

Expert Analysis

Patently Unusual: How a Recent Supreme Court Patent Decision Alters the Landscape for Proving Criminal Knowledge

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White-collar cases often turn on knowledge: Did the company manager know a report made by his division to a federal agency contained false statements? Did the American CEO know that one of his agents in a foreign country was bribing public officials? Did the American food wholesaler know that the lobsters he was importing were obtained in violation of Honduran fishing regulations?

And often, in these cases, the defense is essentially one of negligence: The managers didn't know about the false statements or bribery because they weren't micro-managing their many employees, who worked on a variety of projects.

Over the past 35 years, one important development in cases such as these has been the increased reliance by prosecutors on the "willful blindness" doctrine. An originally narrow rule dating back to common-law England, the doctrine's modern origins are generally traced to a decision by the 9th U.S. Circuit Court of Appeals in *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (*en banc*).

Jewell was a federal narcotics case, in which defendant Charles Jewell had been offered marijuana at a bar in Mexico by someone named Ray, refused and then accepted "Ray's" offer of \$100 to drive a car into the United States. When the car turned out to have 100 pounds of marijuana in it, Jewell claimed he had no knowledge that there was marijuana in the car.

At trial, the court allowed jurors to be instructed that they could convict Jewell if they found him willfully blind to the high probability that marijuana was in the car. On appeal, the *en banc* 9th Circuit affirmed over a dissent by then-Justice Anthony Kennedy and others.

THE DEVELOPMENT OF WILLFUL BLINDNESS

After *Jewell*, the use of the doctrine expanded rapidly, becoming commonplace in drug prosecutions.¹ By 1982, the 9th Circuit had described willful blindness as an integral part of the drug trade.² And this made some sense: In inherently illegal

industries such as the drug, gambling or counterfeit trades, strong incentives exist for individuals to avoid gaining knowledge to protect them in an easily foreseeable criminal prosecution.

Indeed, some courts relied explicitly on this motivation as an essential limitation on the willful-blindness doctrine, ruling that a “motive to escape prosecution” was an indispensable predicate for giving a willful-blindness instruction.³

Other courts, however, rejected this limitation, and the doctrine rapidly began to expand into areas, like many white-collar offenses, where any incentive to avoid gaining knowledge was lacking. In such cases, moreover, there was (and is) often an innocent reason — managerial negligence — for the defendant’s lack of knowledge.⁴

To be sure, all courts recognized this danger and cautioned against it.⁵ But the lack of any meaningful limiting principle on the willful-blindness doctrine, combined with “uncertainty as to the meaning of the doctrine ... often left juries with a discretionary instruction that force[d] them to decide whether or not to attribute guilty knowledge to the defendant without either significant guidance on how to make the decision or significant judicial review once the decision was made.”⁶

One reason for the absence of any meaningful limiting principle — or even any consistent content of the doctrine — was the lack of any guidance from the Supreme Court. While the court had mentioned the doctrine at least once in the 19th century,⁷ it had never discussed willful blindness in any detail in any case. Thus, there were considerable disputes about the definition of willful blindness, the requisite foundation, whether it was synonymous with recklessness and whether giving a properly worded willful-blindness instruction can be reversible error.⁸

THE SUPREME COURT WEIGHS IN

The Supreme Court’s guidance was thus sorely needed, and recently the court weighed in — in the most unusual fashion. The case in which the high court finally broke its silence on the willful-blindness doctrine was a patent dispute, *Global-Tech Appliances v. SEB*,⁹ where the narrow question presented was whether a party who actively induces patent infringement must know that the induced acts constitute patent infringement.

In *Global-Tech* the Federal Circuit had rejected a strict “knowledge” requirement, finding it enough that the inducer “should have known” that the induced acts constituted patent infringement because he was deliberately indifferent to a known risk of patent infringement.

The Supreme Court disagreed with this standard, finding that the lower court’s formulation did not require a sufficiently culpable mental state. The high court held instead the patent infringement statute required “knowledge” but then ruled that this knowledge requirement could be satisfied through a showing of willful blindness.

Moreover, while the justices disagreed with the lower court’s description of the willful-blindness requirement, they found that that requirement was nonetheless met based on the factual presentation in *Global-Tech*.

In reaching this result, there can be no doubt that the Supreme Court’s willful-blindness discussion was intended to apply in the criminal context. Indeed, the court began with the observation that “the doctrine of willful blindness is well established

in criminal law.”¹⁰ The court then relied exclusively on criminal cases in tracing the history of the doctrine, before concluding there was no reason why it should not apply in civil law as well.¹¹

The most important part of the court’s decision, however, was its formulation of the specific standard for showing willful blindness. According to the court, the lower courts generally agreed about the essential elements needed to show willful blindness:

- The defendant must subjectively believe that there is a high probability that a fact exists.
- The defendant must take deliberate actions to avoid learning that fact.¹²

Each of these elements is important, but the second is particularly so. This is because, while many lower courts had adopted a mental state in willful-blindness cases that resembled the Supreme Court’s formulation (though many lower courts did not require as high a standard as the Supreme Court did), few if any courts had required a separate showing of “deliberate actions to avoid knowledge.”

Indeed, the Federal Circuit had omitted such a requirement entirely when discussing the doctrine in *Global-Tech* and, as discussed more below, most pattern jury instructions from the various circuits did not contain such a requirement.

Also significant, moreover, was the Supreme Court’s description of mental states that *do not* rise to the level of willful blindness. All courts had agreed that negligence — that is, where the defendant “should have known” about the disputed fact but did not — was not sufficient to prove “knowledge” and the Supreme Court agreed.¹³

But virtually no courts had contrasted willful blindness with recklessness, as *Global-Tech* did, and the Supreme Court’s distinction is important because many lower court formulations of the willful-blindness standard seem to suggest that a defendant who recklessly ignores a fact could be found to be willfully blind. Thus, the court’s observation that its definition “give[s] willful blindness an approximately limited scope that surpasses recklessness and negligence” is an important one.

THE IMPORTANCE OF GLOBAL-TECH

By clearly defining the elements of willful blindness, and by contrasting that very high *mens rea* with reckless and negligence, the Supreme Court’s decision in *Global-Tech* has brought much needed clarity. In the next sections, the four most likely consequences of this decision in white-collar cases are examined.

Reduced use of the willful-blindness doctrine

One likely consequence of *Global-Tech* is that the willful-blindness doctrine will be used less frequently. Why? Before *Global-Tech*, the definition of willful blindness was so fluid that it could often be pursued in the absence of evidence the defendant took deliberate actions to avoid learning knowledge, and it often was used in such a fashion in white-collar cases.

Indeed, the doctrine was often particularly confusing in white-collar cases where the sort of “knowledge” needed to find guilt was often complex, and adding an

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amorphous willful-blindness instruction to the mix could often permit jurors to take shortcuts around the harder questions pertaining to actual knowledge.

But now that the basic elements of willful blindness are clearer, situations in which the doctrine is *not* applicable are clearer as well. Courts and litigants now must focus on whether evidence exists of specific, active efforts by the defendant to avoid gaining knowledge. If no such evidence exists, prosecutors should not seek to invoke the doctrine at all, and courts should reject its application of the doctrine when they do.

Substantial revision of the pattern instructions on willful blindness

As attorney Dane Ball recently explained,¹⁴ *Global-Tech* is also likely to force changes in many pattern willful-blindness instructions from around the country. Many such instructions do not expressly (or even implicitly) reference the need to prove deliberate actions by the defendant to avoid gaining knowledge and likewise do not distinguish recklessness as a lower mental state.

Ball points to the 5th Circuit's pattern instruction as an example, since it does not expressly include a requirement that the government prove the defendant took deliberate actions to avoid knowledge and it does not exclude recklessness as a mental state. Pattern instructions in the 1st,¹⁵ 8th,¹⁶ 10th¹⁷ and 11th¹⁸ circuits contain similar flaws, and it is likely that many others do as well.¹⁹

Nor can be any doubt about the insufficiency of these instructions, as the Supreme Court noted in *Global-Tech* that the Federal Circuit's willful-blindness instructions had been deficient for virtually identical reasons.²⁰

In addition, the Supreme Court's contrast between negligence and recklessness on the one hand and willful blindness on the other should be an important part of any pattern willful-blindness instruction going forward. While most pattern instructions already rule out negligence as a permissible mental state, the Supreme Court in *Global-Tech* also eliminated recklessness.²¹ And yet, some pattern jury instructions describe willful blindness in terms of "recklessness." Moreover, even those that do not make that basic error fail to specifically rule out recklessness when describing what willful blindness "is not."

This brings up a final point about jury instructions, as the Supreme Court's specific definitions of "recklessness" and "negligence" should also be incorporated in any instructions going forward. On their face, terms such as "negligence" and "recklessness" are unlikely to communicate much to a lay juror. By contrast, telling a juror that he or she may not find willful blindness simply because a defendant "should have known" of a particular fact tells lay jurors, in a much more understandable way, that they may not convict upon a showing of negligence.

Likewise, telling jurors that for the purposes of the criminal law, they may not find the defendant knew of a particular fact simply because the defendant was aware of "a substantial and unjustified risk that a particular fact" existed is a much more straightforward way of describing recklessness. Using such language is much more likely to guide lay jurors as to the very high level of knowledge required to support a finding of willful blindness, even where jurors also find deliberate efforts to avoid knowledge.

Increased importance of specific actions taken to avoid knowledge

In light of *Global-Tech's* emphasis on the importance of "active efforts" to avoid knowledge, all lawyers investigating white-collar offenses must make an effort to develop such facts during the course of their investigations. Moreover, once a case comes to trial, the presence or absence of such "active efforts" will be important to explore during cross-examination and in discussions about whether it is appropriate to give willful-blindness instructions.

Increased focus on legal issues related to willful blindness

Global-Tech is not likely to be the final word on willful blindness. While the Supreme Court's decision puts to rest some of the definitional issues about the doctrine, additional clarification is likely to be needed, as often occurs when the high court enters a distinct area of the law for the first time.

Most importantly, the court is likely to need to provide additional guidance about the "active efforts to avoid knowledge" requirement. *Global-Tech* makes clear that securing an attorney opinion about existing patents while intentionally withholding critical facts and copying a product whose markings will not provide proof of knowledge of that patent qualify as "active efforts" to avoid knowledge of patent infringement. But the opinion contains little additional guidance about how this requirement will play out in other contexts.

In future cases, it is likely the court will need to clarify what other sorts of actions satisfy the element, particularly in light of the fact that so many cases have gone to juries *pre-Global Tech* without any consideration of this factor. In short, the Supreme Court's decision indicates an element with real content, but it will likely require additional cases (and in particular, criminal cases) to determine precisely how much teeth this element possesses.

It is also likely that the court will still need to examine two willful-blindness issues that vexed lower courts even before *Global-Tech* and are likely to survive the Supreme Court's decision.

The first involves application of the rule in some circuits that giving a proper willful-blindness instruction even when there is no evidence to support it is always harmless error if any evidence of actual knowledge exists.²²

The second involves the requirement, discussed above, that the government prove a defendant's efforts to avoid knowledge were motivated by a desire to avoid prosecution.²³

While a complete discussion of these issues is beyond the scope of this article, it is fair to say that they will remain important and vexing in willful-blindness cases unless and until the Supreme Court again enters the fray.

NOTES

¹ Jonathan L. Marcus, Note: Model Penal Code Section 2.02(7) and Willful Blindness, 102 YALE L.J. 2231, 2234 (1993).

² *United States v. Nicholson*, 677 F.2d 706, 711 (9th Cir. 1982).

³ See *United States v. Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003); *United States v. Willis*, 277 F.3d 1026, 1032 (8th Cir. 2002); *United States v. Delreal-Ordones*, 213 F.3d 1263, 1268-69 (10th Cir. 2000).

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- ⁴ See Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 227-29 (1990) (risk of conviction for negligence and observing that some appellate decisions had exacerbated the risk); Marcus, *supra* note 1, at 2235.
- ⁵ *United States v. Alston-Graves*, 435 F.3d 331, 340-41 (D.C. Cir. 2006) (citing cases).
- ⁶ Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 980-81 (1998).
- ⁷ *Spurr v. United States*, 174 U.S. 728, 735 (1899).
- ⁸ *Michels*, *supra* note 6, at 980.
- ⁹ 131 S. Ct. 2060 (2011).
- ¹⁰ *Id.* at 2068.
- ¹¹ *Id.* at 2069 (“Given the long history of willful blindness and its wide acceptance in the federal judiciary, we can see no reason why the doctrine should not apply in civil lawsuits for patent infringement.”).
- ¹² *Id.* at 2070-71.
- ¹³ *Id.* (contrasting willful blindness with negligence, defined as “one who should have known of a similar risk but, in fact, did not”).
- ¹⁴ Dane Ball, *Improving ‘Willful Blindness’ Jury Instructions in Criminal Cases After High Court’s Decision in Global-Tech*, BNA CRIMINAL L. REP. (June 15, 2011).
- ¹⁵ Pattern Criminal Jury Instructions for the District Courts of the First 1st Circuit, Instruction 4.18.1001 (“A false statement is made “knowingly” if the defendant knew that it was false or demonstrated a reckless disregard for the truth with a conscious purpose to avoid learning the truth.”)
- ¹⁶ Manual of Model Criminal Jury Instructions for the District Courts of the 8th Circuit, Instruction 7.04 (“You may find that the defendant [(name)] acted knowingly if you find beyond a reasonable doubt that the defendant [(name)] was aware of a high probability that (state fact as to which knowledge is in question (e.g., that “drugs were contained in his suitcase”)) and that [he] [she] deliberately avoided learning the truth. The element of knowledge may be inferred if the defendant [(name)] deliberately closed [his] [her] eyes to what would otherwise have been obvious to [him] [her]. You may not find the defendant acted “knowingly” if you find he/she was merely negligent, careless or mistaken as to (state fact as to which knowledge is in question (e.g., that “drugs were contained in his suitcase”)).
- ¹⁷ 10th Circuit Criminal Pattern Jury Instructions, Instruction 1.37 (“When the word “knowingly” is used in these instructions, it means that the act was done voluntarily and intentionally, and not because of mistake or accident. Although knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact. Knowledge can be inferred if the defendant was aware of a high probability of the existence of [the fact in question], unless the defendant did not actually believe [the fact in question].”).
- ¹⁸ 11th Circuit Pattern Jury Instructions (Criminal Cases), Special Instruction 8 (“If a defendant’s knowledge of a fact is an essential part of a crime, it’s enough that the defendant was aware of a high probability that the fact existed — unless the defendant actually believed the fact didn’t exist. “Deliberate avoidance of positive knowledge” — which is the equivalent of knowledge — occurs, for example, if a defendant possesses a package and believes it contains a controlled substance but deliberately avoids learning that it contains the controlled substance so he or she can deny knowledge of the package’s contents. So you may find that a defendant knew about the possession of a controlled substance if you determine beyond a reasonable doubt that the defendant (1) actually knew about the controlled substance, or (2) had every reason to know but deliberately closed [his] [her] eyes. But I must emphasize that negligence, carelessness, or foolishness isn’t enough to prove that the defendant knew about the possession of the controlled substance.”).
- ¹⁹ I did not attempt to make a comprehensive survey of pattern instructions around the country in writing this article. In my research, I did not encounter any pattern instructions that tracked the two elements set forth in *Global-Tech*, nor did I find any instructions that eliminated “recklessness” as a sufficient mental state.
- ²⁰ *Global-Tech*, 131 S. Ct. at 2071 (“The test applied by the Federal Circuit in this case departs from the proper willful-blindness standard in two important respects. First, it permits a finding of knowledge when there is merely a “known risk” that the induced acts are infringing. Second, in demanding only “deliberate indifference” to that risk, the Federal Circuit’s test does not require active efforts by an inducer to avoid knowing about the infringing nature of the activities.”).

²¹ *Id.*

²² Compare *United States v. Barnhart*, 979 F.2d 647 (8th Cir. 1992) (traditional harmless-error analysis applies when trial court erroneously instructs jurors on willful blindness), with *United States v. Mari*, 47 F.3d 782 (6th Cir. 1995) (giving willful-blindness instruction despite absence of foundational predicate always harmless unless no evidence of actual knowledge exists).

²³ See *United States v. Puche*, 350 F.3d at 1149; *United States v. Willis*, 277 F.3d at 1032; *United States v. Delreal-Ordonez*, 213 F.3d at 1268-69.



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