



California Corporate & Securities Law

“This Is Not The Way Criminal Law Is Supposed To Work.”

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Last week, the Ninth Circuit Court of Appeals issued its opinion in *U.S. v. Goyal*, No. 08-1436 (Dec. 10, 2010). This case involved an appeal by the former Chief Financial Officer of Network Associates, Inc. (now known as McAfee, Inc.). This unfortunate individual was indicted, tried and convicted of one count of securities fraud, seven counts of making false filings with the Securities and Exchange Commission, and seven counts of making materially false statements to the company’s auditors. The Ninth Circuit reversed on all counts.

All federal prosecutors involved in investigating and prosecuting securities law violations should read this opinion and Judge Kozinski’s concurrence in particular. Judge Kozinski cites a string of recent cases in which federal court’s have found that prosecutors have overreached:

- *Arthur Andersen LLP v. U.S.*, 544 U.S. 696 (2005) (overturning the conviction of the Arthur Andersen accounting firm);
- *U.S. v. Reyes*, 577 F.3d 1069 (9th Cir. 2009) (reversing conviction of Mr. Reyes based on prosecutorial misconduct); and
- *U.S. v. Brown*, 459 F.3d 509 (5th Cir. 2006) (reversing convictions of former Enron and Merrill Lynch employees).

District Court Judge Cormac Carney’s dismissal last December of charges against two Broadcom executives could be added to this list of ignominy. *U.S. v. Ruehle*, (NO. SACR 08-00139-CJC, Dec. 15, 2009) In ordering a dismissal of all charges, Judge Carney bluntly excoriated the prosecution for conduct that was “shameful and contrary to American values of decency and justice.”

Judge Kozinski wisely notes that civil law often covers conduct that falls into gray areas. Anyone who practices in the field of disclosure knows that this is certainly true. Yet nearly any civil violation is susceptible to criminal prosecution. As Judge Clifton notes in the court’s opinion, knowledge of the rules does not make someone criminally responsible for every mistake:

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*If simply understanding accounting rules or optimizing a company's performance were enough to establish scienter, then any action by a company's chief financial officer that a juror could conclude in hindsight was false or misleading could subject him to fraud liability without regard to intent to deceive. **That cannot be.***

(emphasis added). In the words of Judge Kozinski's *cri de coeur*: "This is not the way criminal law is supposed to work." Agreed!

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