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JURY INSTRUCTIONS

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 v. SEB S.A.*[1]—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.[2] 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 wrongdo-

[1] *Global-Tech Appliances Inc. v. SEB S.A.*, 79 U.S.L.W. 2604, 2011 WL 2119109, at *1 (May 31, 2011).

[2] Id. at *9.

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ing).[3] Before *Global-Tech*, willful blindness instructions routinely omitted or watered down these requirements and included other language likely at odds with *Global-Tech*.

Global-Tech in a Nutshell

The facts of *Global-Tech* can be concisely summarized[4]: SEB patented a new appliance in the United States and sold it worldwide. A Global-Tech foreign subsidiary bought one of the SEB appliances overseas (where it bore no U.S. patent markings) and copied its entire design, except the cosmetic features. Global-Tech hired an attorney to conduct a ''right-to-use'' study but didn't tell the attorney that Global-Tech had copied the design directly from SEB. The attorney didn't find the SEB patent. Global-Tech sold the design to manufacturers, who in turn sold the copycat appliance in the United States. SEB found all this out and sued Global-Tech for inducing the manufacturers' infringement of SEB's patent, in violation of 35 U.S.C. § 271(b).

A jury agreed with SEB that Global-Tech had induced the patent infringement. Global-Tech challenged the verdict on the basis that Global-Tech did not actually *know* of SEB's patent, as required by Section 271(b). The U.S. District Court for the Southern District of New York rejected the argument, and the U.S. Court of Appeals for the Federal Circuit affirmed. The Federal Circuit held that, although ''knowledge'' of an existing patent is required under Section 271(b), the requirement is satisfied by evidence that the defendant was ''deliberately indifferent'' to a ''known risk'' that a patent existed.

The Supreme Court affirmed but strengthened the standard for ''knowledge'': Section 271(b) requires knowledge, and ''willful blindness'' will suffice; but ''willful blindness'' is more than ''deliberate indifference'' to a ''known risk.''[5] Instead, willful blindness requires that the defendant (1) ''subjectively believed'' there was a ''high probability'' that a fact existed and (2) took ''deliberate actions'' or ''active efforts'' to avoid learning the fact.[6] The court also noted that, in application, these elements set a standard higher than negligence and even recklessness.[7] The reason is simple: Only when a defendant passes recklessness is he (arguably) ''just as culpable'' as those with actual knowledge.[8]

Though the Federal Circuit had applied the wrong standard, the Supreme Court affirmed because the evidence was ''plainly sufficient'' to satisfy the correct standard.[9] Namely, Global-Tech knew that SEB's appliance was innovative, successful in the United States, and valuable; Global-Tech used a foreign subsidiary to copy an appliance bought overseas, where it would not bear U.S. patent markings; and, finally, Global-Tech obtained a ''right-to-use'' opinion, in part, by failing to tell its attorney it had copied SEB's design.[10]

Why *Global-Tech* Will Impact Criminal Cases

Like the civil statute at issue in *Global-Tech*, many criminal statutes—including broad and commonly used statutes like mail and wire fraud[11] and money laundering[12]—require *knowledge* of certain facts for conviction. Thus, like the plaintiff in *Global-Tech*, the government routinely seeks a ''willful blindness'' instruction. And almost as routinely, it seems, trial courts give such an instruction.

Willful blindness, therefore, is a common issue in criminal cases—much more so than in civil cases. And there is little doubt that *Global-Tech*'s willful blindness holding and rationale apply equally in the criminal context. As noted by the dissent: ''The Court appears to endorse the willful blindness doctrine here for all federal criminal cases involving knowledge.''[13] The majority didn't disagree. In fact, one of the very reasons the court applied willful blindness in this civil case was that circuit courts overwhelmingly have ''applied the doctrine to a wide range of criminal statutes.''[14]

Because *Global-Tech* sets the standard for willful blindness in criminal cases, we must recognize that, as discussed below, current willful blindness instructions given in criminal cases appear to fall short of this standard.

Willful Blindness Instructions Before *Global-Tech*

The court in *Global-Tech* surveyed the law of the circuits and determined (rightly or wrongly) that they ''appear to agree'' on at least two willful blindness requirements: ''(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions [i.e., ''active efforts''] to avoid learning of the fact.''[15]

This may be a correct survey of the appellate decisions, but practitioners should recognize an important distinction. The court did not address and approve the willful blindness *instructions* commonly given in the district courts. Indeed, the cases cited with approval didn't address the *language* in those instructions. This leaves open the possibility, explained below, that willful blindness instructions currently do not comply with

[3] Id.
[4] Id. at *3-4.
[5] Id. at *7-9.
[6] Id. at *8-9.
[7] Id. at *8.
[8] Id. at *8.

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[9] 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).
[10] See *Global-Tech*, at *9-10.
[11] 18 U.S.C. §§ 1341, 1343.
[12] 18 U.S.C. §§ 1956, 1957.
[13] *Global-Tech* , at *11 (Kennedy, J., dissenting).
[14] Id. at *8.
[15] Id. at *9.

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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*[16] 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.*
>
> [17]

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.[18] 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).

[17] See *United States v. Cisneros*, 2011 WL 721534, at *4 (5th Cir. Mar. 1, 2011) ; see also *United States v. Miller*, 588 F.3d 897 (5th Cir. 2009) (same instruction); *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009) (same); *United States v. Ramirez*, 145 Fed. Appx. 915 (5th Cir. 2005) (same).

[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.

See, e.g., *United States v. Moss*, 1990 WL 130747, at *4 (4th Cir. Sept. 13, 1990) (unpublished) (emphasis added) (arguably implying that no affirmative action is required and that recklessness is sufficient).

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.

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