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PERSPECTIVE

Landmark 'willful blindness' decision has failed to deliver

By Laurie Edelstein and Melissa Dassori

Three years ago, when the U.S. Supreme Court redefined the willful blindness doctrine in a patent case — *Global-Tech Appliances Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011) — the white collar criminal defense bar took note. It expected the decision to help individuals facing criminal charges like mail fraud and wire fraud where knowledge is an essential element of the offense and a defendant's state of mind is central. The willful blindness doctrine is a powerful tool for prosecutors. It has been a cornerstone of many a high-profile white collar prosecutions, including the trials of Michael Steinberg, Jeffrey Skilling, Kenneth Lay and Bernard Ebbers.

Under the doctrine — also known as "conscious avoidance" or the "ostrich" instruction — the government does not have to prove that a defendant had "actual knowledge" of wrongdoing. Instead, the knowledge element can be satisfied if a defendant "consciously avoided" learning the truth. In *Global-Tech*, the court restricted the substitution of willful blindness for actual knowledge to situations where a defendant "takes *deliberate actions* to avoid learning of [a] fact," a promising development for white collar defendants. But contrary to expectations, federal courts of appeals have not applied the stringent *Global-Tech* standard in white collar cases.

The *Global-Tech* Decision

In *Global-Tech*, the Supreme 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 did not need to prove that the defendant had actual knowledge, but it rejected the U.S. Court of Appeals for the Federal Circuit's formulation of the willful blindness doctrine, which, like a number of other circuit courts, required only that a party show a defendant's "deliberate indifference to a known risk." The court determined that for willful blindness to equate to knowledge: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." According to the court, "these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence."

Expectations After *Global-Tech*

The *Global-Tech* court reached its definition of willful blindness based on a survey of the doctrine's application in criminal law. The Supreme Court's rejection of the "deliberate indifference" standard appeared to invalidate many "ostrich" instructions given to juries across the country. Those instructions frequently permitted willful blindness to substitute for actual knowledge simply if a defendant "deliberately closed his eyes to what would otherwise have been obvious" or "avoided confirming" certain facts. In the wake of *Global-Tech*, such passive conduct does not appear sufficient to satisfy the "deliberate actions" the Supreme Court required.

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Yet many federal circuits have refused to require district courts to instruct criminal juries in accordance with *Global-Tech*'s more-stringent test or to state expressly that reckless conduct is not sufficient. The 2nd and 5th Circuits have specifically rejected the argument that *Global-Tech* modified the willful blindness doctrine, instead treating the decision as a mere synthesis of lower courts' laws. In *United States v. Goffer*, 721 F.3d 112 (2d Cir. 2013), an insider trading case, the 2nd Circuit recently upheld a jury charge that allowed the government to establish knowledge "by proof that the defendant ... deliberately closed his eyes to what otherwise would have been obvious to him." Similarly, in *United States v. Brooks*, 681 F.3d 678 (5th Cir. 2012), which involved conspiracy and wire fraud charges arising from alleged commodities fraud, the 5th Circuit found that the circuit's pattern jury instruction, which pre-dated *Global-Tech* and uses a "deliberate indifference" standard similar to *Goffer*, was sufficient.

Pattern instructions in other circuits also do not conform to the *Global-Tech* standard. For example, the 9th Circuit's willful blindness instruction provides that actual knowledge can be established if the defendant "was aware of a high probability" that a fact was true, and "deliberately avoided learning the truth." Allowing a jury to infer that a defendant was "aware of a high probability" that a fact is true is significantly different from requiring the government to prove a defendant "subjectively believe[d]" there was a high probability that a fact exists. Nonetheless, in *United States v. Yi*, 704 F.3d 800, 804-05 (9th Cir. 2013), the 9th Circuit ruled that its standard instruction complies with *Global-Tech*.

The Way Forward

Despite the appellate courts' refusal to acknowledge the changes *Global-Tech* mandated, defense counsel whose clients face willful blindness instructions should argue for an instruction that tracks *Global-Tech*'s language (although when possible, they should first argue that the evidence does not support the instruction at all). The Committee on Federal Jury Instructions in the 7th Circuit has not yet adopted *Global-Tech*'s standard pending an express holding from the 7th Circuit or the Supreme Court that it applies to criminal cases, a puzzling position given that the *Global-Tech* standard was derived from criminal law. The committee did acknowledge, however, that *Global-Tech* calls for "an arguably narrower definition of the sort of willful blindness that equates to knowledge" and encouraged trial court judges to consider using the Supreme Court's formulation. Appellate law thus may yet evolve in a pro-defense direction, and the Supreme Court may eventually face a circuit split on the issue.

Another strategy is for defense attorneys to pressure the courts to grapple with a more fundamental question — whether a willfulness blindness instruction should ever be given in a criminal case. Justice Anthony Kennedy raised this issue in his dissent in *Global-Tech*, criticizing the majority's "mistaken step" in sanctioning the substitution of one distinct mental state for another. He echoed an argument he made as a judge on the 9th Circuit almost 40 years ago in *U.S. v. Jewell*, 532 F.2d 697 (9th Cir. 1976): "When a statute specifically requires knowledge as an element of a crime ... the substitution of some other state of mind cannot be justified even if the court deems that both are equally blameworthy." Kennedy recognizes that the willful blindness doctrine endangers the fundamental principle that criminal mens rea is necessary for conviction.

Given the appellate courts' reluctance to apply *Global-Tech*'s formulation of the willful blindness doctrine, the best way for criminal defendants to challenge willful blindness instructions may be to challenge directly the doctrine's application in the criminal context.

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