

Enron: Navigating the Civil Side of the Corporate Case of the Century

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THE IMPACT OF “ENRON”

The word “Enron” has taken on a meaning that goes far beyond the oil and gas turned trading turned broadband company that was once displayed prominently on the Big Board as “ENE.” Enron, rightly or wrongly, has become a moniker for corporate scandal, accounting shenanigans, and corporate excess. Laws have been passed “post-Enron” to deal with the “Enron” issues. Business schools study “what went wrong at Enron.” Academics have analyzed the ethics, the business practices, and the accounting techniques employed at Enron. “Enron” has become a new vocabulary word in our lexicon.

Imagine having had a lawyering role in the Enron case. That exercise is not hard for about 5,000 - 10,000 lawyers – one shot in the dark guesstimate as to the numbers of lawyers who touched “the case.” “The case” consisted of the largest bankruptcy ever filed to that date, dozens of state court lawsuits, dozens of federal cases, a massive multi-district litigation proceeding that had three prongs to it – the securities case, the ERISA case, and the shareholders derivative case. There were also the Congressional investigations and proceedings, the bankruptcy examiner’s investigation, and the Enron Board of Directors’ investigation, all proceeding practically in parallel. Then there was the stream of criminal indictments.

But now imagine representing any of the officers of Enron. Consider what it would be like to stare a two terabyte (a/k/a 2,048 gigabyte) database down to learn about the business of your client’s company – and what that business did over a period of many years – and what your client knew or did not know about what that company did. Consider contending with endless press inquiries, with reporters stalking your clients like paparazzi for the photo op, with your client’s friends feeling compelled to become his enemies.

Now imagine representing the Chairman of the Board of Enron – Ken Lay. Imagine representing Enron’s Chief Executive Officer – Jeff Skilling. Imagine being handed the task of proving that these highly respected businessmen who never had been cross ways with the law in any shape or form are criminals – or defending these men in the face of a public hungry for someone “at the top” to pay for the shocking downfall of a Fortune 10 company.

Imagine trying to defend or convict these men in the trial of their lives – trying the corporate case of the century. That is what our speakers have done. Impressive.

THE CIVIL “CASE”

This paper, however, discusses issues that were looming in the background “civil” side of the Enron cases. The civil side was important to Ken Lay and Jeff Skilling for certain, although its significance paled once they were facing indictments.

The Enron civil “case” could serve as the basis for a law school course or two (or three). It has been a fascinating conglomeration of substantive legal issues and procedural practices that will be difficult to match again in number and complexity. I had the privilege of being on the team of Carrington Coleman lawyers representing Ken Lay in these cases and being the person the team affectionately dubbed “the traffic cop.” In a litigation this massive, someone had to keep tabs on all of its aspects and be sure that all pieces were being handled by the right attorney(s) and that the effort was coordinated and unified in theme and approach. This was my job – along with giving myself some of these assignments (such as an interesting 5th Circuit appellate argument). In this article, I will attempt to recount a few of the major procedural/practical strategy aspects of note in the Enron case. These are procedures and strategies that will arise in many cases to come – although maybe not all at once in one case as here.

What to do when your client is the first-named defendant in a hundred or more cases scattered across the country?

The acronym to know in this instance is “JPMDL” – the Judicial Panel on Multi-District Litigation. One of the first things that the defense lawyers did in the Enron civil cases was file a motion with the JPMDL to have a single federal district court designated as the “MDL Court.” If there ever were a matter appropriate for MDL treatment, this was it. MDL coordination is contemplated by 28 U.S.C. § 1407, which provides:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

In addition to the statute, there are Rules of Procedure of the Judicial Panel on Multi-District Litigation. These can be found in most any rule book compiling the Federal Rules of Civil Procedure.

As of this writing, approximately 147 lawsuits had been made – at one time or another – a part of *In re Enron Corporation Securities, Derivative & ERISA Litigation*, MDL Docket 1446.

What about consolidating cases?

We were able to seek to have a number of the cases consolidated. Consolidation is different from MDL coordination. MDL coordination is generally only for pre-trial and discovery purposes. At the conclusion of discovery, the cases are likely to be sent back to their “home courts” for trial if they had not been resolved before the time of trial. *See* MDL Rule 7.6. Consolidation, on the other hand, means that the cases are combined going forward for all procedural purposes through trial. Consolidation is governed by FED. R. CIV. P. 42, as follows:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

For the most part, we were able to consolidate all of the federal cases that were filed in Texas federal courts or were removed to those courts.

What about the cases that are filed after the MDL panel has coordinated the first hundred or more in one proceeding?

Cases against Ken Lay continued to be filed for a year or more after the original rush of matters. Each of these had to be attended to. Generally, these matters constituted “tag along actions” as defined in Rule 1.1 of the Rules for Multidistrict Litigation:

A “tag-along” action refers to a civil action pending in a district court and involving common questions of fact with actions previously transferred under Section 1407.

A simple letter to the MDL indicating that the matter constitutes a “tag along” sets in motion the procedure to have the case transferred to the MDL Court to be coordinated with the other cases comprising the MDL. Such a letter is contemplated by MDL Rule 7.5 (e), which provides:

Any party or counsel in actions previously transferred under Section 1407 or under consideration by the Panel for transfer under Section 1407 shall promptly notify the Clerk of the Panel of any potential “tag-along actions” in which that party is also named or in which that counsel appears.

The letter may be simple in this procedure, but maintaining the service list can become the real challenge! Moreover, a plaintiff can contest “tag-along” status, raising more procedural niceties. A careful study of MDL Rules 7.4 and 7.5 is necessary to fully understand this process.

What about the answers that became due while the MDL was considering tag-along status?

Filing for tag-along status does not suspend an answer deadline. In the Enron cases, we generally reached agreements with plaintiffs for extensions of the answer deadlines until after the case’s “tag-along” status was finalized. Other times, we had to file motions with the “home” court seeking a stay of proceedings pending a final determination of tag-along by the JPMDL. *See, e.g., Choucroun v. Arthur Andersen L.L.P.*, No. A-03-CA-114-H (W.D. Tex., Mem. Op. Order April 30, 2003). Eventually, the MDL Court entered a broad order generally suspending the need to answer in the underlying cases until after most discovery was completed.

What about all of the cases filed in state courts?

The MDL procedure applies only to cases venued in the federal courts. With respect to Enron, state cases were being filed across the country. The prospect of dealing with discovery in dozens of state courts as well as in a massive federal MDL proceeding was not something that was very appealing. The answer here was removal.

A number of removals were based on the fact that the lawsuits, although not specifically stated as such, were actually in the nature of a shareholder's derivative suit. That is, the cases were based upon alleged injury suffered by all shareholders in the form of a diminution in the value of stock. Given that such a claim is federal in nature, those actions were removable. After removal, these cases were generally stayed because derivative claims are property of a debtor's estate and subject to the 11 U.S.C. § 362 automatic stay.

In addition, a number of the state court cases were actions filed on behalf of 50 plaintiffs or more. These were removable on the basis of the Securities Litigation Uniform Standards Act of 1998. *See* 15 U.S.C. § 77(p).

A third basis for removal was "bankruptcy related to" removal pursuant to 28 U.S.C. § 1452(a):

A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's policy or regulatory power, to the district court of the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

There are uncertainties surrounding bankruptcy "related to" removal. For instance, the question arises whether the case should be sent to the district court where the bankruptcy is pending. The Enron bankruptcy was venued in the Southern District of New York, while the Enron MDL was venued in the Southern District of Texas. Here, it made indisputable sense that these cases should be coordinated with all of the others compiled in the MDL proceeding.

What about State Court TROs entered before you can remove a case?

One day, in the midst of juggling the various complaints and petitions, we were served with a temporary restraining order entered *ex parte* by a state court in a relatively rural county of Texas. A particular plaintiffs' firm was using this technique in an attempt to avoid having its clients' cases swooped up into the MDL proceeding while, at the same time, getting a "jump" on the potentially cumbersome discovery process that would be employed in the MDL Court. The TRO related to, among other things, document preservation issues – a topic that had been front and center in the MDL proceeding for some time. After receiving a copy of the first TRO, we got wind of a second one being sought in another Texas state court.

We concluded that these types of filings were improperly interfering with the MDL Court's ability to deal with and coordinate the massive proceeding to which the TRO cases were undeniably related. Accordingly we sought relief from the MDL Court under the All Writs Act, 28 U.S.C. § 1651, which provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

We succeeded in getting an order under the All Writs Act by which the MDL Court dissolved the TRO entered by the state court and required this particular counsel to notify the MDL Court and get its permission before filing any further state court actions. *Newby v. Enron Corp.*, 188 F. Supp. 2d 684 (S.D. Tex. 2002). This order was appealed to the Fifth Circuit. I had the opportunity to present Mr. Lay's argument in support of the Court's order and our position prevailed. *Newby, et al. v. Enron Corp., et al.*, 302 F3d 293 (5th Cir. 2002).

How do you serve hundreds of attorneys with pleadings?

It is difficult to imagine how this case could have been handled without the existence of the world wide web. The case began before the Southern District of Texas instituted its electronic filing (and notification) program. For a few weeks, we had to serve papers the old-fashioned way – through the mail. The service list grew more and more cumbersome, and, frankly, some of the parties did not have an interest in receiving and maintaining every pleading in the case.

Accordingly, the parties instituted a web-based service system – the “esl website.” A filed pleading would be posted to the site and the site would send a notification to all registered persons that the pleading had been posted. The person so notified could then access the website and the pleading included in the notification. Moreover, the site could be searched for pleadings by date, party, pleading title, etc.

The MDL Court entered an order approving esl service as a sufficient alternative to that provided for in the rules. Indeed, to a certain extent, esl service was mandated by that order. During certain time periods when a pivotal deadline was approaching, I would receive, as much as 100 esl emails serving pleadings on any given day. As of this writing, approximately 5,400 pleadings are housed on the esl website.

How does one create a workable schedule for a proceeding this massive?

The scheduling order in this case was a difficult, time-consuming, and brain-bending exercise. The number of constituencies in the debate made it massively complex. On the defense side, there were directors and officers, other Enron employees, financial institutions, rating agencies, accounting firms, and law firms. The plaintiff's side was hardly united as well, consisting of securities plaintiffs represented by the Lead Plaintiff's firm, securities plaintiffs represented by a myriad of other firms, the SEC, the Department of Labor, and the ERISA plaintiffs, among others. The legal theories were likewise as diverse, creating the need for discovery on each theory and related briefing schedules that could serve all interests.

In the end, the MDL Court, noting that it was “mindful that the eyes of the nation are on this Court and the civil justice system to see if we are up to the challenge of giving to all parties in these suits their day in court,” implemented a very vigorous scheduling order, contemplating a trial within nineteen months of the entry of the order. Despite this noble attempt, due to sheer practicalities, the

MDL Court was forced to relent and grant various extensions of scheduling deadlines. Indeed, it is now about five years later and no civil trial has occurred.

Where do you put millions upon millions of documents?

In a cooperative effort, the parties negotiated an Order Establishing Document Depository, wherein a vendor was named who would operate a “document depository” in Houston. *In re Enron Securities Litigation*, MDL 1446, (S.D. Tex. Oct. 31, 2002). Physical “paper” was stored there, but as a practical matter, most parties produced their documents electronically. Accordingly, the keeper of the document depository also maintained an electronic database of the documents produced in the case and would provide a weekly list of what had been placed into the depository. Parties were obligated to produce their documents to the administrator. Documents produced by third parties were sent to the depository by the requesting party. Deposition transcripts and exhibits, as well as hearing transcripts and exhibits, were placed in the depository. The case is still ongoing, but at present, there are over 20 million documents (not pages – full documents) in the depository.

The parties, in groups of similar interests, established their own web-based electronic databases using the data being kept by the depository administrator. Even web-based electronic databases are challenged by a dataset as large as this one. Similarly, even with the ability to search through optical character reading, the attorneys working on the Enron case were extremely challenged to get their arms around the relevant documents.

How do you conduct depositions in a case of this size?

Approximately 728 attorneys eventually made an appearance in the Enron MDL proceeding. When we started considering how depositions would be conducted, a myriad of issues arose as a result of the sheer number of attorneys who would want to ask questions. The federal rules limitation on time to complete a deposition clearly would not work – but what would? No party would consent to being deposed for as long as it would take for “everyone to have the chance to ask his questions.”

The parties worked very hard to agree to the “Deposition Protocol Order,” eventually entered by the MDL Court. The order specified the parties subject to it by describing them in groups with similar interests. They were: the named class representative securities plaintiffs, the named class representative ERISA plaintiffs, Enron, the Committee of Unsecured Creditors of Enron, the Secretary of the Department of Labor, named plaintiffs in actions consolidated or coordinated (the “Private-Action Parties”), state court plaintiffs not yet coordinated into the MDL, Enron Officer and Employee Defendants, Enron Outside-Director Defendants, Financial Institution Defendants, “Lawyers, Accountants, and Others.” Utilizing these categories of parties, the order set forth “categories” of depositions: “Newby-related depositions” (securities class action related), “Private-Action-related depositions,” and “Tittle-specific depositions” (ERISA class action specific).

The depositions were scheduled in cycles of four weeks on and the fifth week off. Limitations were placed on the number of deposition days that could be used for a category of depositions and the number of depositions that could be tracked on the same day. For instance, 1200 deposition days were set aside for Newby-related depositions and no more than five depositions could be taken on any one

day. There was a one deposition per deponent requirement and a limitation of three days for each deponent, except “Extended Time Witnesses,” who could be deposed for up to six days.

A Deposition Scheduling Committee was instituted, and it would, during any given session, be working on devising a four-week deposition schedule that would commence 60 days in the future. Plaintiffs were allocated 45% of the deposition days. Defendants were allocated 55% of the depositions days, with 30% for the Financial Institutions and 25% for the Enron Officers, Outside Directors, Lawyers and Accountants. A fairly complicated negotiation resulted from this process whereby a deponent was “nominated” for a given deposition cycle and the various constituencies would have to dicker with one another as to who would get a given number of hours with that deponent. Somehow, with much effort, this all worked.

The parties rented space, complete with staffs, for two “deposition centers,” one in New York and one in Houston, where the lion’s share of the depositions occurred. The centers each had a number of large rooms where depositions could be taken, and had seating for approximately fifty people to attend.

As of our last count, including expert depositions, over 700 depositions were taken in the Enron MDL case.

How do you contend with so many witnesses “taking the Fifth”?

The criminal implications of the civil case were recognized by most from the outset. Parties had to assess whether any filing, statement, or action by them could be construed to constitute a waiver of their Fifth Amendment right against self-incrimination. Many parties sought the court’s leave to delay answering the cases until any criminal proceeding against them was resolved. Similarly, they sought and were granted stays of discovery as to them in order to preserve this Constitutional protection. Even document production became grueling with civil lawyers assessing whether production of a given piece of paper could later be argued to be a Fifth Amendment waiver.

The Deposition Protocol Order allowed for “nominated” witnesses to notify the other parties that they would take the Fifth if deposed. The deposition could nonetheless go forward, but only for an hour. All parties could submit written questions to the witness that would have been asked had there been more time, and a summary question was posed as to whether the witness would assert the Fifth Amendment to each of the written questions if they had been posed individually. Parties were permitted the opportunity to recant their Fifth Amendment assertion and be fully deposed at a later date (and presumably would free themselves of the negative evidentiary inferences that would otherwise be drawn from the Fifth Amendment assertion).

THE CONCLUSION OF THE ENRON CASE

The first Enron-related lawsuit was filed in late 2001. Over five years later, massive discovery has occurred, billions of dollars in settlements have been negotiated, parties have been dismissed through motion practice, but it still is not over as of this writing. Precisely how it will wind to completion is yet to be seen. But, for those attorneys who were involved in this corporate case of the century, many hours have been spent, techniques have been learned, and stories have been accumulated. The “lessons from Enron” have spilled beyond the media, the business schools, and the Congress – into the legal

profession where we can all learn something that can someday apply to our everyday, typically less massive-scale, practices. Moreover, the lessons are not yet complete, nor are the implications of “Enron.”

ABOUT THE AUTHOR

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Ms. Sumoski has been involved for a number of years in leadership roles in the ABA Section of Litigation. She currently is a Chair of the Section's Expert Witnesses Committee, and she is the chair and organizer of the program Enron: Trying the Corporate case of the Century.