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Enforcement

Pipeline Safety

Whether and how corporations can be held criminally accountable presents challenges to the justice system. In this BNA Insights, Steven Solow and Mark Farley explore the use of corporate collective knowledge to convict Pacific Gas and Electric.

### **What Does a Corporation Have to Know to Be Guilty of a Crime? The Conviction of PG& E Based on Corporate Collective Knowledge**



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Pacific Gas & Electric Co. (PG& E) was convicted Aug. 9 of five counts of violating the federal Pipeline Safety Act (PSA) and one count of obstructing the National Transportation Safety Board (NTSB) investigation into a 2010 pipeline explosion in San Bruno, Calif. (*United States v. Pac. Gas & Elec. Co.*, N.D. Cal., 2016 BL 240175, No. 3:14-cr-00175, 8/9/16). This case is significant to a wide range of corporate regulatory prosecutions for its use of corporate collective knowledge, a largely unused basis for imposing corporate criminal liability at trial. Traditionally, under the respondeat superior doctrine, a corporation may be held liable for the illegal actions of an employee acting within the scope of his or her employment for the benefit of the company (*N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909)). The theory of corporate collective knowledge, however, seeks to aggregate pieces of knowledge held by different employees, and impute the totality of that knowledge to the corporation as a basis for imposing criminal liability on the company (*United States v. Bank of New England, N.A.*, 821 F.2d 844, 856 (1st Cir. 1987)). Notably:

- The case is the first time the U.S. Department of Justice has successfully prosecuted a company under a theory of corporate collective knowledge in nearly 30 years.

- The case includes jury instructions that may have led the jury to convict PG& E for a knowing and willful violation based on the collective knowledge of the company's employees and without evidence that any single employee acted willfully.
- The case appears to conflict with Deputy Attorney General Sally Yates's September 2015 directive—also known as the “Yates memo”—to hold individuals accountable for corporate wrongdoing.
- The case up-ends traditional principles of corporate vicarious liability by allowing the government, as the defense argued in its motion to dismiss because of erroneous legal instructions to the grand jury, to “aggregate the innocent conduct of (unnamed) employees to manufacture a corporate criminal.”

The prosecution of PG& E followed the Sept. 9, 2010, rupture of a natural gas transmission line owned and operated by the company. The resulting fire killed eight people, injured 58 others, and damaged numerous homes. In 2014, PG& E was charged with criminal regulatory violations of the PSA and with criminal obstruction of the NTSB investigation that was launched soon after the incident. While the impetus for the case was the San Bruno explosion, the court instructed the jury that:

“[T]here is no allegation in this case and there has been no evidence in this case that any alleged regulatory violation caused the San Bruno explosion. Such evidence had no place in this criminal prosecution, because this case is not about the cause of the San Bruno explosion, and you are not tasked with determining what did or did not cause that explosion.”

The indictment alleged that PG& E knowingly and willfully violated PSA regulations by: (1) failing to keep records of pressure testing and repairs on natural gas transmission lines, (2) relying on erroneous and incomplete information when evaluating the integrity of natural gas transmission lines, (3) failing to identify and evaluate potential threats to the integrity of the lines and (4) failing to prioritize lines as high risk after a changed circumstance.

The indictment also alleged that PG& E obstructed the NTSB's investigation based on an April 6, 2011, letter, in which the company stated that its Integrity Management Plan, which allowed for a 10 percent increase in maximum operating pressure before a line was considered to be unstable, had not been officially adopted. The government alleged that the 10 percent allowance was in effect at the time of rupture.

With the jury's decision, PG& E now faces a maximum penalty of \$3 million for the six counts for which it was convicted, which is far less than the company faced under the 28 counts charged in the original indictment and under the government's allegation under the Alternative Fines Act for penalties in excess of the statutory maximum for the PSA counts. The court dismissed 15 PSA counts before trial for multiplicity, while the government dismissed one PSA count during trial and the Alternative Fines Act allegations post-trial.

This case is particularly noteworthy because the government prosecuted PG& E under a theory of corporate collective knowledge with respect to the PSA violations, according to the jury instructions filed in the case. At the start of the case, PG& E challenged this theory in a motion to dismiss the indictment for erroneous instructions to the grand jury. The company argued that the prosecutor incorrectly instructed the grand jury that they could issue an indictment for a knowing and willful violation based on a regulatory duty to act and evidence that employees of the company knew that the regulatory duty was not being met.

The trial judge denied the motion, relying on a 1974 case out of the U.S. District Court for the Western District of Virginia in which the court applied a theory of corporate collective knowledge to establish a knowing and willful violation of a federal regulation pursuant to a statute that provided criminal liability for such infractions, similar to the PSA (*United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738 (W.D. Va.

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1974)). In *T.I.M.E.*, the court found that the company had sufficient information available through various employees regarding violation of the applicable regulation to support imputation of knowledge. Given such knowledge, the court found that the company's "hands-off" approach to compliance with the regulation was sufficient to establish "willfulness." The court did not require evidence that a specific employee demonstrated willful intent, or acted willfully, only that the company's compliance program was less than robust in the face of imputed knowledge of regulatory violations.

Here, in the final instruction to the jury on the PSA counts, the court instructed that: "The corporation is ... considered to have acquired the collective knowledge of its employees. The corporation's 'knowledge' is therefore the totality of what its employees know within the scope of their employment." This instruction, which is based on *Bank of New England* (a 1987 decision regarding cash transaction reporting), has not been widely accepted in prior prosecutions. The court further instructed that: "The willfulness of corporate employees acting within the scope of their employment is imputed to the corporation. Accordingly, if a specific employee acted willfully within the scope of his or her employment, then the corporation can be said to have acted willfully."

At first blush, these instructions appear confusing.

- First, it is not clear what was intended by the use of the plural "employees" in "[t]he willfulness of corporate *employees* acting within the scope of their employment is imputed to the corporation." It stands to reason that willfulness cannot be broken across multiple individuals (*i.e.*, one cannot be a "little bit" willful). The context of this instruction is important because it immediately followed the instruction on corporate collective *knowledge*, which may have led the jury to conclude that the court was instructing them on a separate doctrine of corporate collective *willfulness*.
- Second, adding another layer of complexity, the relationship between the "knowingly" mental element of the statute and the "willfully" mental element of the statute is not clear in the instruction. Was the court suggesting that the "knowingly" element could be established by "corporate collective knowledge," but that the "willfully" element required a single employee with specific intent? Could this employee be a separate employee from those in the pool that the held the "collective knowledge" imputed to the company?

PG& E has filed a motion for a judgment of acquittal, arguing that the government failed to present sufficient evidence to establish that any single employee acted willfully. If this motion is unsuccessful and PG& E appeals the conviction, the company will no doubt challenge the government's theory of corporate liability before the Ninth Circuit. Should that occur, no matter how the court decides the case, its decision is likely to have a significant impact on the future of corporate criminal prosecution.