

REFUSING TO SETTLE: WHY PUBLIC COMPANIES GO TO TRIAL IN FEDERAL CRIMINAL CASES

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On September 9, 2010, a San Bruno, California, natural gas pipeline exploded, killing eight people and leveling a neighborhood. In connection with the incident, utility Pacific Gas and Electric Company (“PG&E”) was charged recently with twelve criminal felony counts alleging violations of the Natural Gas Pipeline Safety Act, 49 U.S.C. § 60123¹ (the “Pipeline Safety Act”).² However, rather than go the route of a negotiated resolution, PG&E pleaded not guilty to the criminal counts in both the initial and superseding indictments, opting to put the prosecutors to their proof.

On July 17, 2014, another publicly traded company, FedEx Corporation, FedEx Express, Inc., and FedEx Corporate Services, Inc. (collectively, “FedEx”) was criminally charged with fifteen counts of violating a number of drug-related laws.³ The counts in part alleged a conspiracy to ship and deliver drugs from online pharmacies that dispensed prescription drugs without a proper prescription.⁴ FedEx pleaded not guilty to the charges on July 29, 2014.⁵ Two weeks later, a superseding indictment added money laundering charges to those previously brought;⁶ FedEx has pleaded not guilty to those charges as well.⁷ Federal criminal charges can overhang companies for years: neither PG&E nor FedEx is scheduled to be tried until 2016.

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** Associate, Gibson, Dunn & Crutcher LLP, Washington, D.C. © 2015, F. Joseph Warin and Julie Rapoport Schenker. Special thanks to our colleague Derek Kraft for his assistance.

1. The Pipeline Safety Act is available at 49 U.S.C. §§ 60101–60301 (2012).

2. Indictment, *United States v. Pac. Gas & Elec. Co.*, No. 3:14-cr-00175 (N.D. Cal. Apr. 1, 2014) [hereinafter PG&E Indictment].

3. The FedEx indictment alleges violations of: 21 U.S.C. § 846 (2012) (Conspiracy to Distribute Controlled Substances); 21 U.S.C. § 841 (2012) (Distribution of Controlled Substances); 18 U.S.C. § 371 (2012) (Conspiracy to Distribute Misbranded Drugs); 21 U.S.C. §§ 331, 333, 353 (2012) (Misbranding Drugs); and 18 U.S.C. § 982 (2012), 21 U.S.C. § 853 (2012), and 28 U.S.C. § 2641 (2012) (Forfeiture).

4. Indictment, *FedEx Express, Inc., and FedEx Corporate Servs., Inc., United States v. FedEx Corp.*, No. 3:14-cr-00380 (N.D. Cal. July 17, 2014).

5. Jeff Overley, *FedEx Denies It Illegally Distributed Generic Valium, Xanax*, LAW360 (July 29, 2014), http://www.law360.com/health/articles/562216?nl_pk=c06cfab6-c403-4b78-a96c-a24f964579fd&utm_source=newsletter&utm_medium=email&utm_campaign=health.

6. Jeff Sistrunk, *FedEx Faces Money Laundering Counts in Drug Shipping Case*, LAW360 (Aug. 15, 2014), <https://www.law360.com/articles/567889>.

7. Arvin Temkar, *FedEx Denies Drug, Laundering Charges*, COURTHOUSE NEWS SERV. (Sept. 24, 2014), <http://www.courthousenews.com/2014/09/24/71753.htm>.

These recent charges invite questions as to the frequency with which publicly traded companies go to trial in federal criminal cases, and the factors driving the decision to do so. In general, only a very small number of corporate prosecutions involve trials, as more than ninety percent of prosecuted corporations plead guilty.⁸ For example, the United States Sentencing Commission data from 2013 indicates that out of 172 organizations convicted that year, only nine had opted for trial.⁹ Companies frequently seek to avoid trial for several reasons, including the nearly strict liability of corporations for the actions of their employees and the fear of an Arthur Andersen-style “corporate death sentence.” Some attorneys have argued that “[t]he low threshold for corporate criminal liability . . . combined with the threat of being debarred or excluded from contracting with the federal government upon conviction, has all but closed the criminal courthouse door to sizable corporations in the United States.”¹⁰ Others contend that despite the ambiguity of the government’s proof, the reputational injury from prolonged proceedings, coupled with the diversion of senior leadership from the corporation’s core mission, compels a resolution.

Accordingly, to animate the issue, we surveyed twelve federal criminal trials of public companies¹¹ from the last two decades and analyzed the trial outcomes and news reporting surrounding the events.¹² Although it is difficult to discern the precise reasoning behind a company’s legal strategy, our analysis suggests that a number of legal, evidentiary, business operational, and general strategic considerations contribute to a company’s decision to go to trial.

After identifying the factors that tend to inform this critical decision, we then, with the benefit of hindsight, address whether the decisions to go to trial in these twelve cases support the unconventional wisdom that it may indeed be mandatory for public companies, under some circumstances, to go to trial.

8. Brandon Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1801 (2011).

9. 2013 *Sourcebook of Federal Sentencing Statistics*, tbl. 53, U.S. SENTENCING COMM’N (2013), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table53.pdf>.

10. John N. Gallo & Daniel M. Greenfield, *The Corporate Criminal Defendant’s Illusory Right to Trial: A Proposal for Reform*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 525 (2014), available at <http://scholarship.law.nd.edu/ndjlepp/vol28/iss2/4>.

11. We reviewed cases involving corporations that are publicly traded on stock exchanges in the United States and elsewhere.

12. *United States v. AU Optronics Corp.*, No. 09-cr-00110-SI, 2012 WL 889874 (N.D. Cal. Mar. 13, 2012); *United States v. Stryker Biotech, LLC*, No. 09-10330-GAO (D. Mass. Jan. 17, 2012); *United States v. W.R. Grace*, No. 05-cr-00007-DWM (D. Mont. May 8, 2009); *United States v. San Diego Gas & Elec. Co.*, No. 06-cr-00065-DMS (S.D. Cal. Oct. 6, 2009); *United States v. Stora Enso North America Corp.*, No. 06-cr-00323-CFD (D. Conn. July 19, 2007); *United States v. Weinbaum*, No. 03-cr-1587L (S.D. Cal. May 31, 2006); *United States v. Tyson Foods, Inc.*, 258 F. Supp. 2d 809 (E.D. Tenn. 2003); *United States v. Mitsubishi Corp.*, No. 00-cr-00033-MK (E.D. Pa. May 10, 2001); *United States v. Gregory*, No. 98-cr-00249-WKU-3 (D. Neb. Dec. 3, 1999); *United States v. Nippon Paper Indus. Co.*, 62 F. Supp. 2d 173 (D. Mass. 1999); *United States v. Consol. Edison Co. of N.Y., Inc.*, No. 93-cr-01063-JSM (S.D.N.Y. Oct. 31, 1994); *United States v. Gen. Elec. Co.*, 869 F. Supp. 1285 (S.D. Ohio 1994).

I. LEGAL CONSIDERATIONS

A. *Ambiguity of the Law*

Some companies may choose to go to trial when the state of the law is unclear, in the hope that they will be able to vindicate themselves. In *United States v. Nippon Paper Industries Co.*, the government charged Nippon Paper Industries Co. (“Nippon Paper”) with conspiring to fix prices for thermal paper,¹³ in violation of the Sherman Act. The case against Nippon Paper was unique, as it “marked the first time a foreign company was tried for alleged misconduct that took place entirely on foreign soil.”¹⁴ Appleton Papers Inc., one alleged coconspirator, had already been acquitted at trial; five other alleged coconspirators had pleaded guilty.¹⁵ Under such circumstances, it was difficult to predict the results of a trial. This legal ambiguity may have been a significant factor in driving the company to trial.

When the Nippon Paper trial ended with a hung jury, federal prosecutors sought to retry the case; defense counsel countered with a motion for acquittal.¹⁶ Ultimately, the district court offered a novel opinion in response to the novel facts. The court ruled that “[t]he correct approach to a foreign price-fixing conspiracy . . . is what the First Circuit announced, something akin to a ‘per se plus’ test, adding to the traditional domestic analysis the requirement that the government show substantial effects by showing a substantial connection to the United States market.”¹⁷ In part based on this “substantial effects” standard, the district court granted Nippon Paper’s motion for acquittal.¹⁸

In *Morrison v. National Australia Bank Ltd.*, the Supreme Court underscored the *Nippon Paper* conclusion¹⁹ in the civil context, reemphasizing the canon of construction that federal law does not apply extraterritorially unless such application is clear from the statute.²⁰ More recent lower court cases have extended this holding beyond the Securities Exchange Act to the Racketeer Influenced and

13. Davan Maharaj, *Deadlock in Japan Price-Fixing Case Leads to Mistrial*, L.A. TIMES (July 14, 1998), <https://articles.latimes.com/1998/jul/14/business/fi-3491>.

14. Davan Maharaj, *Price-Fixing Decision a Blow to Regulators; Courts: Judge Raises Bar with Dismissal of Japan Case, Saying Prosecutors Must Show Global Cartels’ Actions had ‘Substantial Effects’ on U.S. Commerce*, L.A. TIMES (July 20, 1999), <https://articles.latimes.com/1999/jul/20/business/fi-57702>.

15. *Id.*

16. *Id.*

17. *Nippon Paper*, 62 F. Supp. 2d at 195.

18. Maharaj, *supra* note 14.

19. In *Morrison v. Nat’l Austl. Bank Ltd.*, the Supreme Court rejected the “conduct-and-effects test” developed by the Second Circuit to determine the extraterritorial application of statutes that were silent on the issue, instead reaffirming the presumption that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.” 561 U.S. 247, 248 (2010).

20. *See id.* at 255.

Corrupt Organizations Act (“RICO”);²¹ in a recent appeal of its price-fixing conviction, Taiwanese public company AU Optronics argued that *Morrison* applies to the Sherman Act as well, the same legal scheme at issue in *Nippon Paper*. Rather than address that argument on the merits, however, the Ninth Circuit held that the company had waived that claim as a result of its earlier arguments on the subject of extraterritoriality.²²

Like the charges against Nippon Paper, the case against PG&E is a new enforcement frontier for the government. *Bloomberg* quoted the executive director of the Pipeline Safety Trust as saying that the PG&E indictment marks only the second time since the 1968 enactment of the original Pipeline Safety Act that the federal government has brought criminal charges against a company for pipeline safety violations.²³ PG&E may believe that this novelty will work to its advantage.

FedEx may similarly be compelled to go to trial to rebut the prosecution’s expansive theory of culpability. FedEx seeks to go to trial, in part, to challenge the proposition that, as a common carrier of freight, it is obligated to ascertain a package’s contents. The issues in that case, including customer privacy and a transportation company’s liability for the contents of its packages, are unusual, as FedEx sought to highlight in its press release:

We want to be clear what’s at stake here: the government is suggesting that FedEx assume criminal responsibility for the legality of the contents of the millions of packages that we pick up and deliver every day. . . . We have no interest in violating the privacy of our customers. We continue to stand ready and willing to support and assist law enforcement. We cannot, however, do the job of law enforcement ourselves.²⁴

B. Complexity of the Legal Scheme

The complexity of the relevant statutory scheme and seemingly arbitrary criminalization of various violations may compel a company to choose trial as well. The Pipeline Safety Act, for example, involves a deep and intricate statutory scheme that prescribes criminal penalties for knowing and willful violations of various provisions. Approximately a third of the pages in the original nineteen-page indictment are devoted to detailing the statute and underlying regulations.²⁵

21. See, e.g., *Norex Petroleum Ltd. v. Access Indus. Inc.*, 631 F.3d 29, 33 (2d Cir. 2010) (holding that RICO does not apply extraterritorially under *Morrison*); *Cedeno v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010) (holding that RICO does not apply extraterritorially under *Morrison*).

22. *United States v. Hsiung*, 758 F.3d 1074, 1082 (9th Cir. 2014).

23. Karen Gullo, *PG&E Charged by U.S. Over Fatal 2010 Pipeline Explosion*, BLOOMBERG (Apr. 4, 2014), <http://www.bloomberg.com/news/articles/2014-04-01/pg-e-charged-by-u-s-over-fatal-2010-pipeline-explosion>.

24. Press Release, FedEx, FedEx Response to Department of Justice Charges (July 17, 2014) [hereinafter FedEx Press Release], available at <http://investors.fedex.com/news-and-events/investor-news/news-release-details/2014/FedEx-Response-to-Department-of-Justice-Charges/default.aspx>.

25. See PG&E Indictment, *supra* note 2.

The indictment alleges that PG&E:

- “knowingly and willfully failed to gather and integrate existing data and information on a line . . . that could be relevant to identifying and evaluating . . . potential threats;”
- “knowingly and willfully failed to maintain records concerning the date, location, and description of each repair made to a line;”
- “knowingly and willfully failed to identify and evaluate potential threats to covered segments on the lines set forth [in the indictment];”
- “knowingly and willfully failed to include in its annual baseline assessment plan all potential threats on a covered segment and failed to select the most suitable assessment method to assess . . . potential threats;”
- “knowingly and willfully failed to prioritize covered segments of lines as high risk segments for the baseline . . . or a subsequent reassessment, after a changed circumstance rendered manufacturing threats on segments of the lines set forth below unstable;” and
- “knowingly and willfully failed to prioritize covered segments of a line . . . as high risk segments for a baseline . . . or a subsequent reassessment after a changed circumstance rendered manufacturing threats on those segments unstable, and failed to analyze covered segments to determine the risk of failure from such manufacturing threats.”²⁶

A superseding indictment was filed on July 30, 2014.²⁷ The twenty-three-page indictment not only added fifteen counts to the original twelve under the Pipeline Safety Act, but also included a count alleging obstruction of an agency proceeding.²⁸ The potential penalties against PG&E increased to \$1.1 billion.²⁹ To levy these penalties, however, the government will have to prove each one of these knowing and willful violations beyond a reasonable doubt. The Ninth Circuit Model Criminal Jury Instructions explain: “An act is done knowingly if the defendant is aware of the act and does not [act] [fail to act] through ignorance, mistake, or accident. [The government is not required to prove that the defendant knew that [his] [her] acts or omissions were unlawful.]”³⁰ Although the Ninth Circuit does not offer general instructions on what must be shown to prove willfulness, since “the meaning of ‘willfully’ necessarily depends on particular facts arising under the applicable statute,”³¹ the burden on the government

26. *Id.* at 15–19.

27. Superseding Indictment, *United States v. Pac. Gas & Elec. Co.*, No. 3:14-cr-00175-TEH (N.D. Cal. July 30, 2014).

28. *Id.*

29. Michael Lipkin, *PG&E Faces \$1B Indictment in Pipeline Blast Case*, LAW360 (July 29, 2014), <http://www.law360.com/articles/562360/pg-e-faces-1b-indictment-in-pipeline-blast-case>.

30. 9TH CIR. MANUAL OF MODEL JURY INSTRUCTIONS: CRIMINAL § 5.6 (2010) (Knowingly—Defined) (brackets in original), available at <http://www3.ce9.uscourts.gov/jury-instructions/node/373>.

31. *Id.* § 5.5 (Willfully); see also *United States v. Granda*, 565 F.2d 922, 924 (5th Cir. 1978) (noting that “willfully” has “defied any consistent interpretation by the courts”); 5TH CIR. PATTERN JURY INSTRUCTIONS (CRIMINAL CASES), § 1.38 (2012) (“Willfully”—To Act), available at <http://www.lb5.uscourts.gov/juryinstructions/>

imposed by the instructions regarding “knowingly” alone is substantial. Furthermore, the definitions used by other courts suggest that “willfully” will be a similarly difficult hurdle for the government to overcome.³²

Moreover, the twenty-seven counts alleging violations of the Pipeline Safety Act describe omissions on the part of the company, rather than affirmative acts; the indictment repeatedly alleges that PG&E knowingly and willfully *failed* to fulfill various requirements. However, intent is very difficult to prove when the acts are ones of omission. When one commits an affirmative act, such as breaking into a house, intent can be demonstrated through the commission of the act; when one fails to do something, however, how does one prove that he or she did so intentionally, rather than by mistake? The government will have to wage an uphill battle to prove that PG&E knowingly and willfully failed, for example, to “include in its annual baseline assessment plan all potential threats” or “prioritize covered segments of a line . . . as high risk segments for a baseline.”³³ Even when a company takes myriad precautions and renders its best judgments, unanticipated events can occur.

When the Pipeline Safety Act was promulgated, Congress consciously decided to criminalize violations of these regulations. One legal scholar, Professor Richard J. Lazarus, has suggested that rather than identifying which environmental violations are most deserving of criminal penalties, Congress has used criminal law “as another way to achieve environmental policy objectives by maximizing the law’s potential for deterrence.”³⁴ Lazarus argues that Congress’s approach of imposing criminal sanctions for the violation of nearly all federal environmental protection laws is problematic for a number of reasons. Among the concerns Lazarus identifies is that “[c]riminal sanctions should be reserved for the more culpable subset of offenses and not used solely for their ability to deter.”³⁵

Unlike the *malum in se* crimes of theft or murder, the statutory scheme of the Pipeline Safety Act was not criminalized due to any inherent wrongfulness. Indeed, a recent *Economist* article described “[t]he increasing criminalisation of corporate behaviour in America,” arguing that this trend is “bad for the rule of law

fifth/crim2012.pdf (“The Committee has therefore abandoned the indiscriminate use of the term ‘willfully’ accompanied by an inflexible definition of that term. Instead, we have attempted to define clearly what state of mind is required, i.e., what the defendant must know and intend to be guilty of the particular crime charged.”).

32. See, e.g., *Bryan v. United States*, 524 U.S. 184, 191–92 (1998) (noting that “willfully” is a context-dependent term but adding that, “As a general matter, when used in the criminal context, a “willful” act is one undertaken with a “bad purpose.”); *United States v. Doyle*, 130 F.3d 523, 540 (2d Cir. 1997) (“A defendant acts willfully when he acts with a specific intent to do some act, an act which the law defines as being illegal.”); *United States v. Falk*, 605 F.2d 1005, 1010 n.9 (7th Cir. 1979) (defining “willful” as something done “deliberately and intentionally, as distinguished from something which is merely careless, inadvertent or negligent”).

33. PG&E Indictment, *supra* note 2, at 17–18.

34. Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 *LoY. L.A. L. REV.* 867, 887 (1994).

35. *Id.* at 883.

and for capitalism.”³⁶ The article included two major recommendations to improve the current state of regulatory affairs: (1) to establish a “much clearer division between the civil and criminal law when it comes to companies”; and (2) to pare down the estimated hundreds of thousands of regulatory statutes that include criminal penalties.³⁷

The PG&E case marks a fork in the road between what constitutes corporate *crime* versus what constitutes mere corporate *negligence*, an issue likely to be at the heart of the trial. Indeed, PG&E likely will argue that it could not have possibly “knowingly and willfully” failed to fulfill each of these intricate obligations for the specified sections of more than 46,000 miles of natural gas transmission and distribution pipelines,³⁸ and therefore should not be found criminally liable. As a company spokesperson stated, “[b]ased on all of the evidence we have seen to date, we do not believe that PG&E employees intentionally violated the federal Pipeline Safety Act, and that, even where mistakes were made, employees were acting in good faith to provide customers with safe, reliable, and affordable energy.”³⁹

II. EVIDENTIARY CONSIDERATIONS

A. *Unreliable Witnesses*

Often, the government builds its case on the testimony of those who have an incentive to help the government. Knowledge of such a potential weakness in the government’s case may motivate a company to present its case to a jury. For example, in 2001, Tyson Foods (“Tyson”) was charged with thirty-six counts alleging, in part, that the company had conspired to transport illegal aliens into the United States to work at Tyson plants.⁴⁰ Prosecutors painted Tyson as a money-hungry corporation, an image unlikely to win the sympathies of a jury.⁴¹ One article quoted prosecutors describing the Tyson case as an illustration of “what happens when a corrupt corporate culture makes the bottom line the all-consuming priority.”⁴²

36. *Corporate settlements in the United States: The criminalisation of American business*, ECONOMIST (Aug. 30, 2014), <http://www.economist.com/news/leaders/21614138-companies-must-be-punished-when-they-do-wrong-legal-system-has-become-extortion>.

37. *Id.*

38. PG&E Indictment, *supra* note 2, at 2.

39. Channing Joseph, *PG&E Expects New Indictment Over Explosion*, AP (June 4, 2014), <http://bigstory.ap.org/article/pge-expects-new-indictment-over-explosion>.

40. Press Release, U.S. Dep’t of Justice, INS Investigation of Tyson Foods, Inc. Leads to 36 Count Indictment for Conspiracy to Smuggle Illegal Aliens for Corporate Profit (Dec. 19, 2001), *available at* http://www.justice.gov/opa/pr/2001/December/01_crm_654.htm.

41. Sherri Day, *Prosecutors Call Tyson Smuggling Trial a Case of ‘Corporate Greed’*, N.Y. TIMES (Feb. 6, 2003), <http://www.nytimes.com/2003/02/06/national/06TYSO.html>.

42. *Id.*

However, in constructing its case against the company, the government drew heavily on testimony from two sources who ultimately undermined its case: former Tyson employees who had already pleaded guilty to their role in the alleged conspiracy and an undercover agent who had surreptitiously videotaped hundreds of conversations with employees and smugglers.⁴³ In the eyes of the judge and jury, such testimony was insufficient to conclusively prove any wrongdoing by the company. In addition, Tyson successfully convinced the court to instruct the jury to consider relevant corporate policies as part of a compliance defense. The jury instruction, detailed in a later section of this article and excerpted in Appendix A, provided ballast for the company to argue that it had been trying to comply with the law.⁴⁴ Judge R. Allen Edgar dismissed twenty-four of the thirty-six counts against Tyson due to lack of evidence before sending the case to the jury.⁴⁵ The jury, in turn, acquitted Tyson of the remaining charges after approximately five hours of deliberation.⁴⁶ In an article about the verdict, the *New York Times* quoted a juror expressing her shock at the government's lack of "hard evidence."⁴⁷

The effects of using problematic witnesses (or, alternatively, using witnesses problematically) are similarly evident in *United States v. W.R. Grace*, a case that presented a heartbreaking set of facts characteristic of asbestos cases.⁴⁸ For decades, W.R. Grace's vermiculite mining operations in Libby, Montana, had polluted the town with asbestos.⁴⁹ Hundreds had died of related illnesses, and many more had been sickened by their exposure.⁵⁰ Availing itself of tools similar to those used by the Tyson prosecutors, the government developed its case against W.R. Grace in heavy reliance on the testimony of a particular witness with whom it had engaged in immunity negotiations.⁵¹ However, the W.R. Grace prosecution went one step further, failing to divulge the details of its relationship with the witness to the defense, which included an immunity offer, the witness's role in aiding prosecutors, and "extensive e-mail exchanges" with the witness that "ensured . . . he would never face trial."⁵²

This failure proved fatal. In his instructions to the jury, Judge Donald Molloy excoriated the Department of Justice and the U.S. Attorney's office for violating

43. Sherri Day, *Jury Clears Tyson Foods in Use of Illegal Immigrants*, N.Y. TIMES (Mar. 27, 2003), <http://www.nytimes.com/2003/03/27/us/jury-clears-tyson-foods-in-use-of-illegal-immigrants.html>.

44. See *infra* app. A (excerpting Tyson jury instructions).

45. Day, *supra* note 43.

46. *Id.*

47. *Id.*

48. Steven Andersen, *Asbestos Acquittal: W.R. Grace Unexpectedly Wins Environmental Crimes Trial*, INSIDE COUNSEL (July 1, 2009), <http://www.insidecounsel.com/2009/07/01/asbestos-acquittal-wr-grace-unexpectedly-wins-envi>.

49. *Id.*

50. *Id.*

51. Julie Zeveloff, *Criminal Charges Dropped Against W.R. Grace Attorney*, LAW360 (June 18, 2008), <http://www.law360.com/articles/107160/criminal-charges-dropped-against-wr-grace-attorney>.

52. *Id.*

“their constitutional obligations to the defendants . . . the Federal Rules of Criminal Procedure . . . [and] orders of the Court” by “suppressing or withholding material proof pertinent to the credibility” of the cooperating witness.⁵³ Judge Molloy warned the jury to consider the cooperator’s testimony “with great skepticism and with greater caution than that of other witnesses.”⁵⁴ At the close of the eleven-week trial, the jury acquitted W.R. Grace and its executives of all charges.⁵⁵ W.R. Grace was likely successful at trial due, in large part, to the government’s undisclosed relationship with the witness.

B. Missing Critical Evidence

In other cases, a company may decide to go to trial because the government lacks evidence that is critical to establishing its case. In 1994, General Electric (“GE”) went to trial on charges that it had conspired with the South African diamond company De Beers Centenary (“De Beers”) to fix industrial diamond prices.⁵⁶ The prosecution sought to prove that when a GE customer and GE sales chief met to discuss diamond prices, the customer was actually acting on behalf of De Beers, a part-owner of his company. The government alleged that the two were actually part of a larger price-fixing conspiracy.⁵⁷

The government, however, lacked evidence that was essential to building a viable case against GE, as Judge George C. Smith emphasized in his opinion granting GE’s motion for judgment of acquittal:

It is beyond dispute that the government’s attorneys worked diligently to uncover and present the government’s case. In some instances, witnesses who offered testimony favorable to the government at the grand jury stage changed or explained their testimony . . . in a manner that rendered their trial testimony either neutral or, in some cases, favorable to General Electric. In other instances, the government attorneys made good faith efforts as zealous advocates to substitute the testimony of available witnesses for those witnesses it ideally would have called.⁵⁸

Due to extradition laws and other issues, none of the other defendants were available for trial.⁵⁹ Moreover, the former executive who had first suggested that GE engaged in price-fixing stated in an affidavit that he had “never had any

53. *Fiery Jury Instructions*, INSIDE COUNSEL (July 1, 2009), <http://www.insidecounsel.com/2009/07/01/fiery-jury-instructions>.

54. *Id.*

55. Kim Murphy, *Firm acquitted in asbestos case; The verdict’s a blow to a polluted town – and a reeling Justice Dept.*, L.A. TIMES (May 9, 2009), <http://www.articles.latimes.com/2009/may/09/nation/na-asbestos-trial9>.

56. Zachary Schiller, *The Empty Chair at GE’s Diamond Trial*, BLOOMBERG BUSINESSWEEK (Oct. 23, 1994), <http://www.businessweek.com/stories/1994-10-23/the-empty-chair-at-ges-diamond-trial>.

57. Randall Edwards, *Witness Defends GE in Industrial Diamond Price-Fixing Case*, COLUMBUS DISPATCH (Nov. 18, 1994), at 4C.

58. *United States v. Gen. Elec. Co.*, 869 F. Supp. 1285, 1300 (S.D. Ohio 1994).

59. Schiller, *supra* note 56.

personal knowledge of any antitrust wrongdoing . . . [or] any other illegal conduct by GE personnel” and then proceeded to testify at trial about that alleged wrongdoing.⁶⁰ Due to the government’s failed “efforts to compensate for the dearth of supporting evidence,”⁶¹ the district court granted GE’s motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure at the close of the prosecution’s case.⁶² Although we cannot know precisely what GE and its counsel knew about these defects in the government’s case prior to trial, GE knew that critical witnesses were abroad. Even with the subpoena power, bringing witnesses to trial is a challenge. Bringing voluntary witnesses from abroad, particularly when they are implicated in the allegations, can be impossible.

Other federal cases against public companies that have gone to trial have similarly lacked a critical piece of the puzzle. In *United States v. Stryker Biotech, LLC*,⁶³ the government charged Stryker Biotech with thirteen counts of felony misbranding a medical device, alleging that the company had misled surgeons by promoting a combination of two bone-growth products that had not been clinically studied or FDA-approved.⁶⁴ Defense counsel argued to the jury that the government had failed to even attempt to contact a single one of the allegedly defrauded surgeons before the trial.⁶⁵ Moreover, as a witness testified, the physicians had, of their own accord, combined the products for valid clinical reasons, not because they were persuaded to do so by sales representatives.⁶⁶ Such arguments and testimony exposed craters in the government’s case, preventing the government from successfully arguing the critical point that the named surgeons had been defrauded and harmed.⁶⁷ A few days into trial, the government dropped all of the felony charges; Stryker Biotech pleaded guilty to a single count of misdemeanor misbranding and paid a \$15 million fine.⁶⁸

There is speculation that a case against PG&E may be similarly difficult for the government to prove, especially given the “knowingly and willfully” standard required for the imposition of criminal penalties under the Pipeline Safety Act.⁶⁹ The former head of the Pipeline and Hazardous Materials Safety Administration has explained that “[k]nowingly and willfully is a very hard standard to meet

60. Randall Edwards, *Ex-GE Insider Describes Meetings with Executives in Price-Fixing Case*, COLUMBUS DISPATCH, Oct. 28, 1994, at 3B.

61. *Gen. Elec. Co.*, 869 F. Supp. at 1300.

62. *Gen. Elec. Co.*, 869 F. Supp. at 1301; Douglas Frantz, *GE Wins in Diamond Price Case*, N.Y. TIMES (Dec. 6, 1994), <http://www.nytimes.com/1994/12/06/business/ge-wins-in-diamond-price-case.html>.

63. No. 09-10330-GAO (D. Mass. Jan. 17, 2012).

64. *Government’s Off-Label Case Against Stryker-Biotech Unravels at Trial*, RX COMPLIANCE REPORT 1–3 (Feb. 29, 2012), <http://www.rxcompliancereport.com/sample/RxCompSampleIssue.pdf>.

65. *Id.* at 2.

66. *Id.*

67. *Id.*

68. *Id.* at 2–3.

69. 49 U.S.C. § 60123 (2012).

If it can't be shown that PG&E even knew these [issues] were there, how can it be shown that they were willful about it?"⁷⁰

C. Compliance Defense

A company may choose to go to trial because it maintains an internal compliance program sufficient to raise a "compliance defense" against the corporation's liability for its employees' actions. As described in further detail below, Tyson successfully employed this strategy in its 2003 trial, thus avoiding the imputation to the company of the actions of individual employees.

Generally, to hold a company vicariously liable for the actions of its employees, the fact finder must determine that the employees were acting in the scope of their employment when they committed the acts.⁷¹ Moreover, "[t]he acts of an agent may be imputed to the principal . . . if it is the agent's purpose to benefit the principal" even if those acts are "done contrary to express instructions or policies."⁷² However, as the Ninth Circuit explained in *United States v. Beusch*, if a company has established a compliance program to prevent the sort of employee actions with which it is being charged, a court may consider the program in its liability determination.⁷³ In that case, a foreign currency exchange dealer and a corporate officer appealed their convictions under the Bank Secrecy Act. The company contended that a jury instruction had improperly imposed strict liability on the company for the officer's actions.⁷⁴ The court explained that the challenged jury instruction meant that the presence of policies opposing the employee's actions "may be considered in determining whether the employee in fact acted to benefit the corporation," clarifying that "[m]erely stating or publishing such instructions and policies without diligently enforcing them is not enough to place the acts of an employee who violates them outside the scope of his employment."⁷⁵

70. Daniel B. Wood, *San Bruno explosion case against PG&E could be hard to prove*, CHRISTIAN SCI. MONITOR (Apr. 2, 2014), <http://www.csmonitor.com/USA/Justice/2014/0402/San-Bruno-explosion-case-against-PG-E-could-be-hard-to-prove-video>.

71. Peter J. Henning, *Be Careful What You Wish For: Thoughts on a Compliance Defense Under the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 883, 900 (2012).

72. *United States v. Beusch*, 596 F.2d 871, 877–78 (9th Cir. 1979).

73. *Id.* at 878; *see also* Brief for Assoc. of Corp. Counsel, et al. as Amici Curiae in Support of Appellant Urging Reversal, *U.S. v. Ionia Mgmt. S.A.*, 555 F.3d 303 (2d Cir. 2008) (No. 07-5801-CR) (allowing a corporate compliance defense in criminal actions is consistent with Supreme Court jurisprudence regarding corporate civil liability in Title VII employment actions involving punitive damages, which have been described as "quasi-criminal" in nature); Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319 (2007) (same); Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 441 (2007) (same).

74. *Beusch*, 596 F.2d at 877. The disputed jury instruction stated: "A corporation may be responsible for the acts of its agents done or made within the scope of its authority, even though the agent's conduct may be contrary to the corporation's actual instruction or contrary to the corporation's stated policies." *Id.* at 877.

75. *Id.* at 878.

Not only does the case law point to the viability of such a defense but guidance to federal prosecutors does so as well. The United States Attorneys' Manual instructs prosecutors to consider a company's corporate compliance program in deciding whether to charge the company for criminal misconduct.⁷⁶ Since the mere presence of a corporate compliance program is insufficient to release a company from vicarious liability for the illegal acts of its employees, prosecutors are instructed to evaluate a company's compliance program to determine whether it is "adequately designed for maximum effectiveness . . . and whether corporate management is enforcing the program or is . . . pressuring employees to engage in misconduct to achieve business objectives."⁷⁷ Among other factors, prosecutors are instructed to consider whether the program is applied in good faith, whether the program is preventing misconduct, and whether the employees are educated about the program and "convinced of the corporation's commitment to it."⁷⁸

Tyson's presentation of such corporate compliance evidence likely played a substantial role in its trial on charges of violating immigration laws. In response to corporate conspiracy charges, Tyson issued a press statement describing its commitment to legal hiring: "Tyson has a long history of partnering with the Immigration and Naturalization Service (INS) to ensure corporate compliance with immigration laws. We voluntarily adopted the INS Basic Pilot Program company-wide. . . . As has been our history and company policy, we will continue to cooperate with the INS."⁷⁹ The section of the jury instructions laying out the theories of the case, excerpted as Appendix A, describes these policies and notes Tyson's "desire to ensure that [it] was hiring legally and to develop a cooperative partnership with the INS."⁸⁰

The charge to the Tyson jury similarly accounted for these company policies and practices.⁸¹ In its determination of whether the company itself should be held liable for the acts of its employees, the jury was instructed to consider any "specific corporate policy" or "work instructions" provided by the company, as well as "the extent to which Tyson actually implemented and enforced" them.⁸² After the company was acquitted, an attorney for Tyson described the verdict as demonstrating the significance of a company's policies to a determination of liability for

76. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-28.800 (2008), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

77. *Id.*

78. *Id.*

79. Press Release, Tyson Foods, Inc., Statement by Ken Kimbro, Senior Vice President of Human Resources in Response to Indictments Handed Down by Assistant U.S. Attorney John MacCoon (Dec. 19, 2001), available at <http://www.prnewswire.com/news-releases/tyson-foods-inc-statement-by-ken-kimbrow-senior-vice-president-of-human-resources-in-response-to-indictments-handed-down-by-assistant-us-attorney-john-maccoon-74648027.html>.

80. Charge to the Jury at 15, *United States v. Tyson Foods, Inc.*, 258 F. Supp. 2d 809 (E.D. Tenn. Mar. 25, 2003) (No. 4:01-cr-061) [hereinafter *Tyson Jury Charge*] (on file with Authors).

81. *Id.* at 17-18.

82. *Id.* at 18.

actions taken by its employees.⁸³

FedEx may seek to make an analogous compliance argument with regard to its past cooperation with law enforcement and desire to ensure compliance with the law. FedEx emphasized this history in a press release issued in response to the recent charges:

FedEx has a 42-year history of close cooperation with law enforcement agencies. We're proud to say that we have partnered with the FBI, the Department of Homeland Security, DEA, and other federal, state and local law enforcement teams around the world to help stop illegal drug activity and bring criminals to justice. . . . We have repeatedly requested that the government provide us a list of online pharmacies engaging in illegal activity. Whenever DEA provides us a list of pharmacies engaging in illegal activity, we will turn off shipping for those companies immediately.⁸⁴

FedEx additionally maintains a comprehensive Code of Business Conduct and Ethics that covers areas ranging from generally lawful and ethical behavior and conflicts of interest to gifts and favors and improper payments and bribes.⁸⁵ Moreover, while the Board of Directors is ultimately responsible for the company's compliance with the law, a number of others monitor corporate compliance as well; the Nominating & Governance Committee, the Audit Committee, and the General Counsel work in concert to periodically review FedEx's code of conduct and address compliance-related concerns.⁸⁶

III. OTHER STRATEGIC CONSIDERATIONS

A. "Corporate Death Sentence"

For a government contractor, a conviction, or even a Deferred Prosecution Agreement ("DPA") or Non-Prosecution Agreement ("NPA"), may lead to suspension or debarment from future government contracts.⁸⁷ For a corporation in the health care industry, suspension or debarment can mean losses so substantial that they amount to a "corporate death sentence."⁸⁸ 42 U.S.C. § 1320a-7 lists a number

83. Stephanie E. Tanger, *Enforcing Corporate Responsibility for Violations of Workplace Immigration Laws: The Case of Meatpacking*, 9 HARV. LATINO L. REV. 59, 82 (2006).

84. FedEx Press Release, *supra* note 24.

85. *Code of Business Conduct and Ethics*, FEDEX (last amended Jan. 14, 2013), http://investors.fedex.com/files/doc_downloads/BusCodeConduct_english_011112.pdf.

86. *Corporate Governance Guidelines*, FEDEX 1-2 (last amended Mar. 11, 2013), http://investors.fedex.com/files/doc_downloads/corp_gov/Corporate_Governance_Guidelines.pdf.

87. Matthew Chandler et al., *2013 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, GIBSON DUNN 11 (Jan. 7, 2014), <http://www.gibsondunn.com/publications/Documents/2013-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf>.

88. Milton J. Valencia, *US Dismisses Drug Salesmen's Case*, BOS. GLOBE (Jan. 20, 2012), <http://www.bostonglobe.com/metro/2012/01/20/drops-charges-against-pharmaceutical-company-second-case-dismissed-this-week/5Ty3lC2F7t0374jkuGDdeJ/story.html>.

of categories of entities to be mandatorily or permissively excluded from participation in federal and state health care programs; among those listed are entities convicted of fraud and those found to have paid kickbacks.⁸⁹

Such a calculation may have been behind the decision of Stryker Biotech to go to trial in 2012 on felony misbranding charges. *The Boston Globe* reported that the company faced “tens of millions of dollars in fines and, more damaging, being excluded from federal health care programs”⁹⁰ Tenet HealthSystem Hospitals (“Tenet”) likely engaged in a similar analysis when it chose to go to trial on charges of paying illegal kickbacks to physicians at Tenet’s Alvarado Hospital Medical Center in San Diego, California. The *Los Angeles Times* noted the significance of the charges against Tenet when it acknowledged that “[i]f the company is convicted, Alvarado might be dropped from Medicare and other federal reimbursement programs, which could be a financial death knell.”⁹¹

A March 2014 Securities and Exchange Commission (“SEC”) filing stated that PG&E and the government negotiated, but failed to reach an agreement.⁹² The filing noted that PG&E “engaged in discussions with the U.S. Attorney’s office in an effort to reach a fair resolution of the investigation,” but based on “the most recent discussions,” the utility anticipated that it would be criminally charged.⁹³ The company’s second-quarter earnings call in July 2014 declared that the cost of admitting willful and knowing violations of the Pipeline Safety Act is too high: to do so “could have consequences in the ongoing proceedings [G]iven those facts . . . we just can’t see that we should admit to violations.”⁹⁴ Although PG&E would not have been subject to suspension or debarment from federal health care programs like Stryker Biotech or Tenet, clearly the measures proposed by the prosecutors were too draconian for the company.

B. Reputation Preservation

A company may be motivated to go to trial by a desire to establish its lack of culpability or the lack of merit of the government’s charges. This is especially true when a company has previously been the subject of litigation generating significant negative publicity. Reporting surrounding the Tyson trial indicated that Tyson

89. 42 U.S.C. § 1320a-7(a)–(b) (2012).

90. Valencia, *supra* note 88.

91. Lisa Girion, *Tenet Ex-Exec Pleads Guilty in Referral Case*, L.A. TIMES (Jan. 6, 2005), <http://articles.latimes.com/2005/jan/06/business/fi-tenet6>.

92. PAC. GAS AND ELEC. CO., CURRENT REPORT (FORM 8-K) (Mar. 27, 2014), *available at* <http://www.sec.gov/Archives/edgar/data/75488/000100498014000029/form8k03262014.htm>.

93. *Id.*

94. Pacific Gas and Electric Company, Q2 2014 PG&E Corp Earnings Release and Conference Call (July 31, 2014), *available at* <http://investor.pgecorp.com/news-events/events-and-presentations/event-details/2014/PGE-Corporation-Schedules-Second-Quarter-2014-Earnings-Release-and-Conference-Call/default.aspx>; *see also* Joyce E. Cutler, *PG&E Unlikely to Admit Criminal Charges Related to California Pipeline Fire, Explosion*, BLOOMBERG BNA (Aug. 4, 2014), http://news.bna.com/wcrn/WCRNWB/split_display.adp?fedfid=50879109&vname=wcrnotallissues&jd=a0f3z4n9u3&split=0.

was eager to prove the company's integrity and to rebut the charges, and that the company believed any alleged wrongdoing was limited to individual employees.⁹⁵ In an article discussing the company's upcoming trial, the company's spokesperson said, "[w]e are anxious to tell our story in court There is no evidence of a corporate effort to hire undocumented workers."⁹⁶

Tyson may have been further motivated by a desire to improve its reputation, as the company previously had been subjected to a variety of unflattering investigations and accusations. Prior to the federal criminal charges that led the company to trial, Tyson had been tarnished by a range of public allegations.⁹⁷ In the statement released shortly after the company was indicted, Tyson announced, "[w]hile we are disappointed that it has come to this, we will vigorously defend our business, our diverse workforce and our reputation."⁹⁸ Indeed, a recent study on the impact of Foreign Corrupt Practices Act and other financial fraud investigations on the value of a company emphasized the reputational costs borne by companies in these cases: "for some types of misconduct, the reputation loss swamps all of the direct costs incurred by the firm, and represents the most consequential impact on firm value."⁹⁹

PG&E may similarly wish to go to trial in order to restore its reputation. In a 1993 lawsuit made famous by the film *Erin Brockovich*, the town of Hinkley, California, sued PG&E for claims arising from hexavalent chromium, or chromium-6, contaminated groundwater.¹⁰⁰ Although the company settled the class-action lawsuit for \$333 million in 1996,¹⁰¹ PG&E continues to engage in remediation efforts, and issues arising from the contaminated water still linger.¹⁰² In 2012, PG&E entered into a \$3.6 million settlement with water regulators in connection with water contamination concerns;¹⁰³ in 2013, a new group of

95. Jim Vicini, *US Charges Tyson Foods with Immigrant Smuggling*, REUTERS (Dec. 20, 2001), <http://www.rense.com/general18/USchargestyson.htm>.

96. Assoc'd Press, *Tyson Foods' Trial on Illegal Workers to Begin*, L.A. TIMES (Feb. 3, 2003), <http://articles.latimes.com/print/2003/feb/03/business/fi-preview3.4>.

97. Day, *supra* note 41.

98. Press Release, Tyson Foods, Inc., *supra* note 79.

99. GERALD S. MARTIN, ET AL., SEARLE CIVIL JUSTICE INST., LAW & ECON. CTR., GEORGE MASON UNIV. SCH. OF LAW, THE FOREIGN CORRUPT PRACTICES ACT: ECONOMIC IMPACT ON TARGETED FIRMS 7 (June 2014), available at [http://masonlec.org/site/rte/uploads/files/FCPA%20II%20Final%20\(6.4\).pdf](http://masonlec.org/site/rte/uploads/files/FCPA%20II%20Final%20(6.4).pdf).

100. Venturi, *PG&E Hit with Class Action Lawsuit over Lingering Hinkley Contamination*, SAN BERNARDINO CNTY. SENTINEL (Sept. 28, 2013), <http://sbsentinel.com/2013/09/pge-hit-with-class-action-lawsuit-over-lingering-hinkley-contamination/>.

101. Jeremy P. Jacobs, *Another Pollution Battle Looms in Erin Brockovich's Town*, N.Y. TIMES (Aug. 18, 2011), <http://www.nytimes.com/gwire/2011/08/18/greenwire-another-pollution-battle-looms-in-erin-brockovich-58590.html?pagewanted=all>.

102. See Jim Steinberg, *Hinkley: No Hollywood Ending for Town Plagued by Toxic Water*, THE SAN BERNARDINO SUN (July 8, 2013), <http://www.sbsun.com/general-news/20130709/hinkley-no-hollywood-ending-for-town-plagued-by-toxic-water>.

103. Molly Peterson, *PG&E makes \$3.6 million settlement with Hinkley, its second in 20 years*, S. CAL. PUB. RADIO (Mar. 16, 2012), <http://www.scpd.org/news/2012/03/16/31664/pge-makes-36-million-settlement-hinkley-its-second/>.

Hinkley residents brought a class-action lawsuit against the company.¹⁰⁴ Given the massive ongoing efforts of the company to clean up both the water and its reputation, PG&E is likely eager to clear its name completely of the current criminal charges.

FedEx has expressed similar sentiments regarding its desire to prove its innocence. In a company press release, FedEx announced that it “is innocent of the charges We will defend against this attack on the integrity and good name of FedEx and its employees.”¹⁰⁵ Like PG&E and other companies that have chosen trial in the past, FedEx wishes to clear the company name. As one newspaper reported, “FedEx has said in the past that it would not settle because the company does not believe it has committed any wrongdoing.”¹⁰⁶

C. Lack of Blameworthiness

Some companies may choose to go to trial because they feel they cannot be blamed for the allegations against them. For example, Waste Management of Hawaii, Inc. (“Waste Management”) was indicted in April 2014 for felony violations of the Clean Water Act, conspiracy to defraud, and making false material statements to the U.S. Environmental Protection Agency and the Hawaii Department of Health.¹⁰⁷ The indictment, however, ultimately stemmed from a catastrophic storm that caused millions of gallons of contaminated water and waste to spill over from Waste Management’s landfill into the ocean.¹⁰⁸ Waste Management contended that the allegations were baseless and that the company intended to defend against the allegations, stating that “[s]afety, ethics, and environmental protection are core beliefs of our business at Waste Management and we operate our facilities with the utmost regard for the health and safety of employees, neighbors, and the environment.”¹⁰⁹ A superseding indictment was filed on February 11, 2015; although the new indictment adjusted the legal theory of the case, the general alleged conduct underlying the charges was unchanged.¹¹⁰

Some companies, like Waste Management, feel a very human reaction to their circumstances and challenge the overreaching notion that they can be held

104. Brooke Self, *New Hinkley class action lawsuit filed against PG&E*, DAILY PRESS (July 23, 2013), <http://inlandpolitics.com/blog/2013/07/24/vvdailypress-new-hinkley-class-action-lawsuit-filed-against-pge/>.

105. FedEx Press Release, *supra* note 24.

106. Howard Mintz, *FedEx indicted in San Francisco in prescription drug probe*, SAN JOSE MERCURY NEWS (July 18, 2014), http://www.mercurynews.com/crime-courts/ci_26168549/fedex-indicted-prescription-drug-probe.

107. Indictment, United States v. Waste Mgmt. of Hawaii, Inc., No. 14-cr-00468-SOM (D. Haw. Apr. 30, 2014).

108. See Malia Zimmerman, *Waste Management of Hawaii, others indicted for 2011 ocean contamination*, HAWAII FREE PRESS (May 1, 2014), <http://www.hawaiiifreepress.com/ArticlesMain/tabid/56/ID/12539/Waste-Management-of-Hawaii-others-indicted-for-2011-ocean-contamination.aspx>.

109. *Id.*

110. First Superseding Indictment, United States v. Waste Mgmt. of Hawaii, Inc., No. 14-cr-00468-SOM-BMK (D. Haw. Feb. 11, 2015).

responsible for events beyond their control. As one of the defendants' attorneys expressed: "Charging an employee with crimes for simply going to work and exercising his best efforts and judgments to try to manage and prevent further disaster and damage in the face of an unprecedented amount of stormwater is revolting, and cause for alarm and concern for all employees, everywhere."¹¹¹ Corporations, like the individuals who comprise them, are eager to defend against charges for which they feel they cannot possibly be faulted. As proceedings involving Waste Management are still ongoing, the ultimate outcome of the company's strategy remains to be seen.

D. Preference for a Quick Resolution

DPA and NPA have become increasingly popular methods of resolution for the SEC and the Department of Justice.¹¹² However, for some companies, the potential terms of a DPA or NPA may be worse than the prospect of going to trial, spurring a company to choose the latter route. For example, a DPA or NPA often imposes significant ongoing obligations in the form of compliance monitors or self-reporting.¹¹³ Going to trial may enable a company to resolve allegations relatively quickly and without the ongoing commitments prescribed by a DPA or NPA.

A FedEx competitor, United Parcel Service, Inc. ("UPS"), was initially targeted as part of the same larger investigation.¹¹⁴ However, rather than go to trial, UPS signed an NPA in March 2013.¹¹⁵ In addition to agreeing to a \$40 million fine and a statement of facts, UPS agreed to institute an online pharmacy-specific compliance program.¹¹⁶ The ten-page compliance program attachment to the NPA requires, among other specifications, that the company appoint an Online Pharmacy Compliance Officer to oversee its compliance program and "report to local DEA any shipper that the Company believes is delivering controlled substances in violation of the Controlled Substances Act . . . or other laws governing the shipment of pharmaceuticals."¹¹⁷ FedEx may be opting for trial to pursue an alternative route to resolution.

111. Zimmerman, *supra* note 108.

112. See Mark T. Doerr & F. Joseph Warin, *2012 Mid-Year Update on Corporate Deferred Prosecution and Non-Prosecution Agreements*, GIBSON DUNN (July 10, 2012), <http://www.gibsondunn.com/publications/pages/2012MidYearUpdate-CorporateDeferredProsecution-NonProsecutionAgreements.aspx>.

113. See *id.*

114. Andrew Grossman & Laura Stevens, *FedEx Indicted in Prescription Drug Shipping Probe*, WALL ST. J. (July 17, 2014), <http://online.wsj.com/articles/fedex-indicted-for-role-in-distributing-controlled-substances-prescription-drugs-1405637242>.

115. *Id.*

116. *Id.*

117. Non-Prosecution Agreement, *In re* United Parcel Service, Inc. (Mar. 29, 2013), Attachment B, available at <http://www.justice.gov/usao/can/news/2013/docs/UPS.AttachmentB.pdf>.

E. Trial Outcomes

For most of the companies we reviewed, the decision to go to trial was the right one. Of the twelve criminal trials we surveyed, six ultimately resulted in acquittals.¹¹⁸ One company settled with the government to avoid a third criminal trial, after two previous trials had resulted in deadlocked juries.¹¹⁹ Three of the companies we surveyed were convicted at trial,¹²⁰ but for one of the three, the charges were ultimately dismissed.¹²¹ The remaining trials we reviewed ended in mid-trial plea agreements.¹²² The acquittal rate for this sample set is significantly higher than one might anticipate based upon statistics regarding Department of Justice prosecutions generally. United States Attorneys' Annual Statistical Reports from the last two decades indicate that the overall rate of conviction by the Department of Justice has exceeded eighty-five percent, with conviction rates from the last ten years hovering between ninety-one and ninety-three percent.¹²³

The trial outcomes we analyzed suggest that many of the factors influencing companies to go to trial in the first place contribute to their ultimate success at trial. Tyson's success at trial resulted from its compliance program and the government's use of unreliable witnesses. GE's acquittal was directly tied to the insufficiency of the government's evidence. Stryker Biotech's favorable mid-trial plea agreement came on the heels of defense counsel's announcement that the government had constructed its entire case without consulting the individuals it claimed were harmed. Considerations such as insufficient evidence or unreliable witnesses on the part of the government, or a strong compliance program or malleable legal scheme on the part of the company, likely strengthen a company's case before a jury.

Accordingly, before determining that the popular strategies of settlement or a DPA or NPA are, indeed, best for their corporate clients, practitioners would be wise to ask themselves, and their clients, a number of strategic questions. Is the law clear on the relevant issue, or is there some serious ambiguity that leaves room for a novel, yet viable, legal theory? Considering the level of complexity of the

118. *United States v. W.R. Grace*, No. 05-cr-00007-DWM (D. Mont. May 8, 2009); *United States v. Stora Enso North America Corp.*, No. 06-cr-00323-CFD (D. Conn. July 19, 2007); *United States v. Tyson Foods, Inc.*, 258 F. Supp. 2d 809 (E.D. Tenn. 2003); *United States v. Gregory*, No. 98-cr-00249-WKU-3 (D. Neb. Dec. 3, 1999); *United States v. Nippon Paper Indus. Co.*, 62 F. Supp. 2d 173 (D. Mass. 1999); *United States v. Gen. Elec. Co.*, 869 F. Supp. 1285 (S.D. Ohio 1994).

119. *United States v. Weinbaum*, No. 03-cr-1587L (S.D. Cal. May 31, 2006).

120. *United States v. AU Optronics Corp.*, No. 09-cr-00110-SI, 2012 WL 889874 (N.D. Cal. Mar. 13, 2012); *United States v. San Diego Gas & Elec. Co.*, No. 06-cr-00065-DMS (S.D. Cal. Oct. 6, 2009); *United States v. Mitsubishi Corp.*, No. 00-cr-00033-MK (E.D. Pa. May 10, 2001).

121. *San Diego Gas & Elec. Co.*, No. 06-cr-00065-DMS.

122. *United States v. Stryker Biotech, LLC*, No. 09-10330-GAO (D. Mass. Jan. 17, 2012); *United States v. Consol. Edison Co. of N.Y., Inc.*, No. 93-cr-01063-JSM (S.D.N.Y. Oct. 31, 1994).

123. This data was compiled by reviewing the United States Attorneys' Annual Statistical Reports from 1993 through 2013. See *Annual Statistical Reports*, U.S. DEP'T OF JUSTICE (last updated Dec. 9 2014), <http://www.justice.gov/usao/resources/reports/>.

relevant legal scheme, how easily will the government be able to prove its case? Upon whose testimony and evidence is the government constructing its case? Are the witnesses reliable and believable? Is the government's evidence strong enough to build a solid case, or are there critical pieces missing? Does the company maintain a compliance program that is sufficiently strong to support a possible compliance defense? How do the likely outcomes of a trial alternative, for example a settlement or a DPA or NPA, compare to the likely outcomes of a trial? How much does the company wish to fight to prove its lack of blameworthiness, or to preserve its reputation?

IV. CONCLUSION

A company must engage in complex calculations before deciding to go down the unpredictable and costly route to trial, weighing factors such as trial alternatives, the state of the law, the complexity of the statutory scheme, and the strength of the government's case. The current circumstances of PG&E and FedEx echo those of many public companies that have gone to trial in federal criminal cases and, indeed, been vindicated. Perhaps they, too, will soon join the ranks of those public companies that have been successful.

In light of the government's increasing appetite for more substantial sentences, corporate parent pleas of guilty, astronomical fines, massive compliance undertakings, and ongoing monitors, as well as the track record of success when companies do decide to go to trial, corporations will likely take the lead and test the prosecution at trial.

APPENDIX A¹²⁴

CRIMINAL RESPONSIBILITY OF A CORPORATION

TYSON is a corporation. I will now explain the law that applies to a corporation being responsible for criminal offenses which are committed on the corporation's behalf by its officers, employees, and agents.

A corporation can act only through its agents. The agents of a corporation are its officers, directors, employees, and other persons who are authorized by the corporation to act for it.

TYSON is entitled to the same individual and impartial consideration of the evidence that the jury gives to a personal defendant. A corporation may be found guilty or be found not guilty of the offense charged under the same instructions that apply to a personal defendant.

For you to find TYSON guilty on a specific charge in the indictment, the government must prove beyond a reasonable doubt:

124. Tyson Jury Charge, *supra* note 80, at 17–18.

First, that each essential element of the crime charged against TYSON was committed by one or more of its agents; **Second**, that in committing those acts TYSON's agent intended, at least in part, to benefit TYSON; and **Third**, that each act committed by TYSON's agent was within the course and scope of that agent's employment by TYSON.

For an act to be within the course and scope of an agent's employment, the act must relate directly to the general duties that the agent was expected to perform for TYSON. It is not necessary for the government to prove that the act was authorized by TYSON formally or in writing.

An agent is not acting within the course and scope of his or her employment, if that agent performs an act which TYSON has, in good faith, forbidden its agents to perform. In other words, TYSON is not responsible for acts committed by its employees and agents if TYSON, in good faith, ordered or instructed its employees and agents not to commit such acts. A corporation may not be found liable for acts which it genuinely tries to prevent.

On the other hand, TYSON may not avoid responsibility for its actions by meaningless or purely self-serving pronouncements. If TYSON had a specific corporate policy or issued work instructions prohibiting and forbidding its employees and agents from committing certain acts, but the corporate policy or work instructions were merely a sham or pretense giving a false impression of compliance with the law, then acts committed by its employees and agents contrary to the meaningless corporate policy or work instructions would be within the scope of their employment. In this regard, you should consider the extent to which TYSON took steps to notify its employees and agents of the corporate policy or work instructions, and also the extent to which TYSON actually implemented and enforced its corporate policy or work instructions.

If you find that the act of an agent was not committed within the course and scope of that agent's employment or not committed with any intent to benefit TYSON, than you must consider whether TYSON later approved the act. An act is approved by a corporation if, after it is performed, another agent of the corporation having full knowledge of the act and acting within the scope of his employment with the intent to benefit the corporation, approves the act by his words or conduct. A corporation is responsible for acts approved by its agents.[†]

[†] O'MALLEY, GRENIG & LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 18.05 (modified); Eighth Circuit Model Jury Instructions - Criminal § 5.03 (2000) (modified); United States v. Carter, 311 F.2d 934, 941-43 (6th Cir. 1963); United States v. Peterson, 188 F.3d 510 (Table, text at 1999 WL 685917, at (6th Cir. Aug. 23, 1999)); Continental Baking Co. v. United States, 281 F.2d 137, 149-51 (6th Cir. 1960); Holland Furnace Co. v. United States, 158 F.2d 2 (6th Cir. 1946); United States v. Mahar, 801 F.2d 1477, 1488 (6th Cir. 1986).