

When You Do Know What You Don't (Want to) Know-Frederick Bourke and Conscious Avoidance

The Legislative History of the Foreign Corrupt Practices Act (FCPA) makes clear that Congress intended that the so-called "head-in-the-sand" defense - also described as "conscious disregard", "willful blindness" or "deliberate ignorance" - should be covered so that company officials could not take refuge from the Act's prohibitions by their unwarranted obliviousness to any action (or inaction), language or other "signaling device" that should reasonably alert them of the "high probability" of an FCPA violation.

In his recently denied Motion for New Trial, Frederick Bourke argued, among other things, that the jury instructions were wrong in a number of ways, including the *mens rea* element, the local law defense, a good-faith defense, and his possible conviction based on negligent acts.

As reported in the FCPA Blog, the prosecutors at trial contended that Bourke had "stuck his head in the sand". Even if Bourke did not affirmatively know that bribes were being paid, he was aware of a high probability such action was occurring and he consciously and intentionally avoided confirming this fact. In the jury charge, the Court explained this "conscious avoidance" could be equated to actual knowledge under the FCPA.

In his post-trial motion, Bourke argued that the trial judge, US District Judge Shira Scheindlin, had erred simply because he had "not tried hard enough to learn the truth". However, test was not Bourke's actual knowledge of the payment of bribes, but Bourke's efforts to avoid acquiring that actual knowledge. "The conscious avoidance doctrine provides that a defendant's knowledge of a fact required to prove the defendant's guilt may be found when the jury is persuaded that the defendant consciously avoided learning that fact while aware of high probability of its existence", she said, quoting *United States v. Svoboda*, 347 F.3d 471, 477 (2d Cir. 2003).

The trial judge went on to state "In addition, the FCPA explicitly permits a finding of knowledge on a conscious avoidance theory. It provides that '[w]hen knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.' 15 U.S.C. § 78dd-2(h)(3)(B). Because the defendant must be found to possess the same intent as that required for the substantive offense, the conscious avoidance instruction was particularly appropriate in this case".

The successful prosecution of Frederick Bourke is a significant expansion of theories of prosecution under the FCPA. While the Bourke case involved an individual and his investment in one transaction, the red-flags that were (or should have been) raised are similar to those which a US company doing business overseas must investigate and evaluate in any transaction. All transactions must be thoroughly investigated, evaluated and reviewed on an ongoing basis to try and ensure full FCPA compliance.