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 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 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 Goffner, 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 is consistent with Global-Tech.

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The Way Forward

Despite 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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