DEFERRED PROSECUTION AGREEMENTS AND AIG

Remember the flap in the last few years about deferred prosecution agreements? The flap started when it was reported that John Ashcroft's firm had gotten a $52 million deal from his former colleague, NJ US Attorney Chris Christie, to monitor an out-of-court settlement with medical device company Zimmer Holdings. Bush's DOJ loved the deferred prosecution agreements because they provided a way to "crack down" on corporate crime without dismantling the company. But there were problems with the agreements. Cronies were secretly getting the deals to serve as monitors. And—as Eric Lichtblau reported last year—people wondered whether the agreements served as "get out of jail free" cards for big corporations to elude punishment for accounting fraud.

> Deferred prosecutions have become a favorite tool of the Bush administration. But some legal experts now wonder if the policy shift has led companies, in particular financial institutions now under investigation for their roles in the subprime mortgage debacle, to test the limits of corporate anti-fraud laws.
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> Firms have readily agreed to the deferred prosecutions, said Vikramaditya S. Khanna, a law professor at the University of Michigan who has studied their use, because "clearly it avoids a bigger headache for them."
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> Some lawyers suggest that companies may be willing to take more risks because they know that, if they are caught, the chances of getting a deferred prosecution are good. "Some companies may bear the risk" of legally

> questionable business practices if they believe they can cut a deal to defer their prosecution indefinitely, Mr. Khanna said.
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> Legal experts say the tactic may have sent the wrong signal to corporations — the promise, in effect, of a get-out-of-jail-free card. The growing use of deferred prosecutions also suggests one road map the Justice Department might follow in the subprime mortgage investigations.

Well, as the WSJ reminds us today, AIG entered two deferred prosecution agreements in the last several years and there was a monitor actively involved as AIG engaged in the practices that brought down our financial system.

> AIG has paid lawyer James Cole and his firm, Bryan Cave LLP, about $20 million to oversee business practices at the insurer, according to people familiar with the matter. His reports on the company's progress, periodically delivered to federal regulators since 2005, aren't public.
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> Mr. Cole was installed inside AIG as a monitor, or independent consultant, as part of a $126 million settlement struck in November 2004 between AIG and the Justice Department and Securities and Exchange Commission.
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> That pact, called a deferred-prosecution agreement, arose from allegations that the insurer sold products that helped companies manipulate their financial earnings. As part of the settlement, the Justice Department agreed not to pursue criminal charges against the company in exchange for implementing reforms and the review of certain financial transactions by Mr. Cole.
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> [snip]

> His original assignment, which began in January 2005, was to investigate financial transactions dating back to 2000 in which AIG helped companies smooth earnings. Some of those transactions were structured by the insurer’s financial-products group, the unit that would later write billions of dollars in credit-default-swap contracts that turned sour.
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> His responsibilities broadened in November 2006, after a separate settlement with the SEC and New York state authorities. In that case, AIG paid $1.6 billion to resolve an inquiry into accounting irregularities and bid-rigging allegations. That agreement called for Mr. Cole to examine AIG’s controls on financial reporting as well as oversight over corporate governance in areas such as compliance.

Here are the documents describing the settlements: 2004, 2006.

Now, WSJ raises AIG’s deferred prosecution agreements to suggest that Cole, AIG’s monitor, might be a good source of information on what went wrong at AIG. Cole has been submitting reports on AIG’s financial practices since 2005 (and his contract extends through November of this year) and those reports, while confidential, might tell us what went on at AIG.

But shouldn’t we be asking how it is that AIGFP managed to sideline its auditor and set up its rickety financial deals under the nose of a monitor? Shouldn’t we be asking how it is that the reforms that Cole was purportedly overseeing failed so miserably? And shouldn’t we be asking Cole whether the rot at AIG is restricted to AIGFP, or whether it still extends into AIG’s insurance business?

Update: Here’s what DOJ said last year when

pitching how great DPAs were to John Conyers:

> The agreements promote the public interest in ferreting out crime by encouraging corporate cooperation in obtaining the evidence necessary to prosecute individuals and other.corporations who have engaged in misconduct. Perhaps most importantly, by requiring solid ethics and compliance programs, the agreements encourage corporations to root out illegal and unethical conduct, prevent recidivism, and ensure that they are committed to business practices that meet or exceed applicable legal and regulatory mandates. Thus, these agreements can help restore the integrity and preserve the financial viability of a corporation that had descended into corruption and criminal conduct.

Guess that "preserve the financial viability" bit didn’t work out so well for AIG, huh?