

No. 89-661

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

TWENTIETH CENTURY FOX FILM CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

**BRIEF OF THE AMERICAN CORPORATE COUNSEL
ASSOCIATION AS AMICUS CURIAE
IN SUPPORT OF THE PETITION**

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INTEREST OF THE AMICUS CURIAE

The American Corporate Counsel Association (ACCA) is a national bar association of attorneys practicing on the legal staffs of corporations, associations and other business entities in the private sector. ACCA has over 7,800 members who are employed as attorneys by some 3,000 organizations representing a wide variety of industries. Many of ACCA's members are the chief legal officers of their client corporations. One of the primary responsibilities of the in-house attorneys ACCA represents

is to design and implement preventive compliance programs to assure corporate management, directors, and shareholders that the corporation acts in compliance with the law and the authority of the courts.

STATEMENT OF THE CASE

This case involves a criminal contempt indictment brought against both Twentieth Century Fox Film Corporation (Fox) and an employee of Fox for violation of the terms of a 1951 consent decree. After determining the employee's guilt, the District Court held Fox vicariously liable, and excluded all evidence offered by Fox to show its diligence in complying with the decree. The Second Circuit Court of Appeals upheld the District Court's decision in this regard, finding that when a corporate employee violates a court order, the corporation is vicariously liable, and that evidence of the corporation's diligence and good faith efforts to comply with the decree are irrelevant to establishing either the company's liability or the appropriate measure of penalty.

ARGUMENT

Corporate compliance programs, such as the one Fox sought to introduce as evidence, are a highly desirable means of self-regulation of corporate behavior, and should be encouraged rather than discouraged. In the interest of ensuring the continued viability of these compliance efforts in contempt proceedings, the Supreme Court should review and reverse the ruling of the Second Circuit in this case. The Second Circuit has, in effect, ruled that evidence of compliance programs may not be adduced to prove good faith in connection with contempt proceedings. However, nothing prevents the continued use of evidence of departure from such programs against the corporation in establishing fault.

As a result, the future value of compliance programs to corporations is cast into substantial doubt. If the

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Court declines to intervene, ACCA believes that the impact of the Second Circuit's holding will extend well beyond the limited facts in this case, and will stand as a serious obstacle to the maintenance and future implementation of corporate compliance programs. Therefore, ACCA asks that the Court give guidance as to the circumstances in which attempts to comply with the law become probative evidence in criminal contempt proceedings.

I. The Public Interest In Corporate Compliance Programs Is Both Real And Legitimate

In recent years, an increasing number of corporations have become subject to court decrees regulating corporate conduct in a broad spectrum of areas, including workplace safety, employment decisions, antitrust, and environmental control. In order to comply with such decrees, which often impose requirements going beyond any applicable criminal statutes, corporations typically work through their legal departments to implement compliance programs. These programs are designed to ensure that employees operate within all applicable laws and in a fashion consistent with court decrees.

Indeed, because of the diffuse nature and structural attributes of a corporation, the only way the corporate entity can act to prevent decree violations by employees is by instituting directives for the implementation of compliance programs. Short of removing itself entirely from activities regulated by a decree, there is nothing else a corporation can do to guarantee or coerce the legal behavior of its employees in an effort to ensure compliance.

Each corporation's compliance program is necessarily different, having been drafted to suit the specific business goals and needs of the corporation in response to the laws affecting its business. Generally, such programs contain a number of critical elements, including close attention to personnel hiring policies, supervision, educa-

tion, and enforcement. A compliance program is designed, therefore, to serve a variety of important business objectives and public policy goals, and, until the ruling of the Second Circuit, it was also valuable as the primary available evidence to present to a court resolving questions of liability and appropriate penalties in a contempt setting.

In all, corporate compliance programs may serve a variety of self-policing and evidentiary functions. In addition, corporate compliance programs may serve the public interest by saving the government the time and expense otherwise associated with massive internal investigations. They are also the primary vehicle by which corporations can impart to employees the corporation's commitment to comply with the letter of the law. Compliance programs make it possible for corporations to concentrate on efforts aimed at preventing violations of the law rather than efforts which focus on avoiding responsibility for failures. In light of this, it is unlikely that the Second Circuit intended to create a disincentive to the creation of corporate compliance programs, but in fact, its ruling does just that.

II. The Decision Below Merits Review Because It Frustrates The Implementation And Effect Of Corporate Compliance Programs

The Second Circuit found Fox in criminal contempt without the benefit of the admission of evidence which mitigated or exculpated Fox's behavior. In so finding, the Second Circuit did violence to the natural compatibility between compliance programs designed to assure that corporate activities stay within the law and the legitimate concern of courts to hold accountable consent decree violators.

Contempt proceedings give courts responsibility for and discretion in applying the court's authority. When presented with a contempt violation, a court will appropri-

ately consider what measures will protect or vindicate its authority, as opposed to the more common considerations—like compensation of third parties or statutory sentencing—which it considers in other proceedings. In this case, Fox's employee's illegal actions presented the court with the difficult task of determining what measures to visit upon a corporate defendant whose employee violated a consent decree. It is impossible for a court to determine that which would restore the authority of its consent decree without first considering what compliance efforts were made.

Indeed, until this decision, corporations charged with contempt because of employees' actions could raise as a defense their reasonable diligence in seeking to comply with the decree at issue. Given the established line of federal court precedent, discussed in great detail in the Petition for Certiorari at pages 7-12,¹ it is inconsistent for the Second Circuit in this case to disallow evidence of Fox's compliance efforts. Certainly this information is relevant—even crucial—in a contempt situation where the defendant has made all possible efforts to comply with a decree and lacks any malicious or otherwise intentional *mens rea*. To let this ruling stand removes any systemic logic from even the sentencing phase of criminal contempt proceedings, and encourages results that are arbitrary and unconnected to the purposes our judicial system was created to serve.

Furthermore, if allowed to stand, this ruling creates a disincentive to the creation of compliance programs by

¹ See, e.g., *United States v. Greyhound Corp.*, 508 F.2d 529 (7th Cir. 1984), *aff'd* 363 F. Supp. 325 (N.D. Ill. 1973); *United States v. Kroger Grocery & Baking Co.*, 163 F.2d 168 (7th Cir. 1947); *Washington Metropolitan Area Transit Authority v. Amalgamated Trade Union*, 531 F.2d 617 (D.C. Cir. 1976); *Southern Railway Co. v. Brotherhood of Locomotive Firemen and Enginemen*, 337 F.2d 127 (D.C. Cir. 1964); *Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885 (9th Cir. 1982).

living up to the misanthrope's adage that no good deed will go unpunished.² By its effect, this ruling would reserve the evidentiary worth of compliance efforts only for individual plaintiffs or the government wishing to prosecute the corporation based on aberrant employee actions. Indeed, the Government was allowed to use evidence of Fox's compliance efforts in establishing the willfulness of the Fox employee's actions. (Tr. 538)

It hardly seems fair to allow the government to introduce evidence of Fox's compliance efforts in order to show that the employee knew her behavior was illegal, and yet deny Fox the right to introduce evidence of the same compliance program in an effort to prove its diligence in enforcing the consent decree. The future value of compliance programs to corporations is cast into substantial doubt when, due to court limitations on their positive uses—few measurable legal benefits accrue to the diligent corporation, and the effects are often counterproductive. If compliance efforts are not to be allowed as evidence of corporate diligence, surely the Court could not expect that corporate managers would be encouraged to diligently implement compliance programs for the benefit of prosecutors or potential plaintiffs acting against them?

The essence of the Second Circuit's opinion is that compliance programs are only probative evidence when used to document a corporation's failures. If this ruling is allowed to stand, a corporation attempting to comply with a court order—the violation of which exposes the corporation to possible contempt implications—may find its effort irrelevant. Those corporations expending the time and resources to ensure compliance will be frus-

² See, e.g., H. Pitt and K. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability*, 78 Geo. L.J. — (forthcoming in April, 1990), Manuscript p. 59, on file with the Georgetown Law Journal.

trated by the judicial process which charges them with violations, but leaves them with no defenses each and every time an employee steps out of line, regardless of the corporation's efforts to ensure proper behavior.

CONCLUSION

For the foregoing reasons, the American Corporate Counsel Association respectfully requests that this Court grant certiorari in this case.

Respectfully submitted,

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