

# AFFIRMATIVE DEFENSES DENYING LIABILITY AND DEFLECTING BLAME

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## I. The Good Faith Defense

The good faith defense arises in two ways at trial: to negate the *mens rea* requirement or to assert good faith reliance on the advice of an outside professional to negate criminal liability. Both are double-edged swords because the claim of good faith typically results in the automatic waiver of attorney-client privilege.

### A. Negating the Mens Rea

In *United States v. Exxon Corp.*, 94 F.R.D. 246 (D.D.C. 1981), Exxon raised, as one of its defenses, the affirmative defense of good faith reliance on government regulations and communications with the Department of Energy to avoid liability for price overcharges on the sale of crude oil. The government argued that the defense put the "corporate state of mind at issue." The court found that Exxon had waived its attorney-client privilege and that its corporate files had to be released because they were "highly relevant" to the merits of its good faith compliance with government regulations. Exxon's internal statements "should also reveal whether Exxon honestly believed that it acted in good faith."

In another oft-cited decision, *Hearn v. Ray*, 68 F.R.D. 574, 581 n.5 (E.D. Wash. 1975), the court held that defendants impliedly waived the attorney-client privilege when they raised the affirmative defense of qualified immunity. The court explained that by asserting the defense, the defendants imposed on the plaintiff the burden of proving a *mens rea* of malice or disregard of settled, indisputable law. Since the legal advice that defendants may have received is relevant to the proof, the information was discoverable.

Both the *Exxon Corp.* and *Hearn* decisions were cited with approval in the leading case on the issue, *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). There, the court said that “a defendant may not use the privilege to prejudice his opponent’s case or disclose some communications for self-serving purposes. . . . The privilege may be implicitly waived when defendant asserts a claim that in fairness requires examination of the protected communications.”

When putting mental state at issue, the corporation’s internal documentation and the advice that it received become “highly relevant” in evaluating the good faith defense. The defense may be seen as the “affirmative converse of the government’s burden of proving . . . intent to commit a crime.” *United States v. Cavin*, 39 F.3d 1299, 1310 (5th Cir. 1994).

However, the tide may be receding from *Hearn* and its progeny, at least in the Second Circuit. In the recent decision *In re County of Erie*, 2008 U.S. App. LEXIS 21496 (2d Cir. Oct. 14, 2008), the court rejected the *Hearn* test as overly broad and confined the application of the implied “at issue” waiver only to those instances where “a party must rely on privileged advice from his counsel to make his claim or defense.” [Emphasis in the original]. *Id.* at 16.

## B. Reliance on Third-Party Professionals

Another instance in which the attorney-client privilege can be impliedly waived is where a defendant asserts a defense that puts his attorney’s advice at issue in the litigation. This is particularly dangerous for the corporation in matters testified to by management before the grand jury. In *In re Grand Jury Proceedings*, 219 F.3d 175, 181 (2d Cir. 2000), the court implied a waiver where the founder, chairman, and CEO of the target company made selective disclosure of counsel’s advice in an “exculpatory manner.” The witness had volunteered the information where the question did not call for it. As a result of the exculpatory manner in which the witness used expert advice, the privilege was “in fairness” deemed waived. The same testimony had the effect of waiving work product privilege with respect to the advice as well. The court examined the case law at length regarding the ability of a corporate agent to waive the privilege on behalf of the corporation. Even though the privilege belongs to the corporation and cannot be waived by the agent without its consent, implied waiver will be applied where fairness otherwise requires it. That issue must necessarily be decided on a case-by-case basis. *Id.*

## II. Can a Corporation or Other Business Organization Withdraw from a Conspiracy or Otherwise Avoid Successor Conspiratorial Liability?

Why is this question so important? In almost every criminal case and in civil cases, such as antitrust litigation, the government and/or private plaintiff litigants charge conspiracy to avail the parties of the evidentiary benefits of the coconspirator exception to the hearsay rules.<sup>1</sup> Consequently, limiting organizational liability from the acts of coconspirators is not only essential at trial but may be a useful defense strategy where an internal investigation reveals liability and continuing exposure of the organization. The fact that an affirmative action is done by an organization to withdraw from criminal activity before discovery by authorities may also assist the organization in arguing that it should not be formally charged and is a proper candidate for informal prosecutive disposition, as discussed in more detail in Chapter 6.

### A. Defense of Withdrawal

The gravamen of the conspiracy is the unlawful agreement to accomplish an unlawful objective and the commission of an overt act, lawful or unlawful in character, in furtherance of the conspiracy. At the federal level, any coconspirator can withdraw from the conspiracy before the commission of the overt act and avoid criminal liability.

However, once the conspiracy is formed, as a general rule, the defense of withdrawal from the conspiracy does not exonerate a defendant from the crime of conspiracy or other past unlawful conduct; it can only exonerate the defendant as to future conduct engaged in by defendant’s coconspirators. See *Pinkerton v. United States*, 328 U.S. 640 (1946). In order to withdraw, a defendant must take affirmative action, either by reporting to authorities or by communicating the defendant’s intentions to coconspirators; mere cessation of participation is not sufficient. *United States v. Gypsum Co.*, 438 U.S. 422, 464–65 (1978). The defendant’s continued participation in a criminal activity that it claims to have disavowed negates the withdrawal defense. *United States v. Starrett*, 55 F.3d 1525, 1555 (11th Cir. 1995); *United States v. Swiss Family Farms Co., Inc.*, 912 F. Supp. 401 (C.D. Ill. 1995). Because the defense of withdrawal is an affirmative defense, the defendant has the burden to prove it by a preponderance of evidence. If a coconspirator establishes the defense of withdrawal, the statute of limitations will begin to run as to that defendant at the time of withdrawal; otherwise, the statute will not begin to run until the occurrence of the final act of the conspiracy. *United States v. Arias*, 431 F.3d 1327, 1340 (11th Cir. 2005).

In *United States v. Hughes*, 191 F.3d 1317 (10th Cir. 1999), an individual defendant was charged with conspiring with a business trust managed by the defendant, a

1. FED. R. EVID. 801(d)(2)(E).

related partnership, and other individuals in a scheme involving the fraudulent use of performance bonds for a government contract. The defendant, in his capacity as trustee for ARCO Business Services, Ltd., issued a letter on partnership letterhead stating that ARCO "does not intend to seek or claim further benefit of any kind" and requests that the recipient "convey ARCO's current position . . . to all of the other concerned/involved parties."

The court held that the jury was correct in finding that the partnership/trust organization properly withdrew based on the affirmative act evidenced by the letter but that the guilty verdict as to the individual defendant trustee was not inconsistent because the trustee signed the letter in his capacity as trustee only and not in an individual capacity. The court also observed that the letter did not exonerate a related partnership, Arco Properties, because that partnership was likewise not expressly referred to in the letter. Evidence of withdrawal must be an affirmative act and must address each individual coconspirator. It is not enough for coconspirators to have overlapping or identical interests.

Several courts have crafted useful jury instructions. For example, in *United States v. Continental Group, Inc.*:

An individual or corporation may withdraw or abandon a conspiracy by renunciation or by engaging in conduct which is inconsistent with the idea of continued participation in the alleged scheme. Mere cessation of activity in furtherance of the conspiracy is not sufficient to establish withdrawal. For a defendant to be deemed to have withdrawn there must be evidence showing withdrawal by some affirmative action. Such action must consist of a definite and decisive step of some kind which shows complete disassociation. For example, to disavow or defeat the purpose of conspiracy . . . would be the type of decisive act that a party could look to as being the basis for withdrawal. A defendant may also withdraw from a price fixing conspiracy by notifying his alleged coconspirators of his intent to withdraw. . . .

603 F.2d 444, 466 (3d Cir.), *cert. denied*, 444 U.S. 1032 (1979).

The courts have also held, for example, that evidence of the resumption of competitive behavior is sufficient to establish affirmative action to defeat or disavow the purpose of a bid-rigging conspiracy and establish the defense of withdrawal. *United States v. Nippon Paper Indus. Co., Ltd.*, 62 F. Supp. 2d 173 (D. Mass. 1999).

Another example of an affirmative act of withdrawal involved cigarette manufacturers charged with a RICO conspiracy arising out of a scheme to defraud consumers by misrepresenting the adverse health effects of cigarette smoking. The court found that evidence of a manufacturer "breaking ranks" with the tobacco industry, by cooperating with the state Attorney General and publicly announcing its withdrawal, established the defense. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006).

## B. Defense of No Successor Liability

In *In re Catfish Antitrust Litigation*, 908 F. Supp. 400 (N.D. Miss. 1995), the plaintiffs were food distributors purchasing catfish and catfish products from defendant companies. Plaintiffs filed a claim under Section 4 of the Clayton Act alleging that defendant companies engaged in a conspiracy to eliminate competition and fix prices in the catfish industry on a nationwide basis. The corporate defendants named in the suit included ConAgra, Delta Pride Catfish, and Hormel Foods. Hormel defended on the basis that while it had acquired a guilty subsidiary, it was not a member of the conspiracy based on successor liability as the new parent.

The courts have developed various tests for determining whether a purchasing company may be a "mere continuation" of the seller for purposes of imputing liability. In the instant case, the factors include (1) whether there is a basic continuity of the enterprise of the seller organization, including retention of key personnel, assets, and even the seller's name; (2) the seller ceased ordinary business operations, liquidated, and dissolved postacquisition; (3) the purchasing company assumed the liabilities and obligations of the seller only in the course of the normal business operations of the seller; and (4) the purchasing corporation held itself out to third parties as the effective continuation of the seller. If the purchaser is deemed to be a mere continuation of the seller under a theory of successor liability, whether a withdrawal from the conspiracy can be proved may depend on the actions of the seller. *Id.* at 415.

## III. Unauthorized Acts of Agents

The decision in *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir.), *cert. denied*, (1973), holding that a corporation is criminally liable for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent, fairly limits the ability to defend the corporation based on the claims that the acts of the agent were unauthorized or in violation of express corporate policy to the contrary. It remains good law today and has been cited across the circuits with approval. The jury instructions upheld in the decision have also been frequently upheld by the courts.

Likewise in *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 971 (1998), the court reaffirmed the principle that where an agent's conduct is actually or potentially detrimental to the corporation, it may nonetheless be imputed to the corporation in criminal cases if the agent was motivated in part to benefit the company to "any appreciable extent" (citations omitted).

There is some authority for the proposition that the agent employee's position within the organization should not be ignored in determining scope of employment. The opinion does not elaborate. Presumably, a lower-level employee may be deemed to be a renegade employee as opposed to the case of a higher-level employee responsible

for formulating company policy. See, e.g., *City of Vernon v. S. Cal. Edison*, 955 F.2d 1361, 1370 (9th Cir. 1992).

Notably, in the U.S. Attorneys' Manual, *Principles of Federal Prosecution of Business Organizations: VII. Charging a Corporation: Corporate Compliance Programs*, Comment B cites *Hilton Hotels Corp.* for the proposition that "a corporate compliance plan, even one specifically prohibiting the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondet superior*."<sup>2</sup>

In sum, the defense is difficult at best and will not likely shield a corporation from prosecution under the Department of Justice guidelines.

#### IV. Defense Theory Instructions

A defendant is entitled to a theory instruction at trial provided that (1) the instruction represents an accurate statement of the law; (2) the instruction reflects a theory that is supported by the evidence; (3) the instruction reflects a theory that is not already part of the charge; and (4) the failure to include the instruction would deny appellant a fair trial. *United States v. Useni*, 516 F.3d 634 (7th Cir. 2008). Defense argument is not the purpose of a theory instruction. *Id.*

Some examples where organizational convictions have been reversed based on the refusal to tender the defense requested instruction include *United States v. GAF Corp.*, 928 F.2d 1253 (2d Cir. 1991), and *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

*Arthur Andersen LLP* involved an obstruction of justice charge under 18 U.S.C. § 1512 and the meaning of "knowingly . . . and corruptly persuade" as used in that statute. The defendant vigorously disputed at trial how the jury would be instructed on the term "corruptly." The government insisted that the court remove the word "dishonestly" from the approved Fifth Circuit pattern instruction and won. The conviction was reversed because the instructions did not properly define the requisite criminal intent required by the statute. The instructions charged that defendants "knowingly . . . corruptly persuaded another person with intent to . . . cause that person to withhold documents from, or alter documents for use in, an official proceeding." *Id.* at 703 (*internal citations omitted*). The instruction erroneously allowed a conviction for an act of persuasion that also included innocent conduct if the defendants otherwise sincerely believed that the conduct was lawful. Additionally, the instructions incorrectly permitted the jury to believe that it did not have to find a nexus between the corrupt persuasion to destroy documents and the official proceeding.

2. Attached as Appendix C.

In terms of the legacy of *Arthur Andersen LLP*, the case does not open a major new avenue in terms of organizational defense strategy. To obviate the complexity of "corrupt" intent, the Sarbanes-Oxley Act of 2002 added two new provisions to the criminal code, 18 U.S.C. §§ 1519 and 1520. Both code sections address the destruction, alteration, or falsification of documents; in the case of § 1519, with the intent to impair, impede, or obstruct an investigation. Neither of these statutes incorporates a "corrupt" *mens rea* requirement similar to the § 1512 obstruction statute.

#### V. Use of Subpoenas Prior to Trial

Federal Rule of Criminal Procedure 17(c) governs the issuance of both trial and grand jury subpoenas in criminal cases. It is also the primary means by which the defense can obtain materials from persons not covered under *Brady*, Federal Rule of Criminal Procedure 16, or the Jencks Act requirements (18 U.S.C. §§ 3500, *et seq.*). Trial subpoenas are returnable on the day of trial unless a party moves for an early return date under Rule 17(c). In *United States v. Nixon*, 418 U.S. 683, 699–700 (1974), *superseded by statute on other grounds*, *Bourjaily v. United States*, 483 U.S. 171 (1987); see also *United States v. Cuthbertson*, 630 F.2d 139, 144 (3d Cir.1980), the Court considered the pretrial issuance of trial subpoenas and the basis for quashing them.

In order to require production before trial, the moving party must show (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by the exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and that the failure to produce will result in a delay at trial; and (4) that the request is in good faith and not a "fishing expedition." In short, the moving party must clear three hurdles: "relevancy, admissibility, and specificity." Remember, the *Nixon* test does not apply to grand jury subpoenas.