Improving ‘Willful Blindness’ Jury Instructions
In Criminal Cases After High Court’s Decision in Global-Tech

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Perhaps more than most criminal cases this U.S. Supreme Court term, a civil case—Global-Tech Appliances Inc. v. SEB S.A.—will significantly impact future criminal cases. Specifically, Global-Tech should strengthen (from a criminal defendant’s perspective) a jury instruction unfortunately given in many criminal cases: the “willful blindness” (or “deliberate ignorance”) instruction, which usually is given when “knowledge” is an element and at issue.

In short, willful blindness instructions after Global-Tech should include, at the very least, requirements that the defendant (1) subjectively believed there was a high probability that a certain fact existed and (2) took active efforts or actions to avoid learning the fact. Future instructions also should make clear that “subjective belief” in a “high probability” that a fact existed surpasses any negligence standard (the defendant reasonably “should have known” of wrongdoing but didn’t) and even surpasses recklessness (the defendant ignored an “unjustified and substantial risk” of wrongdoing).
In a criminal case, such an error would be subject to harmless-error review rather than the civil sufficiency standard used by the court in Global-Tech. See Chapman v. California, 386 U.S. 18 (1967) (requiring the government to show that preserved constitutional errors in criminal cases are harmless beyond a reasonable doubt).
Global-Tech, but appellate courts nevertheless have affirmed because the evidence satisfied the two requirements (or because the issue wasn’t raised).

The Fifth Circuit is a good example. Global-Tech cited the Fifth Circuit’s decision in United States v. Freeman to support the proposition that all circuits require (1) subjective belief in a high probability that a fact exists and (2) active efforts or actions to avoid learning the fact. But Freeman didn’t address the language in the instruction or whether it was correct—rather, Freeman simply affirmed the district court’s decision to give a willful blindness instruction generally (because the evidence supported such an instruction) and affirmed a conviction potentially based on willful blindness (because the evidence supported such a finding).

Though Freeman didn’t include the language in the willful blindness instruction given to the jury, many other Fifth Circuit cases have. And they expose a disconnect between, on the one hand, the appellate standard for affirming a decision to give a willful blindness instruction generally and, on the other hand, what language the instruction should or should not include. Upon closer inspection, the boilerplate willful blindness instruction given by trial courts in the Fifth Circuit fails the Global-Tech standard—both in what it includes and what it omits.

Here is the instruction given in recent Fifth Circuit cases (based on Fifth Circuit Pattern Jury Instruction 1.37):

Knowingly. The word “knowingly” as that term has been used from time to time in these instructions means that the act was done voluntarily and intentionally not because of mistake or accident. You may find that a 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. While 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.

This common Fifth Circuit instruction fails Global-Tech for two reasons.

First, the instruction omits—or at least doesn’t expressly include—Global-Tech’s two requirements. Specifically, the instruction does not refer to a “subjective belief” in a “high probability” that a fact exists; nor does it refer to “active efforts” or “actions” to avoid learning the fact.

Second, though the omissions alone are detrimental, the language in the instruction actually suggests an incorrect, weaker standard for willful blindness. Most importantly, references to “closed his eyes” and “blinded himself”—though arguably consistent with the catchy title “willful blindness”—contradict Global-Tech by suggesting that a defendant need not take affirmative “action” or “efforts” to avoid knowledge. Additionally, the statement that “negligence, carelessness and foolishness” are insufficient implies that anything more is sufficient. This, too, contradicts Global-Tech’s teaching that “recklessness” also is insufficient.

In sum, Global-Tech sets the new standard for willful blindness instructions, and current instructions—like the Fifth Circuit example above—appear to violate that standard. As set out more fully below, the criminal defense bar should cite Global-Tech and its rationale to obtain more favorable willful blindness instructions in the future.

Obtaining More Favorable Willful Blindness Instructions After Global Tech

After Global-Tech, criminal defense attorneys should consider the following strategy for willful blindness instructions:

1. Object to the court giving any willful blindness instruction at all. This is an easy call: No willful blindness instruction is better than even the most favorably worded willful blindness instruction. As the court in Global-Tech noted, willful blindness is not the same as actual knowledge; it’s something less, just close enough to satisfy a knowledge requirement.

2. If the court decides that a willful blindness instruction is appropriate, request the following bolded language (but reiterate that you object to any willful blindness instruction):


Knowingly. The word “knowingly” as that term has been used from time to time in these instructions means that the act was done voluntarily and intentionally not because of mistake or accident. You may find that a defendant had knowledge of a fact if you find that the defendant was “willfully blind” to that fact. To find that the defendant was “willfully blind,” you must find beyond a reasonable doubt that (1) he “subjectively believed” there was a “high probability” that a fact existed and (2) he took “active efforts” or “actions” to avoid learning of the fact. You may not find that the defendant “subjectively believed” there was a “high probability” that a fact existed simply because he was negligent, foolish, careless, or even reckless as to

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16 434 F.3d 369 (5th Cir. 2005).

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18 Willful blindness instructions in other circuits are similarly flawed. For example, courts in the Fourth Circuit commonly instruct the jury that:

The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant’s knowledge of a fact may be inferred from willful blindness to the existence of the fact.

It is entirely up to you, as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

whether the fact existed. Also, you may not find that the defendant took “active efforts” or “actions” to avoid learning a fact simply because he closed his eyes or failed to investigate; rather, you must find that he took other affirmative efforts or actions.

3. If the court responds that *Global-Tech* is inapplicable because (1) it was a civil case or (2) it cited current willful blindness appellate law with approval, explain that *Global-Tech* (1) did not distinguish between civil and criminal jury instructions and (2) did not approve current willful blindness instructions and their text or language; indeed, *Global-Tech*’s rationale and holding suggest that the language in current instructions is not just grossly inadequate, but incorrect.

In sum, *Global-Tech* isn’t just a civil patent case. It will significantly impact a broad range of future criminal cases, serving as the new standard for willful blindness. The criminal defense bar can and should use *Global-Tech* to obtain more favorable willful blindness instructions—ones that (1) expressly require “subjective belief” in a “high probability” that a fact exists; (2) expressly require “active efforts” or “actions” to avoid learning the fact; and (3) make clear that negligence and even recklessness are insufficient.