

But the Oracle Said It Was OK...

I was watching a rerun of LA Law last night, and they actually highlighted a case involving insider trading. LA Law was the reason about half of my entire generation went to law school. With that said, it has been well documented that the real practice of law isn't too much like what you'd find on a TV drama – because real trials lack the sexy drama required for good TV.

This is especially true of criminal prosecutions that focus on financial dealings as opposed to, say, murder. A DA prosecuting a murder never has trouble explaining to the jury what the case is about – someone died, and the DA thinks the Defendant did it. Criminal prosecutions like U.S. v. Ferguson are far more complex, and educating the jury about what actually happened – or on the other hand, hoping they focus on something else – can be decisive.

Most people know of the spate of financial trials from the past few years: Enron, Worldcom, Martha Stewart, to name a few. Few people could rattle off what the defendants were accused of in each case. Even fewer know about U.S. v. Ferguson, and maybe the occasional CPA could figure out what actually happened, but it just isn't an easily explainable set of circumstances.

So what if I told you that whatever it was that the defendants did, that Warren E. Buffet said it was OK?

Opening statements were held today in federal court in Hartford, Connecticut in a case where the government is prosecuting a number of former executives of Berkshire Hathaway's General Re insurance business over a reinsurance deal that dates back seven years. The government prosecutors allege that General Re and AIG entered into a sham transaction that helped AIG boost its loss reserves in 2000 and 2001 by about \$500 million, misleading analysts and investors. That is the simplest way it can possibly be described. Most likely, the opening statements will involve charts with a "Circle of LPT Involvement" – LPT stands for Loss portfolio transaction – this is why they could never really do a trial like this on LA Law.

So both the prosecution and the defense need to come up with a reason for the jury to render a verdict in for their own side which is more basic, something else to hang their hats on.

The prosecution went with the time tested, safe approach: "The goal of this conspiracy was to help AIG lie," Assistant U.S. Attorney Raymond Patricco said in his opening statement. "When you know the true deal, but document a false one, that is a lie."

The defense, who have not made their opening statements yet, are apparently going to at least in part rely on a remarkable defense – remarkable in that I don't think its ever been used before. The defense is going to use a variant on a common defense – rather than the

typical reliance on counsel defense, this is apparently a reliance on the opinion of Warren Buffet defense.

Mr. Buffet is not a party to the case, and likely won't have to testify, but the defendants plan is both risky yet brilliant. As a technical matter, there simply is no viable "reliance on Warren Buffet" doctrine, the way there is a known legal doctrine that protects defendants from prosecution if they were acting solely upon the advice of their lawyer.

With that said, put yourself in the jury box. Miss work for a week, and try to grasp the import of the various accounting shenanigans that will be paraded in front of you all week. Really – try not to fall asleep as witnesses drone on for hours about generally accepted accounting procedures.

And then consider that according to the defense lawyers, whatever it was that the defendants did, Warren E. Buffet said it was OK.

Would that be enough for you?