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THE ENRON TRIAL

Even if he wins, Lay is not off hook

Bank fraud, false statement charges looming

By MARY FLOOD

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It is possible [Ken Lay](#) could be exonerated by the jury in the Enron fraud and [conspiracy](#) case and still wind up in prison.

After the jury goes to deliberate in the main case against Lay and [Jeff Skilling](#), [U.S. District](#)

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[Judge Sim Lake](#) will begin hearing evidence in a separate trial of four personal banking charges against Enron's former chairman. Each of these charges carries a hefty 30-year prison term and a \$1 million fine.

"These are like extra charges. The bottom line of the whole thing is that the government wants to win," said Houston defense lawyer Joel Androphy, who has tried bank fraud cases. "They won with (ex-Enron CFO [Andrew \)Fastow](#) by charging his wife. They were not sure they could win with Ken Lay in the main case. At the end of the day, there could be a hung jury or an acquittal. But he could still be convicted on the bank fraud."

Lay is the sole defendant in this second trial, and Lake, without a jury, will be the sole arbiter of the facts. This second case, likely to begin May 18 and end the following week, is not about Enron. It's just about Lay's personal finances.

Lay said he did nothing wrong.

It's a question of whether Lay put three federally insured banks at risk and intended to defraud them at the time he signed multiple forms promising not to use his \$75 million in credit to buy or maintain stock on margin. Buying stock on margin is using credit to finance stock purchases. It can be risky if the stock price plummets.

'Speculative transactions'

Court papers filed by prosecutors indicate that in 1993, bankers explained the law to Lay, he agreed to follow it, but then he "engaged in a scheme through 2001" increasing his credit lines and using them to buy stock on margin though he was executing forms saying he wouldn't.

The government says that "after providing the documents required by the banks, Lay did precisely what he represented he would not do."

The three banks with the credit lines in question from January 1999 through November 2001 are: Bank of America, Chase Bank Of Texas and Compass Bank.

Neither prosecutors nor Lay's attorneys would be interviewed for this story as the trial date looms.

In the past, Lay's attorney [Michael Ramsey](#) belittled the charges, saying Regulation U cited in the indictment — or "Reg. U" — sounded to him like "a pasta sauce." On Lay's Web site, he shrugs the charges off as "arcane."

"You can make fun of the forms and regulations, but these are serious regulations," said Peter Henning, a professor at Wayne State University Law School who prosecuted bank fraud cases for three years during the savings and loan scandals of the late 1980s.

"This goes back to the 1930s and came out of the market crash. It represents attempts to put restrictions on when a bank can make stock loans. One of the issues was how depositors' money was used in speculative transactions."

Henning said the charges are not used often, in part because there aren't many borrowers who use banned credit lines to buy stock on margin.

"But the defense that it's a mere technical violation" does not usually work, Henning said. "The rules are there for a reason: It's to be sure the banks are not put at risk."

There is little question that Enron's demise caused the prosecutors to peek at Lay's personal banking decisions.

"If not for the financial collapse of Enron, I doubt the government would look to see if Ken Lay filed a Form U," said William H. Widen, a University of Miami School of Law professor who has written on Enron.

Widen makes the analogy between Lay and mobster Al Capone, who was finally imprisoned not for the crimes with which most people associated his prohibition activities, but for tax evasion.

"Just like Al Capone, having gotten interested in him for (one set of) charges, they looked at his entire portfolio of compliance," Widen said. "The comparison here is not to the crimes. The comparison is to the approach and methodology" of the prosecution.

Stuck with jury waiver

Specifically, there is one charge of bank fraud and three of making false statements to a bank. Lay is not accused of stealing from the banks — but just of putting them at risk. In fact, the banks lost nothing.

"The fact that he paid the loans is not a defense, it's just not the issue," Androphy said.

Defenses could include that Lay didn't intend to break his promise to the banks when he signed the forms and that the bankers would have given him the loans even if they knew he might break this promise and buy margin stock, he said.

Androphy said that bank fraud charges were used commonly during the savings and loan scandals, and one of the best shields was to "prove bank complicity — like show that a bank officer said 'Oh we just trusted it would be OK.' "

Henning noted that Lay could also argue he didn't understand, that the forms were vague, that he didn't buy stock on margin with the money and what he signed was technically true.

Henning said that though the jury in the main case may have needed to hear from Lay, Lay is less likely to feel pressured to take the stand in the bank charges case. Henning said Lay can do what most defendants do and simply force the government to prove its case.

The problem for Lay comes, Androphy said, if the banks have people who get up there and testify for the government.

Another problem, according to Androphy and other legal experts, comes when you try a case to the judge.

Lay and his attorneys got backed into a corner in this case.

In an effort to be severed from former Enron CEO Skilling in the main case, Lay demanded a speedy trial and said he'd even waive his right to a jury to get it. The judge said he'd sever the bank charges out and try just those immediately. Lay wound up backing off the speedy trial request but got stuck with his jury waiver.

"It is always hard to try a case to a judge, unless your client just wasn't there," Androphy said. "Judges are more strict, less broad and you usually can't appeal to human emotion like you can with a jury."

Lay spends little time on his Web site addressing the four banking charges.

"The remaining four charges in my indictment relate to personal banking charges, which are based on arcane laws initially enacted during the Great Depression. These four charges have nothing to do with Enron. My legal team can find no record during this law's 70-year existence of these provisions ever being used against a bank customer (like me) until now," a statement from Lay on his Web site reads.

Old law, stiff penalties

Henning said it's true the law is old, and the high 30-year penalties came when Congress beefed them up after the savings and loan scandal.

The professor said the next time Congress got so vehement in this arena was the Sarbanes-Oxley laws about corporate governance that were in part a response to the fall of Enron.

"It is always the case that legislation can only deal with the next crisis, though inspired by the prior one," Henning said.

Though this case may take up to three days to try, several legal experts said they expect Lake to wait until after the jury verdict in the main case to issue his findings.

If issued prior to the verdict on the main case, a decision by the judge on the bank charges could prejudice the jury deliberations, they said.

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