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CLIENT ALERT

On The Ropes: Recent Criminal Trials Expose Challenges That DOJ Antitrust Division Faces In Court

November 8, 2018

Over the past several weeks, the U.S. Department of Justice's Antitrust Division tried two high profile conspiracy cases against five former securities traders for major financial institutions in the U.S. District Court for the Southern District of New York. The DOJ lost one trial and walked away with a victory in the other trial that appears to face a significant risk of being vacated by the trial court judge or Second Circuit.

The evidentiary and legal issues raised in these two trials will likely have significant implications on how the Antitrust Division approaches its criminal investigations and prosecutions – both within the financial services sector and more broadly – going forward. For instance, the Antitrust Division will need to reassess the role, if any, that it plays in a target company's internal investigation. During one of the trials, the judge expressed strong concerns that the DOJ's case may have been "tainted" by the fact that one of the defendants was compelled to testify (without his counsel present) during the target company's internal investigation, which arguably was controlled by federal agencies that set forth the parameters and priorities of the investigation. The trial judge's rulings on this issue during post-trial briefing and any subsequent appellate decisions will likely provide companies with helpful guidance on best practices for conducting internal investigations in the midst of active government investigations, especially with respect to the appropriate role and influence that government agencies should have in a company's internal investigation.

In addition, the acquittal of all three defendants in one of the trials will likely cause the Antitrust Division to be more gun-shy about bringing contested criminal charges where it has limited evidence or otherwise faces significant litigation risks. In this trial, the DOJ's case primarily rested on the testimony of a single cooperating witness, who conceded several key points during cross-examination. Consequently, companies and individuals who can poke sufficient holes in the Antitrust Division's theories and evidence during the investigative phase will likely have a greater opportunity of convincing the division to forego bringing any criminal charges or, at the very least, of negotiating better plea terms, including lesser charges and lower fines.

I. The DOJ's Foreign Exchange Trial Loss

Last month, the Antitrust Division tried three former traders at Barclays, Citigroup, and JPMorgan on charges that they conspired to fix the prices and rig the bids for U.S. dollars and euros traded on the foreign exchange market. At trial, the DOJ called a former UBS trader, who had entered into a non-prosecution agreement, as its star witness. This witness testified that he and the defendants used a private Bloomberg chatroom – which they called "the Cartel" chatroom – to avoid taking trading positions that harmed each other's existing positions and to coordinate the timing and size of their trades for several years.

As further proof that the defendants entered into an anticompetitive agreement, the DOJ showed the jury numerous messages that the defendants exchanged via their Bloomberg chatroom, which stated things such as: "I prefer we join[ ] forces;" "One team, one dream mate;" "Let's double team;" "It's awesome I think we're both helping each other out;" "Well done mate, nice work . . . I made so much money;" "Best day for as long as I can remember[,] best month ever and I owe it all to you." Moreover,

the DOJ sought to show that the defendants knew that their conduct was illegal by playing a recorded message that one of the defendants left another defendant upon learning that their trading activity was being investigated: "Looking back on it, in the cold light of day, it's gonna look [expletive] awful."

The defense called a finance professor and former foreign exchange trader as an expert witness. During his testimony, the defense's expert witness stated that the defendants could not have entered into an anticompetitive agreement because they often were counter-parties, rather than competitors, that needed to exchange information in order to complete transactions and create liquidity in the foreign exchange market. In doing so, he noted that the use of chatrooms to exchange information was consistent with industry practice and serves as an efficient means for traders at market-making banks to share "market color." He also testified that the DOJ's conspiracy theory was undermined by the defendants' trading history because he found nearly 150 instances where the defendants took positions that were unhelpful to each other's positions.

In addition, the defense called one of the defendants' former colleagues as essentially a character witness with industry expertise. This witness stated that she had nothing to gain from testifying but nonetheless chose to voluntarily do so because she believed it was a miscarriage of justice that her former colleague – who she described as a "genuinely good person" – was being prosecuted for conduct that everyone engaged in and believed was lawful. She also testified that it defied common sense to believe that the defendants would have carried out their alleged conspiracy through chatroom messages and phone conversations that they knew would be preserved if they truly believed that their conduct was unlawful. The defense was able to corroborate her testimony, as well as the testimony of its expert witness, through its cross-examination of the DOJ's cooperating witness, who conceded that the use of chatrooms to exchange market intelligence was commonplace and that he did not believe that he and the defendants were participants in an illegal conspiracy at the time that the conduct in question took place.

Finally, the defense introduced into evidence letters that the U.K.'s Serious Fraud Office (SFO) sent to the DOJ's cooperating witness and two of the defendants in which the agency stated that it opted not to prosecute them because there was insufficient evidence to support a conviction. The DOJ sought to exclude these letters on the basis that such irrelevant evidence about a foreign enforcer's decision under a distinct set of laws and facts would only serve to confuse the jury, but the trial judge (Judge Richard Berman) denied this motion.

After deliberating for about five hours, the jury – which consisted of ten women and two men – returned a not guilty verdict, explaining that "[i]t's not that we didn't believe these gentlemen did what they did, but in the end there was not enough evidence to warrant [a guilty verdict.]"

II. The DOJ's LIBOR Trial Victory And Likely Post-Conviction Challenges

Two weeks prior to losing the foreign exchange trial, the Antitrust Division, along with the DOJ's Criminal Division, secured a guilty verdict against two former Deutsche Bank derivatives traders on charges that they conspired to manipulate the London Interbank Offered Rate (LIBOR), which serves as the benchmark rate for various financial instruments. (One of the defendants was acquitted on certain wire fraud charges.)

During the month-long trial, the DOJ called three former Deutsche Bank employees – who were derivatives traders or LIBOR submitters – as cooperating witnesses. These witnesses testified that the defendants and other members of Deutsche Bank's

derivatives trading desk repeatedly pushed the bank's LIBOR submitters to alter the daily rate submitted to the LIBOR panel in order to increase the profitability of their swaps positions that were tied to LIBOR, which, in turn, would help them secure higher bonuses.

As part of its affirmative case, the DOJ planned to call Deutsche Bank's outside counsel to testify about statements that one of the defendants made when he was interviewed during the bank's internal investigation. The defense opposed the admission of this testimony, arguing that the defendant's Fifth Amendment right against self-incrimination would be violated given that he was "compelled" to provide his statements to outside counsel who was effectively taking its marching orders from the federal government. To resolve this dispute, the trial judge (Judge Colleen McMahon) held an evidentiary hearing outside the presence of the jury.

During the hearing, Deutsche Bank's outside counsel testified that the bank chose to cooperate fully with the DOJ, Commodities Futures Trading Commission (CFTC), and other U.S. and non-U.S. government agencies conducting LIBOR-related investigations. He also testified that the defendant who was questioned as part of the bank's internal investigation would have been terminated had he refused to cooperate with the investigation: "Their choice is to cooperate or to find new employment, basically." At the hearing, the defense also produced documents showing that the CFTC had provided Deutsche Bank's outside counsel with an outline establishing the internal investigation's scope and priorities, including what trading data should be reviewed and analyzed.

During the hearing, the trial judge described the evidence that Deutsche Bank's outside counsel was effectively acting on behalf of government investigators as being "highly persuasive." She also stated that "it appears . . . that the CFTC gave [outside counsel] its marching orders. It is my tentative thought that [this] creates a problem for the government on the state action question." Given the trial judge's clear concerns about the government's role in Deutsche Bank's internal investigation, the DOJ decided not to call the bank's outside counsel as a witness.

During the trial, the defense argued that the DOJ could not prove that any crime had been committed because there were no rules or regulations during the period in question that prohibited traders from requesting that a bank's LIBOR submitters alter their submissions based on a trader's market positions. The defense also sought to undermine the credibility of one of the DOJ's cooperating witnesses by asserting that he was highly incentivized to help the DOJ's case given that his plea deal was structured in a manner that enabled him to retain millions in bonus awards even though these bonuses were the product of conduct he now claimed was illegal.

After deliberating for about seven hours, the jury – which consisted of seven men and five women – found both defendants guilty. The defendants have stated that they plan to move to vacate their convictions on the basis that the DOJ's entire case was "tainted" because the federal government used Deutsche Bank's internal investigation to obtain testimony and documentary evidence in a manner that violated their constitutional rights.

III. Key Takeaways

1. The DOJ's LIBOR trial victory will likely face significant legal challenges because the trial judge expressed strong concerns about the fact that one of the defendants was essentially compelled to provide potentially inculpatory testimony without his counsel being present during an internal investigation that arguably was run by government lawyers. In

addition, the Second Circuit issued a decision last year (*United States v. Allen*) that reversed the convictions that the DOJ secured in another LIBOR trial on the basis that the defendants' Fifth Amendment right against self-incrimination was violated when the DOJ called a cooperating witness who had reviewed the testimony that the defendants were compelled to provide as part of the U.K. Financial Conduct Authority's LIBOR investigation. Irrespective of whether the DOJ's recent LIBOR trial victory is eventually vacated, the trial judge's opinion and any subsequent appellate decisions will provide companies with helpful guidance on best practices for conducting internal investigations in the midst of an active government investigation, especially with respect to the appropriate role and influence that government agencies should have in a company's internal investigation.

2. The foreign exchange trial loss is unlikely to cause the Antitrust Division to retreat from its vigorous enforcement efforts in the financial services sector. Indeed, the Antitrust Division's senior leadership team immediately issued a public statement indicating that it remained committed to holding financial institutions and their employees accountable for their antitrust crimes. Despite this high profile loss, the Antitrust Division has experienced significant success in the financial services sector during the past 10 years, which has included securing nearly $6 billion in fines and numerous guilty pleas and convictions at both the corporate and individual level. Moreover, the Antitrust Division's new Deputy for Criminal Enforcement has primarily worked on financial services investigations and prosecutions, which strongly suggests that the division will remain active in this sector.

3. A key question raised by the Antitrust Division's foreign exchange trial loss is whether the Criminal Division – which has been taking the lead in the LIBOR investigation and has already successfully tried multiple cases as part of this investigation – will assume a greater role in the foreign exchange investigation or other financial services investigations that are or may be conducted by the Antitrust Division. We may soon know the answer to this question given that the Antitrust Division has a pending case against another foreign exchange trader that could go to trial next year.

4. The distinct approaches taken by the defense in the foreign exchange and LIBOR trials prove the old adage that many times "the best defense is a good offense." Rather than simply trying to poke holes in the DOJ's case, the defense in the foreign exchange trial put on an affirmative case by calling an expert witness with significant trading experience in the foreign exchange market. Among other things, this expert testified that the defendants' conduct was not only well accepted within the industry but also had pro-competitive benefits (*i.e.,* the defendants' exchange of information created market efficiencies and liquidity). The defense also called one of the defendant's former colleagues, who helped bolster the defendants' character and confirmed that many other market participants engaged in the same conduct the DOJ claimed was unlawful. Moreover, the defense presented evidence showing that another enforcer with whom the DOJ has closely coordinated in many investigations had declined to prosecute the defendants because it believed there was insufficient evidence to support a guilty conviction.

5. As noted above, the jury in the foreign exchange trial indicated that it believed the defendants engaged in the charged conduct but nonetheless acquitted them because the DOJ failed to proffer sufficient evidence. Given that it will want to avoid another high profile loss, this statement will likely cause the Antitrust Division's senior leadership team to enhance its already rigorous scrutiny of recommendations to bring criminal charges against corporations and individuals by, among other things, requiring investigative teams to develop an even greater amount of rock-solid testimonial and documentary evidence that a jury will find both credible and persuasive. In the foreign exchange trial, the Antitrust

Division's case primarily rested on the testimony of a single cooperating witness, who did not hold up well during cross-examination. Thus, the Antitrust Division will likely be less inclined to bring cases where it does not have multiple witnesses and strong documentary evidence that supports their testimony.

6. In light of the Antitrust Division's foreign exchange trial loss, companies and individuals who can poke sufficient holes in the "jury appeal" of the division's theories and evidence will likely have a greater chance of persuading the division not to bring any criminal charges or, at the very least, of securing more favorable plea terms, including lesser charges and lower fines. Moreover, defense lawyers may be less inclined to advise their clients to cooperate with or enter into non-prosecution agreements where the evidence of guilt is marginal and the tangible benefits of cooperating are not as readily apparent.

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