Mistrial Is Declared in 3rd Suit Over Vioxx*, N.Y. TIMES, Dec. 13, 2005, at C1 (mistrial declared in first federal Vioxx trial after jury deliberated eighteen hours over three days).

[85] Flood, *No Guilty* Verdicts, *supra* note 73 (quoting defense lawyer Ed Tomko, who represented one of the defendants in the case).

[86] Randall Smith & Kara Scannell, *Inside Quattrone Jury Room, Discord Culminates in Mistrial*, WALL ST. J., Oct. 27, 2003, at A1.

[87] *Id.*

[88] Andrew Ross Sorkin, *Quattrone Juror Says Three Wouldn't Budge*, N.Y. TIMES, Oct. 27, 2003, at C11. Credibility was also a factor in the retrial of Tyco's Kozlowski and Swartz. Maremont & Bray, *supra* note 81.

[89] Evidently believing that—like the prosecutors in the Tyco case—he had learned from his mistakes, Quattrone testified again in his second trial. This strategic move came at a price, however, because his admission of knowledge of the contents of the e-mails produced in the first trial also served to undermine the fundamental basis for his claimed innocence. To the surprise of his supporters, the jury returned guilty verdicts after less than a day of deliberations. Randall Smith, *In Quattrone Case, 'Nice' Prosecutor Wins: Jurors Checked Emotions at the Door*, WALL ST. J., May 4, 2004, at C1; Randall Smith, *Quattrone Found Guilty on 3 Counts in Big U.S. Win: Former CSFB Star Banker Could Face 2 Years in Jail; A Case Built on E-Mail*, WALL ST. J., May 4, 2004, at A1; Andrew Ross Sorkin, *Wall St. Banker Is Found Guilty of Obstruction*, N.Y. TIMES, May 4, 2004, at A1. The decision whether to put the defendant on the stand may, of course, be pivotal in trials in which juries reach unanimous verdicts. In the prosecution against WorldCom CEO Bernie Ebbers, for example, his decision to testify hurt more than it helped. Jesse Drucker & Li Yuan, *'How Could He Not See?': Documents Swayed Ebbers Jury*, WALL ST. J., Mar. 17, 2005, at C1; Jonathan D. Glater & Ken Belson, *Ebbers, on Witness Stand, May Have Lost His Case*, N.Y. TIMES, Mar. 16, 2005, at C1. And jurors in the retrial of Tyco executives Dennis

Complexity: As mentioned before, prosecutors in the Tyco trial allowed the case to become bogged down in complexity, and that undoubtedly contributed to the jury's inability to reach a verdict for or against either Kozlowski or Swartz.

Perhaps demonstrating that mistrials can be a blessing for whoever performed the worst at trial,[90] the Tyco prosecutors learned from their mistakes. On retrial, they trimmed the number of witnesses by half and scrapped much of the lifestyle and spending evidence. Although the second trial still consumed about four months and jury deliberations continued for eleven days, the prosecutors were vindicated in the end. Handing the prosecutors a major win, the jury convicted both Kozlowski and Swartz.

Federal prosecutors have been similarly plagued by charging practices that often make trials overly complex. The trial of four Qwest executives on a forty-four count indictment for conspiracy, securities fraud, false statements, and wire fraud ended in disappointment for prosecutors when the jury acquitted two of the defendants and deadlocked on charges against the other two. Afterward, jurors expressed annoyance that the government seemingly "threw everything" at the defendants and "hoped something would stick"[91] and said the overall case was hard to understand.[92]

Not long after the end of that trial, the ongoing fraud investigation culminated in the December 2005 indictment of Qwest CEO Joseph Nacchio. But this time, the charges were surprisingly focused. While similar in one respect to the earlier Qwest indictment—Nacchio was charged with forty-three counts—it was different in that *all* of the charges

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Kozlowski and Mark Swartz concluded that neither defendant was a credible witness and that Swartz came across as "a really good liar" on the stand. Maremont & Bray, *Tyco Trial Defendants Weren't Credible*, *supra* note 81.

In contrast, post-verdict comments after the Martha Stewart trial suggested that the decision not to put the defendants on the stand was a "serious mistake." Jonathan D. Glater, *Defense Gambled, and Lost, With a Minimal Presentation*, N.Y. TIMES, Mar. 6, 2004, at B1. As one juror put it, "How could we tell anything about how smart either of them was if they never took the stand?" *Id.* And then there was the possibility that her failure to tell the jury her side of the story created the impression that she was arrogant or aloof. As another juror posited, "[By not testifying, Stewart] seemed to say: 'I don't have anything to worry about. I fooled the jury. I don't have anything to prove.'" Memorandum of Law in Support of Martha Stewart's Motion for New Trial Pursuant to Federal Rule of Criminal Procedure 33, at 14, United States v. Stewart, S1-03-Cr-717 (MGC) (S.D.N.Y. Mar. 31, 2004) (on file with author).

[90] Carrie Johnson, *For Prosecutors, Shorter Is Sweeter: Government Got Chance To Analyze, Fix Mistakes*, WASH. POST, June 18, 2005, at D1.

[91] Shawn Young & Dionne Searcey, *Qwest's Ex-CEO Is Charged in Probe of Insider Trading*, WALL ST. J., Dec. 21, 2005, at A3.

[92] Ken Belson, *U.S. Tries Simpler Tack Against Ex-Chief of Qwest*, N.Y. TIMES, Jan. 20, 2006, at C3.

were insider trading allegations. Although the charges are ultimately tied to what Nacchio knew about Qwest's financial outlook, which he publicly painted as rosy while he privately knew it was grim, the indictment does not try to link him to the underlying accounting fraud. And by focusing on just one crime, the government increases its chances of proving a pattern of illegal activity—repeatedly selling stock on the basis of inside information—which in theory should make it easier to convict. Simply put, this change in charging strategy simplifies the case for the jury.[93] Indeed, one securities lawyer commented that the government may well be using the strategy it successfully employed in several previous prosecutions. "If you look at Bernie Ebbers, Adelphia, and Martha Stewart, the government has done an exceptional job when they keep it simple so juries understand."[94]

These glimpses at the dynamics of several high-profile trials provide possible, perhaps plausible, explanations for the outcomes. But at the end of the day, we can only speculate on the myriad reasons why these cases resulted in mistrials and partial acquittals. That said, we do have data that facilitate a relatively informed analysis of whether the mistrials signaled failed criminal prosecutions.

What happened after the mistrials were declared? Did the government give up because it thought the cases were losers? Or did the prosecutors persevere? The data in Table 6 tell a compelling story.

In seven of the eight cases that ended in mistrials, prosecutors signaled their intention to retry the defendants.[95] The government's decision to retry most, if not all, of the defendants indicates that prosecutors have a greater degree of confidence in the merits of the cases than one might otherwise

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[93] *Id.*; Young & Searcey, *supra* note 91.

[94] Christopher Palmeri, *The Case Against Qwest's Nacchio: The Telecom's Former CEO Has Finally Been Indicted—For Fraud and Insider Trading. Getting a Conviction Will Be No Slam Dunk*, BUSINESSWEEK ONLINE, Dec. 24, 2005, http://www.businessweek.com/technology/content/dec2005/tc20051221_927069.htm.

The prosecutors have also streamlined their cases for the retrial of defendants in the Enron Broadband Services case (*see* Mary Flood, *Five Former Enron Execs Reindicted*, HOUS. CHRON., Nov. 10, 2005, at B1) and the trial of Enron's Skilling and Lay. Alexei Barriounuevo, *Prosecutors Shift Focus on Enron*, N.Y. TIMES, Jan. 11, 2006, at C1; Kurt Eichenwald, *Big Test Looms for Prosecutors at Enron Trial*, N.Y. TIMES, Jan. 26, 2006, at A1; Mary Flood, *Government Plans to Trim Witness List*, HOUS. CHRON., Dec. 2, 2005, at B4.

[95] When the mistrial was declared in the Duke Energy case, it was uncertain whether the remaining defendant would be retried, *see Mistrial in Case of Former Duke Energy Executive*, N.Y. TIMES, Dec. 10, 2005, at B2, but the prosecutor ultimately decided to drop the remaining charges. Peter Geier, *A Defense Win in the Heart of Enron Country*, NAT'L L.J., Jan. 23, 2006, at 6.

expect. That logically raises the question whether their confidence is warranted. What outcomes flow from the decision to retry?

Table 6

Disposition of Cases Ending in Mistrial

Company	Remaining Defendants	Guilty Plea	Cooperation Agreement	Retrial	Guilty Verdict	Second Mistrial
Adelphia	D-1	√				
Cendant	D-1			√		√
CSFB	D-1			√	√	
Duke Energy	D-1			x		
Enron Broadband Services	D-1			Pending (2006)		
	D-2			Pending (2006)		
	D-3			Pending (2006)		
	D-4			Pending (2006)		
	D-5			Pending (2006)		
Qwest	D-1	√	√			
	D-2	√	√			
Tyco	D-1			√	√	
	D-2			√	√	
Westar Energy	D-1			√	√	
	D-2			√	√	

The answer is fairly straightforward. To date, prosecutors have enjoyed considerable success after mistrials were declared. As seen in Table 6, defendants in two cases pled guilty to avoid the perils of a retrial, and in three of the four retrials, the juries convicted all the remaining defendants.[96] None of the retried defendants has been acquitted.

[96] Retrials of the Enron Broadband Services defendants are scheduled for 2006.

After the Cendant retrial ended with a second hung jury, one might reasonably have expected the prosecutor to throw in the towel. But it seems that a majority of the jury had favored conviction and that the prosecutor would gear up for another new trial, so the judge set a tentative date for a second retrial.[97]

Simply put, the results in three of the retrials are wins for the prosecution, and the fourth is a draw. Thus, prosecutors must surely—and perhaps, justifiably—view their success rate following mistrials as a vindication of the initial decision to prosecute.

IV. CONCLUSION

The corporate fraud prosecution cycle following Enron's collapse has produced an unparalleled number of criminal trials of senior corporate executives in just three years. While guilty pleas and cooperation agreements are strategically significant in developing these cases, the number of CEOs, CFOs, and other senior managers who have been charged and tried belies critics' assertions that mid-level managers who plead guilty become scapegoats, while their superiors go scot free.

Although at first glance the results of the corporate fraud trials seem surprisingly mixed, we have seen that the government enjoys a respectable, if not spectacular, conviction rate; that prosecutors, ever confident of the underlying merits of cases that end in mistrials, are far from reluctant to retry them; and that prosecutors' willingness and ability to shift strategies to secure convictions has paid off handsomely to date. The corporate fraud trials have also provided a unique opportunity to gain insights into prosecutorial charging practices in high profile white collar cases, to observe and evaluate trial strategies and dynamics, and to tentatively assess what seems to work (or not) and why.

The showcase trial of Enron's Skilling and Lay will not be the end of the road. Dozens of executives charged in similar fraud prosecutions are now awaiting trial, and additional fraud investigations are clearly underway. As these cases wend their way through the system, they will further enhance our understanding of the utility (or futility, as the case may be) of relying on individual criminal prosecutions to address systemic corporate fraud.

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[97] Stacey Stowe, *Cendant's Ex-Chairman Faces His Third Trial*, N.Y. TIMES, Feb. 15, 2006, at C15; *Cendant Juror Says Most Favored a Conviction*, ST. LOUIS POST-DISPATCH, Feb. 15, 2006, at C2.

Appendix 1

Corporate Fraud Trials, March 2002 - January 2006[*]

ADELPHIA

Prosecution	Defendant	Charges	Disposition	Status
UNITED STATES V. RIGAS	Adelphia President and Chairman of the Board	Conspiracy; Securities Fraud; Wire Fraud; Bank Fraud	Convicted by Jury	Sentenced to 15 Years in Prison
Co-Defendants				
T. Rigas	Adelphia Executive Vice President, CFO, CAO, Treasurer, and Chairman of Board's Audit Committee	Same	Convicted by Jury	Sentenced to 20 Years in Prison
M. Rigas	Adelphia Executive Vice President for Operations and Secretary	Same	After Hung Jury Resulted in Mistrial, Guilty Plea Entered	Awaiting Sentencing
J. Brown	Adelphia Vice President of Finance	Same	Guilty Plea and Cooperation Agreement	Awaiting Sentencing
M. Mulcahey	Adelphia Director of Internal Reporting	Same	Acquitted by Jury	___

*If Disposition is Convicted by Jury, guilty verdict does not necessarily reflect conviction on all charges listed in Charge column. If Disposition is Guilty Plea, plea does not necessarily admit all offenses listed in Charge column. Disposition column has been updated to reflect outcomes of trials that were in progress in January 2006 and concluded in early February while this article was in press.

Appendix 1 (continued)

Corporate Fraud Trials, March 2002 - January 2006

CENDANT

Prosecution	Defendant	Charges	Disposition	Status
United States v. Forbes	Cendant Chairman of the Board; CUC International CEO and Chairman of the Board	Conspiracy; Mail Fraud; Wire Fraud; Falsifying Books and Records; Securities Fraud; Insider Trading	Hung Jury Resulted in Mistrial; Retrial Resulted in Second Mistrial	Awaiting Second Retrial
Co-Defendants				
E. Shelton	Cendant Executive Vice President and Vice Chairman; CUC International President and COO	Conspiracy; Mail Fraud; Wire Fraud; Falsifying Books and Records; Securities Fraud	Convicted by Jury	Sentenced to 10 Years in Prison; $3.275 Billion Restitution

CREDIT SUISSE FIRST BOSTON (CSFB)

Prosecution	Defendant	Charges	Disposition	Status
United States v. Quattrone	CSFB Head of Global Technologies Group	Obstruction of Justice; Obstruction of Agency Proceedings; Witness Tampering	Hung Jury Resulted in Mistrial; Convicted by Jury on Retrial	Sentenced to 18 Months in Prison; 2 Years' Probation; $90,000 Fine

Appendix 1 (continued)

Corporate Fraud Trials, March 2002 - January 2006

DUKE ENERGY NORTH AMERICA (DENA)

Prosecution	Defendant	Charges	Disposition	Status
United States v. Kramer	DENA Vice President for Eastern Trading Operations	Racketeering; Wire Fraud; Falsification of Books and Records; Money Laundering; Conspiracy; Circumventing Internal Company Controls	Hung Jury Resulted in Mistrial	Prosecutor's Decision on Retrial Pending
Co-Defendants				
T. Reid	DENA Senior Vice President of Managers and Supervisors	Racketeering; Wire Fraud; Falsification of Books and Records; Money Laundering; Conspiracy; Circumventing Internal Company Controls	Acquitted by Jury	——
B. Lavielle	DENA Director of Southeastern Trading Group	Racketeering; Wire Fraud; Falsification of Books and Records	Guilty Plea and Cooperation Agreement	Awaiting Sentencing

Appendix 1 (continued)

Corporate Fraud Trials, March 2002 - January 2006

DYNEGY

Prosecution	Defendant	Charges	Disposition	Status
United States v. Olis	Dynegy Senior Director of Tax Planning/International Tax and Vice President of Finance	Conspiracy; Securities Fraud; Mail Fraud; Wire Fraud	Convicted by Jury	Sentenced to 24 Years, 3 Months in Prison; $25,000 Fine; Sentence Overturned on Appeal and Case Remanded for Resentencing; Awaiting Resentencing
Co-Defendants				
G. Foster	Dynegy Vice President of Tax	Same	Guilty Plea and Cooperation Agreement	Sentenced to 15 Months in Prison; 3 Years' Probation; $1,000 Fine
H. Sharkey	Member of Dynegy Risk Control and Deal Structure Group	Same	Guilty Plea and Cooperation Agreement	Sentenced to 30 Days in Prison

ENRON

Prosecution	Defendant	Charges	Disposition	Status
United States v. Arthur Andersen, LLP	Partnership	Obstruction of Justice	Convicted by Jury	Conviction Overturned by Supreme Court

Appendix 1 (continued)

Corporate Fraud Trials, March 2002 - January 2006

ENRON (continued)

Prosecution	Defendant	Charges	Disposition	Status
United States v. Bayly	Merrill Lynch Head of Global Investment Banking Division	Conspiracy; Wire Fraud	Convicted by Jury	Sentenced to 30 Months in Prison; $250,000 Fine; $295,000 Restitution
Co-Defendants				
J. Brown	Merrill Lynch Head of Strategic Asset Lease and Finance Group	Conspiracy; Perjury; Obstruction of Justice; Wire Fraud	Convicted by Jury	Sentenced to 46 Months in Prison; $250,000 Fine; $295,000 Restitution
R. Furst	Merrill Lynch Enron Relationship Manager, Investment Banking Division	Conspiracy; Wire Fraud	Convicted by Jury	Sentenced to 37 Months in Prison; $665,000 Fine and Restitution
S. Kahanek	Enron Accountant and Senior Director in APACHI Division	Conspiracy	Acquitted by Jury	——
W. Fuhs	Merrill Lynch Vice President	Conspiracy; False Statements; Obstruction of Justice; Wire Fraud	Convicted by Jury	Sentenced to 37 Months in Prison; $665,000 Fine and Restitution
D. Boyle	Enron Vice President in Global Finance	Conspiracy; Wire Fraud	Convicted by Jury	Sentenced to 46 Months in Prison; $320,000 Fine and Restitution

Appendix 1 (continued)

Corporate Fraud Trials, March 2002 - January 2006

ENRON (continued)

Prosecution	Defendant	Charges	Disposition	Status
United States v. Causey	Enron Chief Accounting Officer	Conspiracy; Securities Fraud; Wire Fraud; Making False Statements to Auditors; Insider Trading	Guilty Plea and Cooperation Agreement	Awaiting Sentencing
Co-Defendants				
J. Skilling	Enron President and CEO	Same	——	Trial in Progress
K. Lay	Enron CEO and Chairman	Conspiracy; Securities Fraud; Wire Fraud; Bank Fraud	——	Trial in Progress
S. Kahanek	Enron Accountant and Senior Director in APACHI Division	Conspiracy	Acquitted by Jury	——

Appendix 1 (continued)

Corporate Fraud Trials, March 2002 - January 2006

ENRON (continued)

Prosecution	Defendant	Charges	Disposition	Status
United States v. Rice	Enron Broadband Services Chairman and CEO	Conspiracy; Securities Fraud; Wire Fraud; Insider Trading; Money Laundering	Guilty Plea and Cooperation Agreement	Awaiting Sentencing
Co-Defendants				
J. Hirko	Enron Broadband Services President and CEO	Same	Hung Jury Resulted in Mistrial	Awaiting Retrial
K. Hannon	Enron Broadband Services COO	Same	Guilty Plea and Cooperating Agreement	Awaiting Sentencing
R. Shelby	Enron Broadband Services Senior Vice President of Engineering Operations	Same	Hung Jury Resulted in Mistrial	Awaiting Retrial
S. Yaeger	Enron Broadband Services Senior Vice President of Strategic Development	Same	Hung Jury Resulted in Mistrial	Awaiting Retrial
K. Howard	Enron Broadband Services Vice President of Finance	Conspiracy; Securities Fraud; Wire Fraud; False Statements	Hung Jury Resulted in Mistrial	Awaiting Retrial
M. Krautz	Enron Broadband Services Senior Director of Transactional Accounting	Same	Hung Jury Resulted in Mistrial	Awaiting Retrial

Appendix 1 (continued)

Corporate Fraud Trials, March 2002 - January 2006

HEALTHSOUTH

Prosecution	Defendant	Charges	Disposition	Status
United States v. Scrushy	HealthSouth Co-Founder, CEO, and Chairman of Board of Directors	Conspiracy; Mail Fraud; Wire Fraud; Securities Fraud (Sarbanes-Oxley and Title 15 Charges); False Statements; Certifying False Financial Statement (Sarbanes-Oxley Charge); Attempt to Cause Certification of False Financial Statement (Sarbanes-Oxley Charge); Money Laundering; Obstruction of Justice; Perjury	Acquitted by Jury	——
United States v. Thomson	HealthSouth President and Chief Operating Officer	Conspiracy; False Books and Records; Travel Act Violation	Acquitted by Jury	——
Co-Defendants				
J. Reilly	HealthSouth Vice President for Legal Services	Same	Acquitted by Jury	——
United States v. Crumpler	HealthSouth Controller	Wire Fraud; Mail Fraud; Securities Fraud	Convicted by Jury	Awaiting Sentencing

Appendix 1 (continued)

Corporate Fraud Trials, March 2002 - January 2006

IMCLONE

Prosecution	Defendant	Charges	Disposition	Status
United States v. Stewart (Martha)	Chairman of the Board and CEO of Marth Stewart Living Omnimedia	Conspiracy; False Statements; Obstruction of Justice; Securities Fraud	Convicted by Jury	Sentenced to 5 Months in Prison; 5 Months' Home Detention; $30,000 Fine
Co-Defendant				
P. Bacanovic	Merrill Lynch Financial Advisor	Conspiracy; False Statements; Making and Using False Documents; Perjury; Obstruction of Justice	Convicted by Jury	Sentenced to 5 Months in Prison; 5 Months' Home Detention; $4,000 Fine
United States v. Stewart (Larry F.)	Director of U.S. Secret Service Forensics Lab	Perjury	Acquitted by Jury	——

IMPATH

Prosecution	Defendant	Charges	Disposition	Status
United States v. Adelson	Impath President and COO	Conspiracy; Securities Fraud; Making False Filings with the SEC	Convicted by Jury	Awaiting Sentencing
Co-Defendant				
A. Saad	Impath Board Chairman and CEO	Same	Guilty Plea	Sentenced to 3 Months in Prison

Appendix 1 (continued)

Corporate Fraud Trials, March 2002 - January 2006

MCKESSON HBOC

Prosecution	Defendant	Charges	Disposition	Status
United States v. Hawkins	McKesson CFO	Conspiracy; Securities Fraud; False Statements	Acquitted by Jury	——

NEWCOM

Prosecution	Defendant	Charges	Disposition	Status
United States v. Khan	NewCom President, CEO, and Chairman of the Board	Conspiracy; Mail Fraud; Filing False Statements; Securities Fraud; Circumventing Internal Accounting Controls; Money Laundering	Guilty Plea	Sentenced to 24 Months in Prison; $15,000 Fine
Co-Defendant				
A. Khan	NewCom Executive Vice President and Board Member	Conspiracy; Mail Fraud; Filing False Statements; Securities Fraud; Falsifying Required Books and Records; Circumventing Internal Accounting Controls; Money Laundering	Guilty Plea	Sentenced to 24 Months in Prison; $15,000 Fine
S. Veen	NewCom CFO and Board Member and Aura Systems CFO	Filing False Statements	Acquitted by Jury	——

Appendix 1 (continued)

Corporate Fraud Trials, March 2002 - January 2006

OGILVY & MATHER

Prosecution	Defendant	Charges	Disposition	Status
United States v. Early	Ogilvy & Mather Chief Financial Officer	Conspiracy; False Claims	Convicted by Jury	Sentenced to 14 Months in Prison; 2 Years' Probation; $10,000 Fine
Co-Defendant				
S. Seifert	Ogilvy & Mather Senior Partner and Executive Group Director	Same	Convicted by Jury	Sentenced to 18 Months in Prison; 2 Years' Probation; $125,000 Fine

QWEST

Prosecution	Defendant	Charges	Disposition	Status
United States v. Graham	Qwest Global Business Unit CFO	Conspiracy; Securities Fraud; False Statements; Wire Fraud	After Hung Jury Resulted in Mistrial, Guilty Plea and Cooperation Agreement	Sentenced to 1 Year's Probation; $5,000 Fine
Co-Defendant				
T. Hall	Qwest Global Business Unit Senior Vice President	Same	Same	Same
J. Walker	Qwest Global Business Unit Vice President	Same	Acquitted by Jury	——
B. Treadway	Qwest Assistant Controller	Same	Acquitted by Jury	——

Appendix 1 (continued)

Corporate Fraud Trials, March 2002 - January 2006

RITE AID

Prosecution	Defendant	Charges	Disposition	Status
United States v. Grass	Rite Aid Chairman and CEO	Securities Fraud; Conspiracy; Lying to the SEC	Guilty Plea and Cooperation Agreement	Sentenced to 7 Years in Prison; 3 Years' Probation; $500,000 Fine
Co-Defendants				
F. Brown	Rite Aid Chief Legal Officer	Same	Convicted by Jury	Sentenced to 10 Years in Prison; 2 Years' Probation; $21,000 Fine
F. Bergonzi	Rite Aid Executive Vice President and CFO	Same	Guilty Plea and Cooperation Agreement	Sentenced to 28 Months in Prison
E. Sorkin	Rite Aid Executive Vice President	Conspiracy; Lying to Grand Jury	Guilty Plea and Cooperation Agreement	Sentenced to 5 Years in Prison

Appendix 1 (continued)

Corporate Fraud Trials, March 2002 - January 2006

TYCO

Prosecution	Defendant	Charges	Disposition	Status
State v. Kozlowski	Tyco CEO	Conspiracy; Obstruction of Justice; Enterprise Corruption (State Charges)	Juror Controversy Resulted in Mistrial; Convicted by Jury on Retrial	Sentenced to 8 1/3-25 Years in Prison; $70 Million Fine; $97 Million Restitution
Co-Defendant				
M. Swartz	Tyco CFO	Same	Same	Sentenced to 8 1/3-25 Years in Prison; $35 Million Fine; $38 Million Restitution
State v. Belnick	Tyco General Counsel	Falsifying Business Records; Grand Larceny; Securities Fraud (State Charges)	Acquitted	—

Appendix 1 (continued)

Corporate Fraud Trials, March 2002 - January 2006

WESTAR ENERGY, INC.

Prosecution	Defendant	Charges	Disposition	Status
United States v. Wittig	Westar CEO	Conspiracy; Circumventing Internal Accounting Controls; Falsifying Books and Records; Wire Fraud; False Statements; Money Laundering	Hung Jury Resulted in Mistrial; Convicted by Jury on Retrial	Awaiting Sentencing
Co-Defendant				
D. Lake	Westar Executive Vice President	Same	Hung Jury Resulted in Mistrial; Convicted by Jury on Retrial	Awaiting Sentencing

WORLDCOM

Prosecution	Defendant	Charges	Disposition	Status
United States v. Ebbers	WorldCom CEO	Conspiracy; Securities Fraud; Making False Filings with the SEC	Convicted by Jury	Sentenced to 25 Years in Prison