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Jury Instructions: Key Topics in Federal White Collar Cases

BY SUSAN E. BRUNE AND LAURIE EDELSTEIN

The right jury charge can make the difference between conviction and acquittal. Take, as a basic example, a criminal securities fraud case in which the government has alleged that a defendant employed in a large organization made misleading statements about the company's performance in financial statements. The defendant contends that although he participated in drafting the documents, he did not have final control over the statements. Under the Supreme Court's recent decision in *Janus Capital Group Inc. v. First Derivative Traders*, only "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it" is the maker of a statement for purposes of primary liability under the securities laws.[1] Most model or pattern securities fraud instructions do not account for or address the *Janus* ruling. Proposing and advocating for an instruction that incorporates *Janus* could provide the jury with a reason to acquit.

This article discusses six key issues where the court's instructions to the jury can truly affect the outcome of the case and where there is much room for advocacy. The first three — reasonable doubt, willful blindness, and venue — are common to white collar cases and to criminal cases in general. As a result, courts often propose to give their standard instructions. But there is a strong basis to propose instructions that may be more advantageous to the defense and can help make the difference between conviction and acquittal. The last three concern instructions in substantive areas of white collar law — securities fraud, tax evasion, and antitrust. These areas highlight that where the law is still developing, model or pattern jury instructions may not reflect the latest precedent, and often there are significant open issues that can, in appropriate cases, be pursued to the defense's advantage.

Jury instructions are an extremely effective way for defense counsel to present their theory of the case and law. The right charge can focus the jury and require it to confront directly whether the government has met its burden of proof on key defense issues. Proposing and advocating for clear and fair instructions in the trial court is thus critical, particularly in areas such as those discussed below, where courts are reluctant to reverse convictions on the basis of erroneous instructions.

Reasonable Doubt

"Proof beyond a reasonable doubt" is a concept fundamental to the American criminal justice system. A clear instruction that requires jurors to reach the con-

stitutionally required "subjective state of certitude" or "near certitude" necessary for conviction can anchor the jury in its deliberations and force the jury to answer squarely whether the government has met its heavy burden of proving guilt beyond a reasonable doubt.[2] It is remarkable, then, that there is no standard federal jury instruction established in the case law.

In many circuits, trial courts do not instruct jurors that they must reach a subjective state of certitude to convict. Instead, they use a "hesitate to act" formulation.[3] This formulation is potentially ambiguous and may trivialize the key decision facing jurors. Other circuits have approved instructions that define reasonable doubt in a way that can lower or shift the burden of proof required for conviction. And surprisingly, given how fundamental the burden of proof is to deliberations, there remains a circuit split over whether reasonable doubt should even be defined for the jury.[4]

The potpourri of reasonable doubt instructions and the circuit split stem from the Supreme Court's failure to provide clear guidance. Indeed, not until 1970, in *In re Winship*, did the Supreme Court explicitly hold that the due process clause of the Fifth and Fourteenth Amendments "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[5] The Court recognized that the reasonable doubt standard was "indispensable" because it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue," and is thus "a prime instrument for reducing the risk of convictions resting on factual error."[6] But *Winship* was an appeal from a bench trial, and the Supreme Court did not address the particulars of instructing the jury on this constitutionally required burden of proof.

The Supreme Court addressed reasonable doubt again in 1994 in *Victor v. Nebraska*.[7] Unfortunately, however, the Court again left trial courts without clear guidance about whether or how to instruct juries on the standard.[8] In dictum, the Court went so far as to state that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course."[9]

But helpful for the defense is Justice Ginsburg's concurrence, which advocates for defining reasonable doubt for the jury.[10] Justice Ginsburg acknowledged that certain formulations of the reasonable doubt standard can be confusing and unhelpful, including the "hesitate to act" analogy that many circuits still use: "a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life."[11] That analogy, as Second Circuit Judge Jon Newman has astutely observed, can be beset by ambiguity:

> If the jurors encounter a doubt that would cause them to "hesitate to act in a matter of importance," what are they to do then? Should they decline to convict because they have reached a point of hesitation, or should they simply hesitate, then ask themselves whether in their own private matters, they would resolve the doubt in favor of action, and if so, continue on to convict?[12]

Justice Ginsburg noted that other reasonable doubt instructions have additional shortcomings, such as "uninstructive circularity": "Jury comprehension is scarcely advanced when a court 'defines' reasonable doubt as 'doubt … that is reasonable.'"[13]

Justice Ginsburg recognized that difficulties in defining reasonable doubt have led some courts to question the usefulness of any reasonable doubt instruction.[14] But she refused to accept those difficulties as a reason not to give a definition. Justice Ginsburg's approach has to be the right one. The concept clearly is not self-defining; even courts define it inconsistently. And studies confirm that when jurors are not given a definition, they "are often confused about the meaning of reasonable doubt."[15] That confusion can lead jurors to apply a lower standard of proof than the constitutionally required "subjective state of certitude" or "near certitude."[16]

Defense counsel might consider proposing the Federal Judicial Center's (FJC) pattern instruction on reasonable doubt, which Justice Ginsburg highlighted in *Victor*.[17] This instruction does away with the "hesitate to act" analogy and instead focuses on whether the government has met its burden of proof: "Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt."[18] The "firmly convinced" standard, which certain circuits have approved, more accurately reflects the state of certainty required to find a defendant guilty.[19]

The FJC's pattern instruction, however, is not perfect. The last two sentences state: "If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty." Several circuits and commentators have expressed concern that the phrase "a real possibility" could suggest that the defendant must make a showing that he or she is not guilty, thereby impermissibly shifting the burden of proof to the defense.[20] The Supreme Court of New Jersey has adopted a modified version of the FJC instruction that eliminates this issue: "If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give defendant the benefit of the doubt and find him not guilty."[21]

Because the Supreme Court's decision in *Victor* effectively held that problematic words or definitions in a reasonable doubt charge can be neutralized by words or phrases that preclude the jury from requiring more than a reasonable doubt to acquit, it is unlikely that a reasonable doubt charge will provide grounds for reversal of a guilty verdict on appeal.[22] Advocating for a charge that focuses on the government's burden and instructs the jury that it cannot convict unless it is firmly convinced of the defendant's guilt thus can be critical. It may help secure an acquittal in the first instance.

Willful Blindness

In May 2011, the Supreme Court issued a decision in a patent case, *Global-Tech Appliances Inc. v. SEB S.A.*,[23] which changed the contours of the willful blindness doctrine — also known as "conscious avoidance," "deliberate ignorance," or the "ostrich" instruction. The doctrine relieves a party from establishing a defendant's "actual knowledge" of wrongdoing. Instead, it allows the court to instruct the jury that a party can prove "knowledge" by showing that a defendant actively avoided learning a fact. The decision in *Global-Tech* has caught the attention of the criminal bar because it raises significant questions regarding

when — if ever — courts should give a willful blindness instruction in a criminal case requiring proof of knowledge, and how any such instruction should be worded. These questions are particularly important for white collar cases in which a defendant's knowledge and state of mind are often central. Indeed, willful blindness instructions have played a prominent role in many recent high-profile white collar prosecutions, including the trials of Jeffrey Skilling, Kenneth Lay, Bernard Ebbers, and Conrad Black.

In *Global-Tech*, the Court was asked to rule upon the level of knowledge required to prove a claim for active inducement under the patent law. The Court held that a plaintiff must prove that the defendant had "knowledge" that the induced acts constituted patent infringement, but that a plaintiff did not need to prove that the defendant had actual knowledge. Instead, the "knowledge" requirement could be satisfied by a showing that the defendant "willfully blinded itself to the infringing nature" of the conduct it encouraged.[24] To support its conclusion that "willfulness blindness" could substitute for actual knowledge, the Court turned to the criminal law. According to the majority, although many criminal statutes require proof that a defendant acted knowingly or willfully, many courts have "fully embraced willful blindness," holding that defendants could not escape liability "by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances."[25] Based on what the Court viewed as "its wide acceptance in the Federal Judiciary," the Court saw no reason to confine the doctrine to criminal actions.[26]

Justice Anthony Kennedy's dissent strongly criticized the majority's reasoning and its suggestion that willful blindness can appropriately satisfy the mental state requirement in "all federal criminal cases involving knowledge."[27] As Judge Kennedy pointed out, the Supreme Court had "never before held that willful blindness can substitute for a statutory requirement of knowledge."[28] And he questioned the majority's "mistaken step" of sanctioning the substitution of one distinct mental state for another.[29]

The majority's opinion in *Global-Tech* also overstates the federal judiciary's embrace of the willful blindness doctrine. Although the courts of appeals have upheld willful blindness instructions, many have also held that the instruction should rarely be given.[30] These courts recognize that by allowing a jury to convict without finding that the defendant had actual knowledge of illegal conduct, the willful blindness doctrine endangers the fundamental principle that criminal *mens rea* is necessary for conviction. Justice Kennedy's dissents in *Global-Tech* and *Jewell*, discussed in note 29, along with appellate decisions that are critical of the doctrine, support an objection to a willful blindness instruction, particularly when knowledge is a statutory element of the relevant offense.[31]

Tax prosecutions provide a particularly compelling opportunity for challenging the instruction. Under *Cheek v. United States*, the government must prove beyond a reasonable doubt that a defendant committed a "voluntary, intentional violation of a known legal duty."[32] A willful blindness instruction is inconsistent with the requirement that the government prove that a defendant had actual knowledge that his conduct violated the tax laws.

Defense counsel can also object to a willful blindness instruction on the ground that the evidence does not support giving the instruction. Although the government has the burden to prove willful blindness, just as it has the burden to prove knowledge,[33] the doctrine clearly makes it easier for the government to prove a defendant's knowledge beyond a reasonable doubt. Therefore, the government often seeks a willful blindness instruction even when the government's entire theory of guilt is based on the defendant's actual knowledge or when there is no evidence that the defendant took steps to avoid learning the truth.[34] But courts have held that there must be some actual evidence of "willful blindness" before the instruction is properly given — that is, the government must establish an appropriate factual predicate for the instruction.[35] (Unfortunately, however, the courts of appeals have often excused improper willful blindness instructions as harmless error. A trial court ruling that the requisite factual predicate has not been laid thus can be critical.)[36]

The upside about *Global-Tech* is that it strengthened the test that juries should apply when such an instruction is given. Previously, courts instructed the jury that the knowledge element could be satisfied by proof that the defendant "deliberately closed his eyes to what would otherwise have been obvious to him,"[37] or if a defendant "deliberately and consciously avoided confirming [the] fact."[38] But under *Global-Tech*, willful blindness can substitute for actual knowledge only if the defendant (1) "subjectively believe[s] that there is a high probability that a fact exists" and (2) "take[s] deliberate actions to avoid learning of that fact."[39] In other words, the government must show that the defendant took an affirmative step to avoid learning a fact that he believed had a high probability of existing.

Recently, the Fifth Circuit in *United States v. Brooks* held that its pre-*Global Tech* pattern instruction, which instructs the jury that it "may find that defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him," was sufficient to meet the *Global-Tech* standard.[40] Although the court admitted that the instruction did not use the same language as in *Global-Tech*, it concluded that "the same meaning is conveyed."[41] But there is a significant difference between deliberately closing one's eyes and taking deliberate actions to avoid learning a fact. Closing one's eyes amounts to inaction. Taking deliberate actions to avoid learning a fact requires an affirmative act.[42] Although most pattern jury instructions, like the Fifth Circuit's, have not yet been revised to account for *Global-Tech*'s subjective belief and active avoidance requirements, despite the Fifth Circuit's decision in *Brooks*, they should be explicitly part of any instruction.[43]

Global-Tech's distinction between willful blindness and recklessness or negligence is also worth emphasizing. A powerful and persistent criticism of the willful blindness instruction is that it creates the risk that a jury will convict based on reckless or even negligent conduct when intentional or knowing conduct is actually required.[44] *Global-Tech* explicitly distinguishes a willfully blind defendant "who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts" from a "reckless defendant … who merely knows of a substantial and unjustified risk of such wrongdoing," and a "negligent defendant … who should have known of a similar risk but, in fact, did not."[45] Where an instruction is given, incorporation of language emphasizing that recklessness and negligence are insufficient to establish knowledge is essential.

Venue

The Constitution of the United States twice guarantees to every defendant in a criminal case the right to be tried in the state and district where the alleged offenses were committed.[46] Proper venue thus is not simply a matter of formal legal procedure; it is a constitutional right.[47] Some criminal statutes, like the securities fraud statute, specify how to determine proper venue.[48] When the statutes do not, "[t]he *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it."[49]

It cannot be assumed that the government has met its burden of proving venue to the jury, particularly nowadays where prosecutions can involve complex financial transactions that touch upon various districts in preparatory or ancillary ways or where the focus is on the foreign actions of foreign defendants. For example, in 2011, the Second Circuit, in *United States v. Tolov*, vacated a securities fraud conviction for lack of proper venue.[50] The defendant had taken flights from JFK airport, in the Eastern District of New York, to meet with investors to whom he allegedly made material misstatements. The court held that the defendant's contact with the Eastern District was insufficient under the relevant securities fraud statute, which required trial "where any act or transaction *constituting the violation occurred*." [51] As the Second Circuit put it, "catching flights" were, at most, acts preparatory to the crime.[52]

Venue was also a hotly contested issue in the recent high-profile prosecution of John Edwards, whom the government charged in the Middle District of North Carolina with violating campaign finance laws.[53] Edwards argued throughout that venue was not proper for certain substantive counts where the government neither alleged nor proved that he accepted illegal campaign contributions in the district.[54] Instead, the contributions were paid in Colorado, California, and Florida. The only contribution tied to North Carolina was payment for a flight that originated in Raleigh, which is in the Eastern District of North Carolina, not the Middle District where Edwards was indicted.[55] The government claimed venue was proper under various theories, including characterizing the campaign finance violations as continuing offenses that Edwards set in motion by calling his aide in North Carolina and directing him to arrange the illegal contributions.[56]

At the close of the evidence, Edwards made an oral motion for judgment of acquittal. The court denied the motion from the bench but noted that, having gone back and reviewed the briefing from the motion to dismiss stage, "the closest questions in my mind have to do with some of the venue issues."[57] After the jury acquitted Edwards on one count and hung on five others, the court allowed defense counsel to file papers in support of a renewed Rule 29 motion and requested that "the brief be directed primarily towards the venue issues raised" by two counts.[58] The government never filed a response and instead voluntarily dismissed the case with prejudice.[59]

The government's proof of proper venue was also a major issue in a closely watched criminal antitrust case recently tried in the Northern District of California, *United States v. AU Optronics Corporation.*[60] There, the government indicted a foreign corporation, its U.S. subsidiary, and a number of executives, all of whom were Taiwan residents, for allegedly engaging in a conspiracy to fix prices of TFT-LCD panels[61] in violation of the Sherman Act. The conduct underlying the charges was predominately foreign in nature.[62] At the close of all the evidence, the defendants moved for acquittal on various grounds, including that the government had failed to meet its burden of proof on venue. The court inquired of the government whether it was "at all worried about your venue proof."[63] The government responded by moving to supplement an exhibit for reasons that had "something to do with venue."[64] The court granted the motion over the defendants' objection and allowed the government to augment the record with a certification from a custodian of records at Apple Computers, a company that had purchased TFT-LCDs, attesting to the authenticity of certain business records. The certification was sworn out in Cupertino, Calif., a city within the Northern District of California, but the business records made no reference to Cupertino or the Northern District of California.[65]

Following the verdict, the two corporations and the two senior executives who were convicted — two individuals were acquitted and the jury deadlocked as to another — renewed their motions for acquittal, vigorously arguing again that the government had failed to satisfy its burden of proof on venue.[66] The government, in response, essentially conceded that it had failed to offer direct evidence that a co-conspirator committed an overt act in furtherance of the conspiracy in the Northern District of California, arguing instead that direct proof was not necessary where circumstantial evidence supported the inference that venue was proper in the district where the indictment was brought.[67] The court denied the motions, agreeing with the government that direct proof was not necessary and that there was sufficient evidence from which the jury could have inferred that venue was proper. Venue, however, is likely to be an issue on appeal.[68]

In cases like *Tolov*, *Edwards*, and *AU Optronics,* where there is slim or no evidence of proper venue, getting a clear instruction that focuses the jury on the venue requirement, coupled with a closing argument that points to a lack of evidence satisfying venue, could provide jurors with a path to consensus for acquittal. Model instructions that address venue, however, are not usually tailored to the venue requirements of specific offenses. Therefore, requests to charge should be modified to fit the particular venue requirements of the offenses charged.

An additional note about venue — the courts of appeals have held unanimously that the government must prove venue only by a preponderance of the evidence and not by proof beyond a reasonable doubt.[69] Defense attorneys may nonetheless want to request a higher burden on the ground that a charge setting forth two standards on the fundamental issue of the government's burden will confuse the jury. For this reason, Sand's *Modern Federal Jury Instructions* proposes that the court use the "beyond a reasonable doubt standard."[70] Moreover, the lower standard is not in harmony with the Supreme Court's holding in *Blakely v. Washington* that every issue "legally essential to the punishment" be proven beyond a reasonable doubt.[71]

Securities Fraud: Reasonable Reliance

A perplexing aspect of criminal securities law is that courts have imposed more stringent requirements on a private plaintiff in a civil suit to prove securities fraud than on the government to prove criminal liability. This is so even though the same statute — Section 10(b) of the Securities Exchange Act of 1934[72] — governs

criminal securities fraud actions and private civil suits — and even though courts typically interpret liability more narrowly in the criminal context.

Under Section 10(b) and Rule 10b-5, which implements the statute, it is unlawful (1) to make an untrue statement of material fact or materially misleading omission, (2) with scienter, (3) in connection with the purchase or sale of securities, while (4) knowingly using, or causing the use of, any means or instrumentalities of interstate commerce or the mails.[73] In interpreting this statute and rule in the civil context, the Supreme Court has expressly required private securities fraud plaintiffs to prove the additional "essential element" of actual reliance on the alleged misstatement or omission.[74] According to the Supreme Court, reliance is required "because proof of reliance ensures that there is a proper 'connection between a defendant's misrepresentation and a plaintiff's injury.'"[75]

To date, an express reliance requirement has not been incorporated broadly, if at all, into the elements the government must prove to establish criminal liability for securities fraud (or in SEC enforcement actions). But there is a basis for seeking an instruction on reliance. An unpublished Second Circuit decision, *United States v. Schlisser*, sets forth the rationale for a reliance requirement in criminal cases.[76] As the *Schlisser* court explained, the government should likely be required to prove reliance as an element of criminal securities fraud because "[w]hile the securities fraud statute speaks only in terms of 'material[ity],' the very same statutory language has been interpreted in the civil context to require actual reliance."[77] The *Schlisser* court did not decide whether reliance was a required element because, on the facts of the case, the district court's failure to so instruct the jury did not rise to the level of plain error, and the evidence of the victims' actual reliance was overwhelming. The court noted, however, that the government had not offered a rationale for why the statute should be interpreted differently in the criminal context, where, in fact, courts "typically interpret liability *more* narrowly."[78]

Even if the court refuses a request to instruct the jury that reliance is an element, counsel may still be able to persuade the court to integrate the concept into the charge and thereby put the issue before the jury. For example, in a securities fraud prosecution in the Eastern District of New York, defense counsel asked the court to instruct the jury that reliance was a required element of the securities fraud charges in the case.[79] The issue of reliance was critical because of the absence of evidence that the alleged victims of the purported fraud — sophisticated hedge fund investors — actually relied on any of the alleged misstatements or omissions upon which the government had based its case.

The court declined to give the requested instruction. But it did incorporate the concept of reliance into its charge on materiality. The court instructed the jury that "[i]t is also not a defense that investors did not rely upon material misrepresentations or misleading omissions. Reliance by an investor is not an element of the offense of securities fraud as I have defined it for you. *You may, however, consider reliance or lack of reliance in assessing materiality.*"[80] In other words, the jurors could ask themselves whether the alleged misstatements or omissions were material in light of the lack of evidence that any alleged victim acted in reliance thereon.

Both defendants were acquitted of all charges in that case. The issue of reliance therefore did not reach appellate review. Someday the issue will be reached; therefore, where appropriate, it should be addressed and preserved.

Tax Evasion: The Economic Substance Doctrine

Over the last 10 years, the government has stepped up its attack against what it alleges to be abusive tax shelters by bringing criminal tax evasion charges — not against the taxpayers who allegedly evaded their taxes — but against the tax shelter promoters and the accountants, lawyers, and bankers involved in the transactions.[81] In recent cases, a chief battleground has been the court's instructions to the jury as to whether the tax transaction had "economic substance." The "economic substance" charge is critical because to convict a defendant of tax evasion, the government must establish that the taxpayer owed additional taxes.[82] One way the government can do that is to show that the transaction lacked "economic substance," the effect of which is that the taxpayer cannot claim the tax benefits of the transaction and therefore owes taxes. But the contours of the economic substance doctrine have been far from clear with the courts applying a dizzying array of tests that were subject to intense legal debate. In March 2010, Congress passed legislation codifying the economic substance doctrine. That legislation resolves certain issues for those transactions to which it applies, but leaves others unresolved.

Before codification, some courts applied a "conjunctive test," requiring the taxpayer to show that the transaction had an objective economic effect, such as potential for profit or other meaningful change in the taxpayer's position *and* that the taxpayer had a subjective non-tax business purpose for entering into the transaction. Other courts applied a disjunctive test. For the tax aspects of the transaction to be respected, the taxpayer needed to show only that the transaction presented an objective economic benefit *or* a non-tax business purpose. And still others used a more fluid test treating the objective and subjective components as factors to be considered in the economic substance analysis.[83]

Codification appears to resolve the conjunctive/disjunctive split, at least for future cases. For a transaction to have economic substance, the statute imposes a conjunctive test. A taxpayer must show that "the transaction changes in a meaningful way (apart from federal income tax effects) the taxpayer's economic position," and that "the taxpayer has a substantial purpose (apart from federal income tax effects) for entering into such transaction."[84] In other words, to obtain the tax benefits of a transaction, a taxpayer must satisfy both the objective and subjective prongs of the doctrine. On the flip side, in a criminal tax evasion action, it now appears that the government may have to disprove only one of the prongs to show that a defendant acted "willfully" in violation of the tax laws — that is, committed a "voluntary, intentional violation of a known legal duty."[85]

Codification, however, leaves a number of questions unanswered. The statute does not define the term "transaction," beyond stating that the "[t]erm 'transaction' includes a series of transactions."[86] The definition of a "transaction" in tax cases can be critical. For example, if a narrow definition is used, it may be more difficult to show that the taxpayer had a substantial non-tax purpose in entering the transaction.[87] The statute, likewise, provides little guidance on what would constitute a "meaningful change" in a taxpayer's "economic position" or what would

qualify as a "substantial purpose" apart from tax effects for entering into the transaction.

The statute also does not resolve another key debate in recent tax evasion cases: how to define a transaction's profit potential. Under the statute, one way a taxpayer can show that a transaction has economic substance is to meet the "profit potential" test. That test is met "if the present value of the reasonably expected pre-tax profit from the transaction is substantial in relation to the present value of the expected net tax benefits that would be allowed if the transaction were respected," taking into account "[f]ees and other transaction expenses."[88] But the statute does not define "pre-tax profit" or what it means to be "reasonably expected." Nor is it clear what "substantial" means. Is it a qualitative test, a quantitative one, or both? The statute is likewise ambiguous as to which fees and transaction expenses are to be taken into account when determining pre-tax profit. Does the calculation include legal fees for a tax opinion letter received in connection with the transactions? Those can substantially and significantly affect the profit potential.[89]

Codification has a way of resolving some issues while opening up new ones. The recent codification in the tax law area is no exception. Jury instructions in this area thus will continue to be debated and contested.

Antitrust: Application Of the FTAIA

Over the last decade, the Antitrust Division of the U.S. Department of Justice has vigorously pursued and prosecuted international cartels that have allegedly violated the antitrust laws. These cases, which often involve predominately foreign conduct, have raised thorny issues about the application of the Sherman Act to alleged criminal conduct beyond the borders of the United States. Many of these issues have remained unresolved because these criminal cases rarely go to trial. Since 2001, no corporate defendant and only a few individuals have taken the government to trial in an international criminal cartel case.[90] But recently, one international corporation and several of its executives challenged the government's global price-fixing allegations all the way through trial. That case, *United States v. AU Optronics Corporation*, discussed above in the venue section, required the parties and the court to confront directly a number of novel issues concerning the extraterritorial reach of the U.S. antitrust laws in the criminal context. As the court stated during the charge conference, "We are in what appears to me to be pretty uncharted waters here."[91]

A key open issue was whether the Foreign Trade Antitrust Improvements Act (FTAIA),[92] which excludes foreign commerce from the reach of the Sherman Act, applied to the criminal conduct charged and whose decision was it to make — the judge's or the jury's? If it was the jury's decision, then how should it be instructed with respect to the Act's requirements? Congress passed the FTAIA in 1982 in an effort to limit the application of U.S. antitrust laws to foreign anticompetitive conduct when that conduct causes no injury to U.S. consumers.[93] Although the statute's language is "convoluted" and "inelegantly phrased,"[94] the FTAIA, in essence, provides that the Sherman Act does not apply to foreign commerce unless the alleged anticompetitive conduct (1) involves "import trade or commerce" or (2) has "a direct, substantial, and reasonably foreseeable effect" on U.S. domestic, import, or export commerce that gives rise to a claim under U.S. antitrust laws.[95] This first exception is known as the "import trade or commerce" exception and the second as the "domestic injury" or "direct effects" exception.[96]

The defendants in *AU Optronics* moved to dismiss the indictment, arguing that it failed to allege that defendants' actions fell within either of the two exceptions to the FTAIA — the "import trade or commerce" or the "domestic injury" exception. They contended that the FTAIA serves as a substantive limitation on the Sherman Act; these facts thus were essential elements of a Sherman Act claim involving foreign commerce and the government was required to plead and ultimately prove them beyond a reasonable doubt. The government maintained that the FTAIA addresses only subject matter jurisdiction, not the merits or elements of the Sherman Act. Therefore, it was not required to plead or prove either fact, and it was for the court, not the jury, to decide where the conduct alleged fell within the Sherman Act. But in deciding the motion, the court did not resolve the substantive versus jurisdictional issue. It concluded that even if the FTAIA applied in a criminal antitrust case, the indictment's allegations were sufficient to satisfy the statute's exception for "import trade or import commerce."[97]

Several months later, however, in the parallel TFT-LCD civil antitrust action — assigned to the same judge — the court expressly held that the FTAIA was a substantive, not a jurisdictional, limitation on the Sherman Act.[98] The court rejected Ninth Circuit precedent to the contrary, ruling that the Supreme Court's decision in *Arbaugh v. Y&H Corporation* compelled the conclusion that the FTAIA imposed a substantive merits limitation rather than a jurisdictional bar.[99] In *Arbaugh*, the Supreme Court held that a statute is jurisdictional only if the legislature clearly says so.[100] Between the court's motion to dismiss ruling in *AU Optronics* and its ruling in the civil suit, the Third Circuit in *Animal Sci. Prods. v. China Minmetals Corp.*, another global antitrust case, had come to the same conclusion.[101] The Seventh Circuit in *Minn-Chem Inc. v. Agrium Inc.* also strongly suggested that its previous ruling that the FTAIA imposed a jurisdictional bar would not survive *Arbaugh* and the Supreme Court's decision in *Morrison v. National Australian Bank Ltd.*, concluding that Section 10(b) of the Exchange Act does not apply extraterritorially.[102]

Based on these decisions, the defendants in *AU Optronics* convinced the court to instruct the jury that the two exceptions to the FTAIA were elements of the offense and that the government was required to prove them beyond a reasonable doubt.[103] The court also agreed to define somewhat narrowly the conduct required to satisfy the "import trade or commerce" exception. Defendants argued that for the government to satisfy its burden of proving that defendants' conduct involved "import trade or commerce," it was required to establish beyond a reasonable doubt that defendants' conduct was "directed" or "targeted" at the U.S. import market.[104] The government contested this definition, claiming that there was "no targeting requirement in the statute"; all the jury was required to find was an agreement to fix the price of products that eventually were sold in the United States or delivered to the United States.[105] Over the government's objection, the court instructed the jury that the "import trade or commerce" exception required the government to prove that the defendants engaged in "fixing the price of TFT-LCD panels *targeted by the participants* to be sold in the United States or for delivery to the United States."[106]

It remains to be seen whether other courts will agree that the FTAIA imposes substantive, as opposed to jurisdictional, limitations on antitrust actions involv-

ing foreign commerce. The Supreme Court's decision in *Morrison* and the Seventh Circuit's *en banc* decision in *Minn-Chem* holding that the FTAIA spells out an element of an antitrust claim suggest that they will.[107] Interpreting the FTAIA as imposing a substantive limitation on antitrust actions will make it more difficult for *civil* antitrust defendants to dismiss claims at the outset of an action, but it is likely to be helpful for *criminal* antitrust defendants because it requires the government to prove the two exceptions to the FTAIA beyond a reasonable doubt.

It is also unclear how other courts will construe the conduct necessary to satisfy the "import trade or commerce" exception. In *Minn-Chem*, the original panel agreed that the relevant inquiry is whether the defendants' alleged anticompetitive conduct is "directed" at an import market or "target[s] [U.S.] import goods or services."[108] It is not enough merely for defendants to be engaged in the U.S. market. But in its *en banc* decision, the Seventh Circuit appears to have broadened the definition of "import and trade commerce," stating that "transactions in which a good or service is being sent directly into the United States with no intermediate stops" fall within the U.S. antitrust laws.[109]

Another open issue is how "direct" the effects on U.S. commerce must be to satisfy the domestic injury or direct effects exception to the FTAIA. The defendants in *AU Optronics* requested that the court instruct the jury that a "direct" effect is one that "follows as an immediate consequence of the defendant's activity."[110] The government agreed that a direct effect must "follow as an immediate consequence" of the conduct. But based on the facts of the case — the incorporation of price-fixed panels into finished products sold in or for delivery to the United States — the government argued that there was no need to instruct the jury on the meaning of "direct," and the court did not provide a definition.[111] In *Minn-Chem*, however, the government took the position that the term "direct" as used in the FTAIA should be interpreted more broadly to mean "reasonably proximate" so as to cover a wider range of conduct.[112] Although the original panel held that an effect is "direct" if "it follows as an immediate consequence of the defendant's activity,"[113] the Seventh Circuit *en banc* agreed with the government, adopting its definition that "direct" means only "a reasonably proximate causal nexus" between the alleged foreign anti-competitive conduct and the effect on U.S. commerce.[114] This holding has the potential to expand significantly the "domestic injury" or "direct effects" exception to the FTAIA. It also creates a circuit split with the Ninth Circuit, which has held that an effect was direct only if it was an "immediate" consequence of a defendant's anticompetitive conduct.[115]

Ultimately, the Supreme Court may need to resolve these issues. But until it does, this evolving area of law demands careful attention — both at the motion phase and when drafting jury instructions.

Conclusion

Model or standard jury instructions often do not capture the nuances of every case or keep pace with evolving case law. They can — and should — be revisited. Unsettled areas of the law provide significant opportunities for the defense. Because the right charge can help win a case, taking advantage of these opportunities is crucial. It truly may make the difference between conviction and acquittal.

Melissa S. Dassori of Brune & Richard LLP contributed to the research and writing of this article.

Notes

1. *Janus Capital Group Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011).

2. *See Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (fact-finder needs to "reach a subjective state of near certitude of the guilt of the accused"); *In re Winship*, 397 U.S. 358, 364 (1970) (necessary for trier of fact to reach "subjective state of certitude of the facts in issue") (citation omitted).

3. Judge Leonard Sand's *Modern Federal Jury Instructions* presents an example of the "hesitate to act" formulation. *See* 1 LEONARD B. SAND, ET AL., MODERN FEDERAL JURY INSTRUCTIONS, 4.01, Instr. 4-2 (2011).

4. Notably, the Fourth and Seventh Circuits have taken the position that courts should not define "reasonable doubt" for the jury. They reason that "reasonable doubt" is a common term with a self-evident meaning that is readily apparent to jurors and that definitions can be misleading. *See, e.g., United States v. Garcia*, No. 94-5117, 1996 U.S. App. LEXIS 1882, at *26-27 (4th Cir. Feb. 9, 1996) (district court correctly refused to give instruction); *United States v. Reynolds*, 64 F.3d 292, 298 (7th Cir. 1995) ("An attempt to define reasonable doubt presents a risk without any real benefit.") (internal quotations and citation omitted); *United States v. Moss*, 756 F.2d 329, 333 (4th Cir. 1985) (definitions create confusion); *United States v. Lawson*, 507 F.2d 433, 442-43 (7th Cir. 1974) (the phrase "reasonable doubt" is "of common acceptance"; further elaboration "tends to misleading refinements"); Circuit Pattern Criminal Jury Instructions for the Seventh Circuit, Instr. 2.04, Comment ("The Commission recommends that no instruction be given defining 'reasonable doubt.'"). Other circuits, including the Third, Eighth, and Tenth Circuits, have ruled that a trial judge, upon request, must define reasonable doubt or be reversed. *See, e.g., United States v. Pepe*, 501 F.2d 1142, 1143 (10th Cir. 1974); *Friedman v. United States*, 381 F.2d 155, 160 (8th Cir. 1967); *Blatt v. United States*, 60 F.2d 481, 481 (3rd Cir. 1932). The Sixth Circuit has "consistently proceeded on the assumption that some definition should be given, with the only real question being what the definition should be." Pattern Criminal Jury Instructions for the Sixth Circuit, Instr. 1.03, Committee Commentary 1.03.

5. *Winship*, 397 U.S. at 364.

6. *Id.* at 364, 363 (internal quotations and citations omitted). In his concurring opinion, Justice Harlan agreed, explaining that proof beyond a reasonable doubt reflects society's value determination that "it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372 (Harlan, J., concurring).

7. *Victor* v. *Nebraska*, 511 U.S. 1 (1994).

8. Between *Winship* and *Victor*, the Supreme Court addressed the adequacy of specific reasonable doubt instructions in two other cases. In *Cage v. Louisiana*, 498 U.S. 39 (1990), the Court reversed a conviction where the trial court's instruction suggested a higher standard for acquittal by requiring "an actual substantial doubt," "grave uncertainty," or "a moral certainty." In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Court faced a similar instruction and held that such an instruction, which permitted conviction on less than proof beyond a reasonable doubt, violated the defendant's Sixth Amendment right to a jury finding of guilt and thus constituted a basic structural error.

9. *Victor*, 511 U.S. at 5. The Court explained, "[S]o long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." *Id.* (citations omitted).

10. *Id.* at 26 (Ginsburg, J., concurring in part and concurring in the judgment).

11. *Id.* at 24-25; 1 SAND, ET AL., MODERN

FEDERAL JURY INSTRUCTIONS, Instr. 4-2. Pattern instructions from the Third, Fifth, Sixth, Eighth, and Eleventh Circuits contain similar language.

12. Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 982-83 (1993). The "hesitate to act" analogy has also been criticized as trivializing the constitutional standard. *See United States v. Noone*, 913 F.2d 20, 28-29 (1st Cir. 1990); Federal Judicial Center, Pattern Criminal Jury Instructions, Commentary to Instruction No. 21 (1987).

13. *Victor*, 511 U.S. at 25 (Ginsburg, J., concurring in part and concurring in the judgment).

14. *Id.* at 24-25.

15. *Id.* at 26 (citing Note, *Defining Reasonable Doubt*, 90 COLUM. L. REV. 1716, 1723 (1990)) (collecting and discussing studies).

16. *See, e.g.*, Robert C. Power, *Reasonable and Other Doubts: The Problem of Jury Instructions*, 67 TENN. L. REV. 45, 97-108 (1999) (collecting and discussing studies); Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 119-132 (1999) (same).

17. *Victor*, 511 U.S. at 26-27.

18. Federal Judicial Center, Pattern Criminal Jury Instructions, Instr. No. 21 (1987).

19. The First, Second, Fifth, Ninth, Tenth, and D.C. Circuits have approved the "firmly convinced" standard. *See, e.g.*, *United States v. Rodriguez*, 162 F.3d 135, 146 (1st Cir. 1998); *United States v. Reese*, 33 F.3d 166, 172 (2d Cir. 1994); *United States v. Williams*, 20 F.3d 125, 131-32 (5th Cir. 1994); *United* States *v. Velasquez*, 980 F.2d 1275, 1278 (9th Cir. 1992); *United States v. Conway,* 73 F.3d 975, 980 (10th Cir. 1995); *United States v. Taylor*, 997 F.2d 1551, 1555-56 (D.C. Cir. 1993).

20. *See, e.g., Reese*, 33 F.3d at 172; *United States v. Porter*, 821 F.2d 968, 973 (4th Cir. 1987); Solan, *Refocusing the Burden of Proof in Criminal Cases*, 78 TEX. L. REV. at 116-18; Power, *Reasonable and Other Doubts*, 67 TENN. L. REV. at 84.

21. *State v. Medina*, 685 A.2d 1242, 1251-52 (N.J. 1996); *see* Solan, *Refocusing the Burden of Proof in Criminal Cases*, 78 TEX. L. REV. at 117-18.

22. *Victor*, 511 U.S. at 17, 21-22.

23. *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011).

24. *Id.* at 2071.

25. *Id.* at 2068-69.

26. *Id.* at 2069.

27. *Id.* at 2073 (Kennedy, J., dissenting).

28. *Id.*

29. *Id.* at 2072. *Global-Tech* was not the first time that Justice Kennedy has spoken on this issue. Then-Judge Kennedy wrote a forceful dissent in *United States v. Jewell*, the case in which the Ninth Circuit adopted the willful blindness doctrine. There, Judge Kennedy clearly explained the dangers of applying willful blindness in the criminal context: "the English authorities seem to consider wilful blindness a state of mind distinct from, but equally culpable as, 'actual' knowledge. When a statute specifically requires knowledge as an element of a crime, however, the substitution of some other state of mind cannot be justified even if the court deems that both are equally blameworthy." *United States v. Jewell*, 532 F.2d 697, 706 (9th Cir. 1976) (Kennedy, J., dissenting).

30. *See, e.g.*, *United States v. Skilling*, 554 F.3d 529, 548-50 (5th Cir. 2009); *United States v. Alston-Graves*, 435 F.3d 331, 339-41 (D.C. Cir. 2006); *United States v. Ruhe*, 191 F.3d 376, 385 (4th Cir. 1999); *United States v. Barnhart*, 979 F.2d 647, 651 (8th Cir. 1992); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991).

31. As one commentator has observed, "[i]n an appropriate case down the road, Kennedy could lead the Court to reconsider how the 'willful blindness' doctrine erodes the criminal-intent safeguards in federal law." Brian W. Walsh, *The Supreme Court's Willful Blindness Doctrine Opens the Door to More Wrongful Criminal Convictions*, The Heritage Foundation, WebMemo No. 3304 (June 30, 2011).

32. *Cheek v. United States*, 498 U.S. 192, 201 (1991).

33. *See, e.g., United States v. Flores*, 454 F.3d 149, 156-59 (3d Cir. 2006) (discussing burden of proof and collecting cases). If the court does charge the jury on willful blindness, defense counsel may ask the court, as part of the specific instruction, to reaffirm that the burden of proof remains on the government. *See, e.g., id.* at 159 ("So with respect to the issue of the defendant's knowledge, if you find, beyond a reasonable doubt, from all the evidence in the case, that the defendant was subjectively aware of a high probability of the existence of a fact and deliberately tried to avoid learning whether the fact was true, *you may find that the government has satisfied its burden of proving the element of knowledge of that fact*.") (emphasis added).

34. *See, e.g.*, *Skilling*, 554 F.3d at 549-50; *United States v. Kaplan*, 490 F.3d 110, 127-28 (2d Cir. 2007); *Alston-Graves*, 435 F.3d at 341-42; *United States v. Ferrarini*, 219 F.3d 145, 154-57 (2d Cir. 2000); *de Francisco-Lopez*, 939 F.2d at 1411-12.

35. *See, e.g.*, *Alston-Graves*, 435 F.3d at 339-42; *Kaplan*, 490 F.3d at 127-28; *Ferrarini*, 219 F.3d at 154-57; *de Francisco-Lopez*, 939 F.2d at 1409-11; *United States v. Giovannetti*, 919 F.2d 1223, 1226-29 (7th Cir. 1990).

36. *See, e.g.*, *Alston-Graves*, 435 F.3d at 431; *Kaplan*, 490 F.3d at 128; *United States v. Mendoza-Medina*, 346 F.3d 121, 133-35 (5th Cir. 2003); *Ferrarini*, 219 F.3d at 157; *Barnhart*, 979 F.2d at 652.

37. *Skilling*, 554 F.3d at 548 & n.19.

38. *Ferrarini*, 219 F.2d at 154.

39. *Global-Tech*, 131 S. Ct. at 2070.

40. *United States v. Brooks*, 681 F.3d 678, 701-03 (5th Cir. 2012).

41. *Id.* at 703.

42. In *Giovannetti*, 919 F.2d at 1226-29, the Seventh Circuit emphasized the importance of the distinction between avoiding learning of a fact through inaction and taking active steps to avoid learning the truth.

43. Dane C. Ball, in his article, *Improving 'Willful Blindness' Jury Instructions in Criminal Cases After High Court's Decision in Global-Tech*, CRIMINAL LAW REPORTER (June 15, 2011), provides specific strategies and arguments to use in trying to obtain an instruction based on *Global-Tech.* He also proposes a possible instruction emphasizing that the defendant must take "affirmative efforts or actions" to avoid learning a fact rather than simply ignoring the truth. The Third Circuit's post-*Global Tech* instruction also provides a model. *See* Model Criminal Jury Instructions, Third Circuit Court of Appeals, Chapter 5 (Mental States), Instr. 5.06 & cmt.

44. *See United States v. Kaiser*, 609 F.3d 556, 566 (2d Cir. 2010); *Alston-Graves*, 435 F.3d at 340; *United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992); *de Francisco-Lopez*, 939 F.2d at 1410-11; *Giovannetti*, 919 F.2d at 1228.

45. *Global-Tech*, 131 S. Ct. at 2070-71.

46. U.S. CONST. art III, § 2, cl. 3 & amend. VI; *see also* FED. R. CRIM. P. 18.

47. *See United States v. Ebersole*, 411 F.3d 517, 524 (4th Cir. 2005). When multiple offenses are charged, the government has the burden to prove that venue is proper as to each count. *Id.*

48. *See, e.g.,* 15 U.S.C. § 78aa.

49. *United States v. Cabrales*, 524 U.S. 1, 6-7 (1998) (quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946)). For conspiracy, venue is appropriate in any district where an overt act in furtherance of the conspiracy was committed by a co-conspirator. *See United States v. Svoboda*, 347 F.3d 471, 483 (2d Cir. 2003).

50. *United States v. Tolov*, 642 F.3d 314 (2d Cir. 2011).

51. 15 U.S.C. § 78aa (emphasis added).

52. *Tolov*, 642 F.3d at 319. The Second Circuit found that flying out of JFK was, however, sufficient to establish venue for the conspiracy counts with which the defendant was charged because for a conspiracy charge, venue is proper in any district where any overt act in furtherance of the conspiracy occurred. *Id.* at 319-20.

53. *United States v. Edwards*, No. 11Cr. 161 (M.D.N.C.).

54. *See, e.g.*, John Edwards' Mem. in Supp. of his Mot. to Dismiss Ind. Allegations for Charging Defects, *Edwards* (Sept. 6, 2011), Dkt. No. 39 ("Edwards Mot. to Dismiss") at 4-7; *see generally* Edwards' Renewed Rule 29 Mot. for an Aquittal, *Edwards* (June 11, 2012), Dkt. No. 319 ("Edwards Rule 29 Mot.").

55. Edwards Mot. to Dismiss at 1; Edwards Rule 29 Mot. at 1-2.

56. *See* Gov't Resp. to Def.'s Mot. to Dismiss Ind. Allegations for Charging Defects, *Edwards* (Sep. 26, 2011), Dkt. No. 62 at 6-15; *see also* Edwards Rule 29 Mot. at 5.

57. Tr., *Edwards* (May 11, 2012), Tr. at 97, *available at* http://msnbcmedia.msn.com/i/msnbc/Sections/NEWS/120514_Edwards_Motion.pdf (last visited Aug. 8, 2012).

58. Order, *Edwards* (June 4, 2012), Dkt. No. 315.

59. Order for Dismissal, *Edwards* (June 13, 2012), Dkt. No. 320.

60. *United States v. AU Optronics Corp.*, No. 09 Cr. 110 (N.D. Cal.).

61. TFT-LCDs are thin-film transistor liquid-crystal display panels, which are used in a number of products, such as computer monitors, notebook computers, and televisions.

62. *See, e.g.*, Superseding Indictment, *AU Optronics* (Jun. 10, 2010), Dkt. No. 8.

63. Tr., *AU Optronics* (Feb. 27, 2012), Dkt. No. 822, Tr. at 4696.

64. *Id.* at 4697.

65. *See* Defs.' Obj. to Any Use in the Gov't's Rebuttal Arg. of the Certification to Exhibit 835, *AU Optronics* (Feb. 29, 2012), Dkt. No. 827; Defs.' Jt. Mem. in Supp. of Mot. for J. of Acquittal, or in the Alternative, for New Trial, *AU Optronics* (Apr. 20, 2012), Dkt. No. 878 at 6.

66. *See* Defs.' Jt. Mem. in Supp. of Mot. for J. of Acquittal, *AU Optronics* (Apr. 20, 2012), Dkt. No. 878 at 3-16; Def. Hui Hsiung's Mots. for J. of Acquittal and for a New Trial, Notice of Mots., and Mem. of P. & A., *AU Optronics* (Apr. 20, 2012), Dkt. No. 879 at 29-36.

67. *See* U.S.' Opp. to Defs.' Jt. Mot. and Def. Hui Hsiung's Mot. for Judg. of Acquittal, *AU Optronics* (May 4, 2012), Dkt. No. 895 at 6-17.

68. *See United States v. AU Optronics Corp.*, No. 09 Cr. 110, 2012 U.S. Dist. LEXIS 80605, at *8-9 (N.D. Cal. Jun. 11, 2012).

69. *See United States v. Kuok*, 671 F.3d 931, 937 (9th Cir. 2012); *United States v. Acosta-Gallardo*, 656 F.3d 1109, 1118 (10th Cir. 2011); *United States v. Knox*, 540 F.3d 708, 716 (7th Cir. 2008); *United States v. Rommy*, 506 F.3d 108, 119 (2d Cir. 2007); *United States* v. *Jaber*, 509 F.3d 463, 465 (8th Cir. 2007); *United States v. Stickle*, 454 F.3d 1265, 1271-72 (11th Cir. 2006); *United States v. Perez*, 280 F.3d 318, 329-30 (3d Cir. 2002); *United States v. Scott*, 270 F.3d 30, 34 (1st Cir. 2001); *United States v. Carreon-Palacio*, 267 F.3d 381, 390-91 (5th Cir. 2001); *United States v. Crozier*, 259 F.3d 503, 519 (6th Cir. 2001).

70. *See* 1 SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS P 3.01, Inst. 3-11 & cmt.

71. *Blakely v. Washington*, 542 U.S. 296, 313 (2004).

72. 15 U.S.C. § 78j(b).

73. 17 C.F.R. § 240.10b-5(b).

74. *Stoneridge Inv. Partners LLC v. Scientific-Atlanta Inc.*, 552 U.S. 148, 157, 159 (2008).

75. *Erica P. John Fund v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988)).

76. *United States v. Schlisser*, 168 Fed. Appx. 483 (2d Cir. 2006).

77. *Id.* at 486 (citation omitted).

78. *Id.* (emphasis in original). Other courts have reached the same conclusion regarding other elements of the securities fraud statute. *See, e.g., United States v. Charnay*, 537 F.2d 341, 348 (9th Cir. 1976) (in interpreting the scope of the statute's prohibition on manipulative and deceptive devices, court concluded that there "'is no reasonable basis for holding that some different interpretation (of Rule 10b-5) should apply to a criminal action' than in a civil action") (quoting *United States v. Clark*, 359 F. Supp. 128, 130 (S.D.N.Y.1973)). Courts in criminal securities fraud cases thus often look to and apply precedents established in the civil context. *See, e.g., United States v. Reyes*, 660 F.3d 454, 468 (9th Cir. 2011) (adopting definition of materiality from *Basic v. Levinson*, 485 U.S. 224 (1988)); *United States v. Cusimano*, 123 F.3d 83, 88 (2d Cir. 1997) (same); *see also United States v. Kelley*, 551 F.3d 171, 175 (2d Cir. 2009) (construing "in connection with" requirement by reference to *SEC v. Zandford*, 535 U.S. 813 (2002)).

79. The authors were counsel for one of the defendants in the action, *United States v. Cioffi*, 08 Cr. 415 (FB) (E.D.N.Y.).

80. *United States v. Cioffi*, 08 Cr. 415 (FB) (E.D.N.Y.), Court Ex. 1 at 17 (emphasis added).

81. *See, e.g.*, *United States v. Stein*, No. 05 Cr. 888 (S.D.N.Y.); *United States v. Coplan*, No. 07 Cr. 453 (S.D.N.Y.); and *United States v. Daugerdas*, No. 09 Cr. 581 (S.D.N.Y.). The authors were counsel to one of the defendants in the *Daugerdas* case.

82. *See Boulware v. United States*, 552 U.S. 421, 424 (2008).

83. Much has been written on the various tests and their application. *See, e.g.,* Jeffrey C. Glickman & Clark R. Calhoun, *The 'States' of the Federal Common Law Tax Doctrines*, 61 TAX LAW. 1181 (2008); Yoram Keinan, *The Many Faces of the Economic Substance's Two-Prong Test: Time for Reconciliation?*, 1 N.Y.U. J.L. & BUS. 371 (2005).

84. 26 U.S.C. § 7701(o)(1) (2012).

85. *Cheek*, 498 U.S. at 201.

86. 26 U.S.C. § 7701(o)(5)(D).

87. *See* David P. Hariton, *The Frame Game: How Defining 'The Transaction' Decides the Case*, 63 TAX LAW. 1 (2009).

88. 26 U.S.C. § 7701(o)(2)(A)-(B).

89. The American Bar Association's Section on Taxation has issued comments noting these ambiguities and requesting guidance from the Department of Treasury. *See* ABA Section of Taxation, *Request for Guidance on Implementation of Economic Substance Legislation* (Jan. 18, 2011) at 26-37.

90. *See* Jason Brown, Mark S. Popofsky & Anthony Biagioli, *Restraining Liberty Before a Verdict Is in Sight*, GLOBAL COMPETITION REV. 36, 36 (May 2011).

91. Tr., *AU Optronics* (Feb. 27, 2012), Dkt. No. 822, Tr. at 4699.

92. The Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a.

93. *See Hartford Fire Ins. v. California*, 509 U.S. 764, 796 n.23 (1993) ("The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy.") (citing H.R. Rep. No. 97-686, at 2-3, 9-10 (1982)).

94. *Turicentro S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 300 (3d Cir. 2002) (internal quotations and citation omitted).

95. 15 U.S.C. § 6a.

96. In the recent Seventh Circuit *en banc* decision in *Minn-Chem Inc. v. Agrium Inc.*, 683 F.3d 845, 2012 U.S. App. LEXIS 13131 (7th Cir. 2012) (*en banc*), Judge Diane Wood writes that describing "import trade and commerce" as an "exception" to the FTAIA is inaccurate because "import trade and commerce" are excluded at the outset from coverage of the FTAIA in the same way that domestic interstate commerce is excluded. Given that most courts have discussed FTAIA issues in terms of the two exceptions — the "import trade or commerce" exception and the "domestic injury" or "direct

effects" exception — we adopt that convention here. *Id.* at *22.

97. Alternatively, the court held that the indictment alleged a domestic conspiracy that was not barred by the FTAIA. *See United States v. AU Optronics Corp.*, 2011 U.S. Dist. LEXIS 42345, at *14-18 (N.D. Cal. Apr. 18, 2011).

98. *In re TFT-LCD Antitrust Litig.*, 2011 U.S. Dist. LEXIS 115212, at *11-18 (N.D. Cal. Oct. 5, 2011).

99. *Id.* at *15-18 (citing and relying on *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006)).

100. *Arbaugh*, 546 U.S. at 515-16.

101. *See Animal Sci. Prods. v. China Minmetals Corp.*, 654 F.3d 462, 467-69 (3d Cir. 2011).

102. *See Minn-Chem Inc. v. Agrium Inc.*, 657 F.3d 650, 659 (7th Cir. 2011) (citing *Arbaugh* and *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010)). The Seventh Circuit declined to decide the issue because it was not necessary to resolve the appeal. But on rehearing *en banc*, the Seventh Circuit overruled its earlier precedent, holding that the FTAIA does not impose a jurisdictional limit but instead spells out an element of a claim. *See Minn-Chem*, 2012 U.S. App. LEXIS 13131, at *13-17.

103. Jury Instructions, *AU Optronics* (Mar. 1, 2012), Dkt. No. 829 at 10.

104. Defs.' Proposed Preliminary Jury Instructions on the Elements of the Offense, and Mem. in Supp. of Proposed Instructions, *AU Optronics* (Nov. 2, 2011), Dkt. No. 411 at 3-5 (quoting *Animal Sci. Prods.*, 654 F.3d at 470 ("the relevant inquiry is whether the defendants' alleged anti-competitive behavior was directed at an import market")) (internal quotations and citations omitted). *See also* Stipulated and Party-Proposed Jury Instructions, *AU Optronics* (Feb. 24, 2012), Dkt. No. 807 at 30.

105. Tr., *AU Optronics* (Feb. 27, 2012), Dkt. No. 822, Tr. at 4698-99.

106. Jury Instructions, *AU Optronics* (Mar. 1, 2012), Dkt. No. 829 at 10 (emphasis added); *see also* Tr., *AU Optronics* (Feb. 27, 2012), Dkt. No. 822, Tr. at 4699-4700.

107. *See Minn-Chem*, 2012 U.S. App. LEXIS 13131, at *13-17.

108. *Minn-Chem*, 657 F.3d at 661 (internal quotations and citations omitted).

109. *Minn-Chem*, 2012 U.S. App. LEXIS 13131, at *21.

110. Defs.' Reply Mem. in Supp. of Proposed Jury Instructions, *AU Optronics* (Dec. 6, 2011), Dkt. No. 470 at 10 (internal quotations and citation omitted).

111. U.S.' Opp. to Defs.' Proposed Preliminary Jury Instructions on the Elements of the Offense; U.S.' Proposed Alternative Preliminary Instruction, *AU Optronics* (Nov. 23, 2011), Dkt. No. 432 at 16 (internal quotations and citation omitted); Jury Instructions, *AU Optronics* (Mar. 1, 2012), Dkt. No. 829 at 10-11.

112. Br. for the U.S. and FTC as Amici Curiae in Supp. of Neither Party on Reh'g En Banc, *Minn-Chem* (Jan. 18, 2012), Dkt. No. 64 at 20-30.

113. *Minn-Chem, Inc.*, 657 F.3d at 662 (internal quotations and citation omitted).

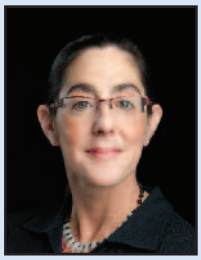
114. *Minn-Chem*, 2012 U.S. App. LEXIS 13131, at *29 (internal quotations and citation omitted).

115. *United States v. LSL Biotechs.*, 379 F.3d 672, 680 (9th Cir. 2004). ■

About the Authors

Susan Brune focuses her practice on white collar defense, government investigations, and commercial litigation. A seasoned trial lawyer, she founded Brune & Richard LLP, a firm with offices in New York and San Francisco, in 1998. Before becoming a defense lawyer, she served as an Assistant U.S. Attorney in the Southern District of New York.

Susan E. Brune
Brune & Richard LLP
One Battery Park Plaza
New York, NY 10004
212-668-1900
E-MAIL sbrune@bruneandrichard.com



Laurie Edelstein is the head of Brune & Richard LLP's San Francisco office. Her practice focuses on commercial litigation, white collar defense, and SEC enforcement actions. An accomplished trial lawyer in commercial and white collar matters, she has recently tried cases involving allegations of conspiracy, securities fraud, and tax evasion, as well as a breach of contract action.

Laurie Edelstein
Brune & Richard LLP
235 Montgomery Street
Suite 1130
San Francisco, CA 94104
415-563-0600 x111
E-MAIL ledelstein@bruneandrichard.com