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Expert Analysis

Conscious Avoidance: An Over-Used Doctrine

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Southern District of New York prosecutors recently convicted five ex-employees of Bernard Madoff in a case that appeared to turn almost entirely on the question whether the defendants had knowledge of Madoff's illegal Ponzi scheme.[1] This much-discussed prosecution provides another opportunity to consider the law of conscious avoidance, a topic this column has addressed in the past.[2] As is typical in cases where the element of knowledge or willfulness is contested, the government sought and obtained, over a defense objection,[3] a conscious avoidance instruction that allowed the jury to find the defendants guilty even if they lacked actual knowledge of Madoff's fraud, if their lack of knowledge was due to their deliberate acts to avoid discovery of Madoff's actions.[4]

Pursuant to the doctrine of conscious avoidance, also sometimes referred to as "wilful blindness" or the "ostrich doctrine," a defendant who deliberately shields himself from clear evidence of critical facts is considered equally liable as one who has actual knowledge. He may not escape guilt by "'clos[ing] his eyes, when he pleases, upon all sources of information, and then excuse his ignorance by saying that he does not see anything.'"[5]

The rule properly applies only in those situations where there is evidence that a defendant actively has avoided the acquisition of knowledge, but it has become the government's go-to position in virtually every case where knowledge or intent is contested. This troubling loosening of the conscious avoidance doctrine from its moorings has been buoyed by Second Circuit decisions that a conscious avoidance instruction is permitted where the jury would be able to draw an inference that the defendant deliberately avoided knowledge of a disputed fact, rather than requiring actual evidence that the defendant engaged in any act of avoidance. The result is over-use of the conscious avoidance instruction that risks confusing juries and permitting conviction of defendants who lack the required culpable mental state.

Law of Conscious Avoidance

The Supreme Court did not endorse the notion of conscious avoidance until its 2011 decision in *Global-Tech Appliances v. SEB*.[6] In the context of that civil patent infringement case, the court examined the law of conscious avoidance as articulated by nearly every circuit court of appeals in the criminal context to frame the doctrine's two basic 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 to avoid learning that fact.

In so holding, the court rejected a formulation applied by the U.S. Court of Appeals for the Federal Circuit, which previously affirmed the jury's verdict against the defendant on the grounds that there was adequate evidence that the defendant "deliberately disregarded a known risk" that the plaintiff had a patent. The Supreme Court rejected the Federal Circuit's rule as insufficient because it permitted a finding of knowledge when there was merely a "known risk" and it failed to require "active efforts" by the defendant to avoid knowledge about the infringing nature of its activities.

The court wrote, "[A] willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability and who can almost be said to have actually known the critical facts. By contrast, a reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing and a negligent defendant is one who should have known of a similar risk but, in fact, did not."[7]

Second Circuit case law has long provided that a conscious avoidance instruction is proper only where: i) the defendant asserts the lack of some specific aspect of knowledge required for conviction; and ii) the appropriate factual predicate for the charge exists.[8] A factual predicate exists if the evidence demonstrates that the defendant was aware of a high probability of a disputed fact (i.e., that his or her boss was engaged in an illegal Ponzi scheme) and consciously and deliberately avoided confirming the fact. The instruction must make clear, however, that the defendant cannot be convicted of the crime if he actually believed that the particular fact did not exist, and also should advise the jury that mere carelessness does not suffice.[9]

Second Circuit Cases

The Second Circuit's application of the requirement that a defendant take deliberate and active steps to avoid knowledge in order to invoke the conscious avoidance doctrine effectively has eliminated it as a check on the doctrine's invocation. A recent unpublished Second Circuit decision in *United States v. Whitman*[10] serves as an example. In *Whitman*, the defendant was convicted in the Southern District of New York of securities fraud by insider trading. According to the government, Whitman, a remote tippee, traded on inside information he obtained from primary tippees who had received the information from corporate insiders. At trial, Whitman argued that he had no knowledge that the information passed to him by the primary tippees was confidential, non-public information disclosed by a corporate insider in breach of a fiduciary duty, as required by the applicable law of securities fraud.

Whitman appealed his conviction arguing, among other things, that the district court erred in giving a conscious avoidance instruction to the jury because no factual predicate for such instruction existed. Whitman relied on the

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Supreme Court's decision in *Global-Tech*, asserting that no evidence was introduced that he took "active efforts" to avoid learning the information he received was improperly obtained. "It is not enough to ignore a potential risk, or otherwise act negligently or even recklessly; the defendant must undertake 'active efforts… to avoid knowing.'"[11]

The government argued that the factual predicate was satisfied because Whitman's involvement in the criminal scheme was so suspicious that his failure to question the circumstances was proof that he purposely contrived to avoid guilty knowledge.[12] In so arguing, the government relied upon a host of evidence indicating that Whitman acted knowingly, including: his training on insider trading rules; his statements about insiders' demands for cash and his suggestions that such sources be given gifts; his trading immediately after receiving such information and the highly profitable nature of those trades; Whitman's advice to take steps to avoid detection in response to a source's expressed worry about going to jail; text messages and recorded phone calls to and from Whitman expressly referencing obtaining earnings information from insiders in advance; and much more.

The government's argument in *Whitman* relied on the Second Circuit's decision in another insider trading case, *United States v. Svoboda*.[13] In *Svoboda*, the court held that although the defendant denied knowledge of the unlawful source of the investment advice, a conscious avoidance instruction was appropriate because the nature of the information, as well as the timing and success of the trades, were highly suspicious, suggesting a high probability that the tips were based on inside information. Accordingly, the defendant's lack of actual knowledge of this fact was "due to a conscious effort to avoid confirming an otherwise obvious fact."[14]

The Second Circuit panel in *Whitman* agreed with the government's assessment that *Svoboda* applied, determining that Whitman's involvement was "so overwhelmingly suspicious" that it established his "purposeful contrivance to avoid guilty knowledge." As to the requirement that the defendant make "active efforts" to avoid the acquisition of guilty knowledge, the court held that a defendant's attempts to avoid knowledge would not always manifest in an affirmative act and frequently would be established through circumstantial evidence.[15] Thus, although the court did not say it this way, it is sufficient for the "active efforts" or "deliberate action" to occur only in the defendant's mind; they need not manifest in any physical acts in the world.

'United States v. Giovannetti'

By not requiring that "active efforts" to avoid knowledge manifest in any actual conduct, decisions like *Whitman* and *Svoboda* stretch the doctrine of conscious avoidance into troubling territory. Seventh Circuit Judge Richard Posner's discussion of conscious avoidance in *United States v. Giovannetti*[16] helps illustrate why.

In *Giovannetti*, the defendant Janis rented out a house that a gambling ring used as a "wireroom" where illegal bets were accepted over the telephone. The key issue was whether Janis did so with knowledge. Janis was a gambler himself, and knew members of the ring, including a bookmaker who asked to rent the house for his recently divorced friend. After the house ceased use as a wireroom, Janis offered a house key to the leader of the ring, during a recorded call in which Janis asked the leader if everything was all right, and the leader said yes but "they just wanted to get out of there" and "they spotted some guys out there, I guess." Janis replied: "I know."

In holding that it was improper to give a conscious avoidance charge and reversing Janis' conviction, the Seventh Circuit explained that "the most powerful criticism" of the conscious avoidance instruction is "precisely, that its tendency is to allow juries to convict upon a finding of negligence for crimes that require intent." That tendency can be avoided only by requiring evidence that the defendant deliberately take steps to avoid knowledge.

Thus, the court rejected the government's argument based upon the fact that the rented house was located a short way down a side street from a thoroughfare on which Janis commuted daily, so he could easily have gone by and likely seen that the house was being used as a wireroom. "[T]his is not the active avoidance with which the ostrich doctrine is concerned. It would be if the house had been on the thoroughfare, and Janis, fearful of what he would see if he drove past it, altered his commuting route to avoid it." Failing to display curiosity is not acting to prevent the truth from being communicated. The court concluded that because there was some evidence of Janis' knowledge, which the jury could either accept or reject, but no evidence of his active efforts to avoid knowledge, it was improper for the court to give a conscious avoidance instruction.

By not requiring any evidence of a manifest, affirmative act of avoidance, decisions like *Whitman* and *Svoboda* blur a critical distinction. That distinction, as explicated by Posner, is between failing to go out of one's way to learn something, which is akin to a negligence concept, and actually going out of one's way to avoid learning something. How does it help the jury to imagine, in the absence of any affirmative evidence, that the defendant engaged in an internal monologue in which he deliberately decided to engage in an act of will not to learn the truth? Analytically, the extra step of imagining conscious avoidance adds nothing but confusion.

If the evidence tends to show knowledge, and no evidence exists of active, manifest avoidance, the jury instructions should be limited to knowledge. If the evidence is sufficient to show circumstances that were "overwhelmingly suspicious," a jury can use that evidence to find that there was actual knowledge. In such a case, a conscious avoidance instruction serves no useful purpose; only its tendency to allow conviction based on an improperly reduced mental state remains.

Conclusion

It has become de rigueur for the government to request, and for trial courts to deliver, a conscious avoidance jury instruction in virtually all criminal prosecutions where the element of knowledge is contested. Where no evidence of manifest conduct by the defendant to avoid knowledge is introduced, however, such instruction serves no useful purpose except to threaten to cause confusion and to lessen the government's burden to demonstrate the culpable mental state required by statute. Particularly in business cases where the underlying facts are complex and jury charges already tend to be lengthy and involved, courts should resist the temptation to give a conscious avoidance instruction as a matter of course, and instead limit their use to circumstances where the actual evidence provides a proper foundation.

1. Rachel Abrams and Diana B. Henriques, "Jury Says 5 Madoff Employees Knowingly Aided Swindle of Clients' Billions," The New York Times (March 24, 2014).
2. See Elkan Abramowitz and Barry A. Bohrer, "Conscious Avoidance: a Substitute for Actual Knowledge?" New York Law Journal (May 1, 2007). See also Jeremy H. Temkin, "'Conscious Avoidance' and Government's Burden of Proving Willfulness," New York Law Journal (July 14, 2011); Robert J. Anello, "Conscious Avoidance Theory: 'Ostrich Instruction' Changes Standard of Proof in White Collar Cases," New York Law Journal (July 12, 1999).
3. Letter to Judge Laura Taylor Swain from Andrew J. Frisch on behalf of all defendants, *United States v. Bonventre*, 10-cr-228 (Dec. 24, 2013).
4. Proposed Jury Instructions from United States, *United States v. Bonventre*, 10Cr.228 (filed Feb. 26, 2014).
5. *Global-Tech Appliances v. SEB*, 131 S.Ct. 2060, 2069 n.6 (2011) (citing *United States v. Houghton*, 14 F. 544, 547 (D.C.N.J. 1882)).
6. 131 S.Ct. 2060 (2011).
7. Id. at 2070-71.
8. *United States v. Kaplan*, 490 F.3d 110 (2d Cir. 2007).
9. *United States v. Kaiser*, 609 F.3d 556, 565-66 (2d Cir. 2010).
10. ___ Fed. Appx. ____, 2014 WL 628143 (2d Cir. Feb. 19, 2014)
11. Brief of Defendant-Appellant, *United States v. Whitman*, 13-cr-491, at p. 44 (2d Cir. April 15, 2013) (citing *Global-Tech*, 131 S. Ct. at 2071).
12. Brief for the United States of America, *United States v. Whitman*, 13-cr-491, at p. 55 (2d Cir. July 15, 2013). The government also argued that any error in instructing the jury was harmless given the "abundant proof" that Whitman had actual knowledge of the inside nature of the information. Id. at p. 60.
13. 347 F.3d 471 (2d Cir. 2003).
14. Id. at 481.
15. 2014 WL 628143 at *6.
16. 919 F.2d 1223 (7th Cir. 1990).