

K&L GATES

What You Don't Know Can't Hurt You, Right?
Resolving the Inherent Tension between the *Yates*
Memo and the Collective Knowledge Doctrine in
Environmental Enforcement Actions



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THE SITUATION

The U.S. Attorney's Office has executed a search warrant at one of your facilities. It raided your facility with agents carrying assault rifles, some even emerging from the woods wearing ghillie suits. The agents are currently trying to interview your employees. During the raid, the government handed one of your employees a grand jury subpoena seeking detailed information about air emissions at all of your facilities in the state.

THE PROCESS

Initiation

- Search Warrant
- Grand Jury Subpoena

Investigation

- Subpoena Compliance or Full Cooperation with Government
- Internal Investigation

INITIATION



ENFORCEMENT CHOICES: CRIMINAL VS. CIVIL

- Differing Goals:
 - Civil Enforcement – Compensation/Injunctive Relief
 - Criminal Enforcement – Punishment
- Differing Government Burdens:
 - Environmental Civil Enforcement – Strict Liability
 - Environmental Criminal Enforcement – *Mens Rea*

WHAT IS THE GOVERNMENT LOOKING FOR?

- Criminal provisions of environmental statutes require proof of *mens rea* for liability.
- **Negligently**
 - Failure to use such care as a reasonably prudent and careful person would use under similar circumstances
- **Knowingly**
 - Knowledge of facts and attendant circumstances that comprise a violation of the statute, not specific knowledge that one's conduct is illegal
 - Distinguishable from “willfulness,” or knowledge that one's conduct is illegal

WHAT DOES THIS LOOK LIKE IN THE REAL WORLD? BACK TO THE SCENARIO

WHAT THE GOVERNMENT NEEDED TO PROVE:

- 1+ employee *actually knew* that the emissions exceeded permit/reporting thresholds;
- Knowledge that the release *needed to be permitted/reported;*
- The employee *voluntarily and intentionally* failed to do so.

WHAT THE GOVERNMENT *THOUGHT* IT NEEDED TO PROVE:

- Knowledge of emissions;
- The emissions were above the permit/reporting thresholds;
- Failure to permit/report the emissions.

WILLFUL BLINDNESS: AN ALTERNATIVE TO ACTUAL KNOWLEDGE

- The Government will use inferences from the proof that a defendant deliberately closed his eyes to what otherwise would have been obvious to establish knowledge.



- » Must show that that the defendant was subjectively aware of the high probability of the fact in question, not merely that a reasonable man would have been aware.

WHO CAN BE ON THE HOOK?

- **Guilty Actor**
 - Individual wrongdoer
- **Responsible Corporate Officer**
 - Hold accountable the person who failed to exercise the authority/supervisory responsibility resulting in the alleged violation
 - Applies whether or not the RCO committed a criminal act themselves
 - Impossibility defense

WHO CAN BE ON THE HOOK?

COLLECTIVE KNOWLEDGE

- If there is no guilty actor or RCO liability, some jurisdictions allow the Government to establish corporate knowledge (and corporate liability) by the sum of the knowledge of all of the employees

» Therefore, it is possible to prove the elements of a crime without identifying an individual who satisfies every element of the violation.



WHAT DOES THIS LOOK LIKE IN THE REAL WORLD? BACK TO THE SCENARIO

WHAT THE GOVERNMENT NEEDED TO PROVE:

- 1+ employee *actually knew* that the emissions exceeded permit/reporting thresholds;
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- The employee *voluntarily and intentionally* failed to do so.

WHAT THE GOVERNMENT *THOUGHT* IT NEEDED TO PROVE:

- Knowledge of emissions;
- Failure to report/permit the emissions;
- No permit existed.

WHO CAN BE ON THE HOOK?

COLLECTIVE KNOWLEDGE

- Some jurisdictions reject collective knowledge because it could allow a jury to find criminal scienter of a corporation where no wrongful intent is found by permitting the Government to piece together scraps of innocent knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing.

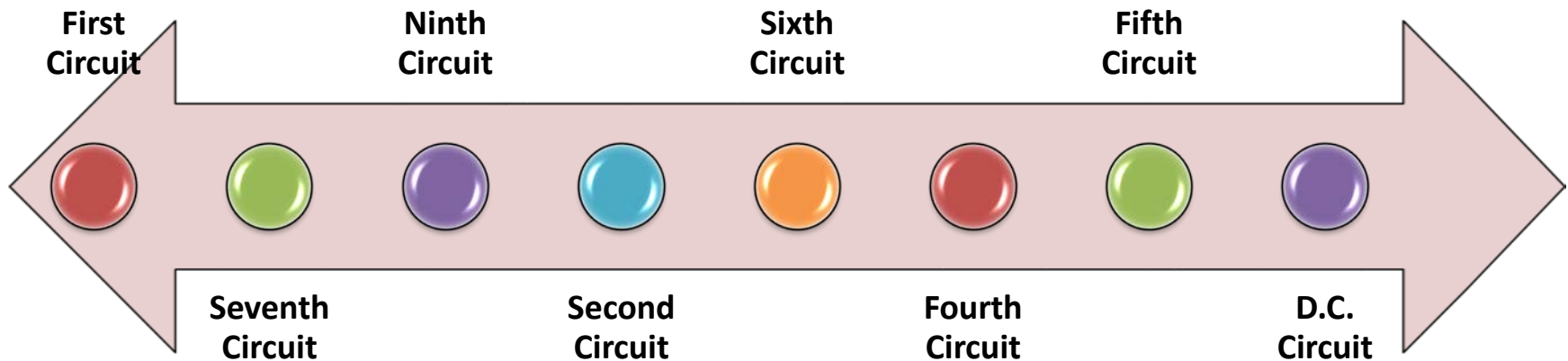


WHO CAN BE ON THE HOOK? COLLECTIVE KNOWLEDGE

The Circuit Split:

Most likely to allow collective
knowledge to prove scienter

Least likely to allow collective
knowledge to prove scienter



Undecided: Third, Eighth, and Tenth Circuits

INTERNAL INVESTIGATION



INTERNAL INVESTIGATION

- What is it?
 - Fact finding
- Why?
 - Fiduciary duty to company stakeholders
 - Statutory and regulatory obligation
 - Required to secure cooperation credit
- How is it conducted?
 - Internally or by outside counsel?
 - Interviews
 - Records review

INTERNAL INVESTIGATION

Early Threshold Decisions Matter

- Identify and interview witnesses
- Identifying and preserving documents
- Ethical consideration: Does the corporation have an obligation to provide an employee counsel?
- How can the company respond to identified misconduct?

INTERNAL INVESTIGATION

“Individual Accountability for Corporate Wrongdoing”

- September 9, 2015 memorandum by Deputy Attorney General Sally Q. Yates
- *“Yates Memo”*
- Increased focus in holding individuals accountable for their role in corporate misconduct outlined in 6 key steps for any investigation of corporate misconduct

INTERNAL INVESTIGATION

Yates Memo Considerations –

“Individual Accountability for Corporate Wrongdoing”

- What does it mean to “cooperate”
 - “All relevant facts relating to individuals responsible for the misconduct”
- What will the government expect?
- How does the government leverage cooperation?

INTERNAL INVESTIGATION: BACK TO THE SCENARIO

The company hired outside counsel to conduct an internal investigation. The first person to be interviewed is the director of HSE.

INTERNAL INVESTIGATION

Who is the client? *Upjohn* Considerations

- Model Rule 1.13(a): Outside counsel represents the organization
- Model Rule 1.13(f): Ethical Obligations to Interviewees & *Upjohn* warning
- What does an *Upjohn* warning sound like?

INTERNAL INVESTIGATION

Additional Ethical Considerations

- Does the Yates Memo require an amended *Upjohn* warning?
 - Model Rule 4.1: misrepresenting material facts/failure to disclose material facts when dealing with third parties
 - Model Rule 4.4: cannot use means to embarrass, delay, or burden a third party or use methods that violate the third party's rights
 - Risks to privilege and mitigating the risks

INTERNAL INVESTIGATION: BACK TO THE SCENARIO

During an interview, the director of HSE admits that she knew that the emissions occurred and were above the permitting threshold. However, obtaining permits would have put the project behind schedule, so she rolled the dice and decided not to get a permit for the emissions.

INTERNAL INVESTIGATION

Other Ethical Obligations to Interviewees

- Model Rule 1.7: Representing the company and employee and conflicts of interest
 - Does the Yates Memo prevent joint defense agreements?
- Model Rule 4.2: Communicating with represented employees
- Model Rule 4.3: Communications with unrepresented employees

INTERNAL INVESTIGATION: BACK TO THE SCENARIO

The director of HSE hired her own attorney. The attorney has written the company and your outside counsel a letter forbidding the company from sharing anything about his client's interview with the company's outside counsel under the guise of attorney-client privilege.

INTERNAL INVESTIGATION

Ethical and Practical Repercussions: Pitfalls of an Incomplete or Nonexistent *Upjohn* Warning

- The corporation losing the ability to control the attorney-client privilege
- Ethical sanctions
- Litigation over whether an interviewee can prevent disclosure

INTERNAL INVESTIGATION: BACK TO THE SCENARIO

As part of the ongoing investigation, the government reveals that it has a confidential informant. Information from that informant provided the underlying facts to support the search warrant and grand jury subpoena. Through the process of elimination, you are fairly certain that you have identified one of your employees as the confidential informant.

INTERNAL INVESTIGATION

Ethical & Practical Whistleblower Considerations

- Caring for your whistleblower
 - Proactive protection: compliance programs and a culture of compliance
 - Avoiding the misperception of retaliation during an internal investigation



QUESTIONS?

