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The DOJ's Mixed Record on Cases Against Traders

As long as there have been markets, there have been accusations of fraud and manipulation. But where is the dividing line between illegal activity and hard-charging, savvy trading? Do a trader's tactics merely offend market norms or customs such that the trader should be informally shunned or, in the lingo of traders, "put in the penalty box"? Or should the trader be punished by a regulator — or even criminally prosecuted? What conduct justifies which outcome?

Over the last decade or so, the U.S. Department of Justice has committed to the idea that it should rid the markets of certain traders, something that it accomplishes the very moment it files charges. These traders' sorry examples serve to announce once and for all that certain tactics are viewed to be on the wrong side of the line.

But the DOJ has had only mixed success in the actual prosecutions that follow. This article reviews each of the major categories of recent prosecutions and highlight the key and often recurring issues that have presented obstacles to conviction — and opportunities for the defense.

Behind each of these prosecutions there have been multiple, much broader investigations. In these, many traders have come close, but ultimately were not charged, often because of these same issues.

A. RMBS: Meaningless Sales Talk or Material Misrepresentation?

Jesse Litvak was a trader at Jefferies & Co., Inc., in the market for residential mortgage-backed securities (RMBS). Litvak's words in negotiating and confirming his trades were preserved for all time in his Bloomberg chats. A sales assistant mistakenly sent out of his firm a spreadsheet showing Jefferies' actual costs in acquiring certain of the bonds that Litvak later had resold to customers. A customer reviewed the spreadsheet and saw that the prices did not square with what Litvak had claimed in the chats. The customer turned Litvak in.

Investigation and indictment swiftly followed. The indictment, which was handed down in January 2013, alleged that Litvak had defrauded his firm's customers by: (1) misrepresenting to purchasers the prices at which his firm had acquired securities; (2) misrepresenting to sellers the price at which his firm had agreed to resell securities; and (3) telling purchasers that his firm was functioning as an intermediary between the purchaser and an unnamed third-party seller, when in fact his firm already owned the RMBS and thus there was no third-party seller.[1]

In the world of over-the-counter bond trading, the indictment was a surprising development. After all, a certain amount of jaw-boning and bluffing was a usual and tolerated part of almost any negotiation. Was the new standard in bond trading negotiations that traders were to consider themselves to be, as practical matter, under oath? While what Litvak had said had been manifestly untrue, his customers were among the most sophisticated players out there. Where was the harm? And where was the fraud?

BY SUSAN E. BRUNE AND ERIN C. DOUGHERTY

The industry and the legal press closely watched the case — Litvak's conviction at trial, the reversal on appeal (*Litvak I*),[2] Litvak's conviction at retrial, Litvak's imprisonment, and then another reversal on appeal (*Litvak II*).[3] After the second appellate defeat, the prosecution walked away, declining to proceed with a third trial.

The troubles for the prosecution revolved around the concept of materiality and a mismatch between the prosecution's theory and how the relevant market actually functioned.

At Litvak's first trial, the judge precluded expert testimony bearing on materiality. The expert would have testified about the process by which sophisticated investment managers evaluate a security. Customers' mathematical valuation models, he was prepared to explain, cancel out happy sales talk from the likes of Litvak about prices of prior or anticipated future transactions.[4]

In *Litvak I*, the Second Circuit reversed, holding that the exclusion of the expert justified a new trial.[5]

But expert testimony did not help Litvak with the jury the second time around. He was found guilty and sentenced to prison.

This time on appeal, the Second Circuit decided that the trial court had erred in allowing testimony from a government witness to the effect that Litvak had been acting as an agent of a customer, Invesco.[6] This testimony reflected a misapprehension of how the real-world market functioned: "Appellant acted as a principal: Jefferies bought the bond from one party, held it for a brief period of time, and then sold it to Invesco. The transaction was at arms-length, and appellant owed no fiduciary duties to the buyer."[7] Jefferies and Invesco were counterparties, nothing more.

The appellate ruling in *Litvak II* by no means gave the green light for traders to lie during negotiations. But the fact that the prosecution's theory was based on unrealistic notions of how real-world negotiations and market relationships worked ended up undermining the case against Litvak and other similar cases against RMBS traders.

B. LIBOR: A Non-Convergent — and Convergent — Scheme to Defraud?

As the *Litvak* saga unfolded, so too did multiple criminal and regulatory investigations and cases related to LIBOR — the London Interbank Offered Rate. LIBOR was the global benchmark for pricing forward rate agreements, interest rate futures, interest rate swaps, swaptions, floating rate notes, syndicated loans, variable rate mortgages, collateralized debt obligations, and more. To many in the markets, LIBOR may have seemed similar to the time and temperature. But was it actually so objective?

Here is how it worked: On a daily basis, 16 LIBOR submitters at London banks submitted to the British Bankers' Association (BBA) the rates at which their banks could be said to have been able to borrow overnight from other banks. The BBA threw out the four highest and four lowest submissions, and arrived at an average of those submissions that remained. The resulting benchmark number was LIBOR.

What if, on any given day, there was no single "right" number to submit to the BBA? Could a submitter take into account the stated preferences of traders at his firm who might, for their own trading-position reasons, have hoped that the final LIBOR number that day might come in high or low? What if, as was the case during the financial crisis, there was little or no interbank lending, such that the number each submitter provided could be said to be almost entirely a hypothetical?

Once again, Bloomberg chats were the DOJ's focus — and the market participants' undoing. The prosecution's investigation uncovered many chats in which traders had asked submitters to give the BBA a high or a low number so as to benefit the traders' own position — and in which submitters readily had agreed to do so.

In late 2014, the DOJ's Antitrust Division, along with the DOJ's Criminal Division, brought wire fraud and conspiracy charges against, among others, Anthony Allen and Anthony Conti, two former derivatives traders at Rabobank, for their participation in an alleged scheme to cause Rabobank to submit "false and fraudulent" LIBOR submissions to the BBA.[8] This came after several of Allen's and Conti's former colleagues had reached plea agreements with the DOJ.[9] Then, in 2016, the DOJ brought similar charges against two former Deutsche Bank (DB) derivatives traders, Matthew Connolly and Gavin Black.[10]

The prosecution's theory was that the submissions had been formulated by improperly taking into account considerations other than the banks' true borrowing costs.[11] This conduct had at least the potential to benefit the submitters' banks at the expense of counterparties. The defendants had allegedly caused those counterparties "to be susceptible to substantial risk of loss and to suffer actual loss."[12]

The *Allen* defendants took the case to trial and were found guilty. At trial, in post-trial motions and on appeal, they argued that the prosecution had failed to establish the actual falsity or the materiality of Rabobank's LIBOR submissions.[13] The Second Circuit did not take on these issues, instead concluding that the convictions must be reversed and the indictment dismissed as a result of the prosecution's improper use of the defendants' compelled testimony.[14] That decision is discussed in a later section of this article.

The *Connolly* defendants picked up where the *Allen* defendants had left off. In advance of trial, Chief Judge Colleen McMahon of the U.S. District Court for the Southern District of New York issued what she called a "thoughts on the proof" memorandum.[15] In it, the judge expressed her skepticism about the case. Among other things, she noted that it appeared that the prosecution was alleging what she identified as a non-convergent scheme to defraud: that is, a scheme where there is not "'convergence' between the party 'whom [the] fraudster seeks to deceive' and the party who would wrongfully lose money or property as a result of that deceit."[16] In such a scheme, "the fraudster actually deceives, or at least tries to deceive, the person to whom he makes the false statement" (here, the BBA), "which is the 'fraud.'" The fraudster "thereby caus[es] the deceived party to take an action that leads to adverse consequences for the intended victim" (here, the BBA sets LIBOR in a way that may impact a counterparty), "who is unaware of the deceitful statement."[17]

The judge noted that she had come up mostly empty-handed when looking for cases in which one person was somehow duped by a lie told to another person — to whom the lie did not even matter. She went on to provide a warning to the prosecution:

> Of course, the government has every right to try to advance a novel theory of wire fraud by relying on a snippet from this case and a statement from that one. But it is simply a fact that not all sharp business practices that make use of the wires violate the federal wire fraud statute. Sometimes, a sharp business practice is just a sharp business practice — unethical, dishonest, but not criminal ....[18]

The judge found particularly "troubling" the prosecution's assertion that it did not need to call a witness from the BBA to prove its case.[19] The prosecution's position was that it did not "need to prove that the misstatements were material to a decision made by the BBA; rather, it [was] sufficient to prove that the trading counter-parties would have wanted to know that such a scheme was afoot."[20] But wait a minute! The defense argument was that the submissions had not been intended to deceive — and had not deceived — the BBA, which arguably had been well aware that submitters could shade their submissions within a range of potential rates. How would it be fair for the jury not to hear from the body that supposedly had been duped?

Having been schooled by the judge's "thoughts on the proof" memorandum, the DOJ secured the testimony of a former BBA executive. The prosecution also enunciated an entirely new "convergent" wire fraud theory: that the traders had made false statements to bank counterparties by stating that the prices would be tied to "LIBOR" and not a "manipulated LIBOR." This theory required testimony from witnesses who had traded with Connolly and Black — testimony that the prosecution had previously tried to block as irrelevant.

With that, the case lurched to trial, and the defendants were duly found guilty.

When charges had been filed, the DOJ announced that the "defendants [had] undermined the integrity of financial markets here and around the world."[21] In imposing home-confinement sentences, though, the judge took a much narrower view. She stated that "while the pair had engaged in wrongdoing, prosecutors had used Connolly and Black as 'proxy wrongdoers' to make an example out of them."[22] They were, she said, only "very minor participants."[23] As she told Black: "While I don't like the way you played the game, you're really a bit player in this."[24] As for Connolly, the judge opined that he "is hardly a player at all," calling him "the least culpable person" she had heard about in the whole case.[25]

The case is now on appeal, with multiple issues in play. Were the LIBOR submissions even false to begin with? Were the resulting, published LIBOR numbers false? Were the submissions even material, given how the BBA calculated LIBOR? And was any counterparty decision ever — objectively or subjectively speaking — influenced by the LIBOR submissions?[26]

C. Foreign Exchange: Global Sherman Act Conspiracies and 'Front Running'

Not long after the LIBOR investigations and cases started, prosecutors began looking at other benchmarks. Most notably, they looked at the foreign exchange market.

Of course, the prosecutors went right to the Bloomberg chats. And they were not disappointed. Not only had the traders seemingly discussed possibly improper conduct in chats within their own banks, but they also appeared to have been colluding via chats with traders at other banks. Helpfully (for the prosecution), the traders had conducted these multibank chats under colorful chat-group names, including "The Bandits' Club" and "The Cartel."

The DOJ has had mixed success in prosecuting traders. One obstacle to conviction has been a divergence between the prosecution's theory and how participants understood their markets.

1. Purported Antitrust Violations

WM/R (World Market/Reuters) fixes for active currencies are published by Reuters every 30 minutes, but the number published after 4 p.m. London time is the most often used. Unlike LIBOR, which is based on trader submissions, WM/R fixes are based on actual trades going through the Reuters system during a brief window around 4 p.m.

In January 2017, three former traders, including former Royal Bank of Scotland and JP Morgan Chase trader Richard Usher, were indicted based on their discussions in The Cartel chats. The three were charged with conspiring to restrain trade in violation of the Sherman Act.[27]

The case proceeded to trial, with the DOJ calling as its star witness a former trader who had entered into a non-prosecution agreement. The cooperator testified that he and the defendants had, for several years, a "gentleman's agreement" that the traders would avoid taking new positions that would harm one another's existing positions and would coordinate their trading. To do this, they would share their fix trading volumes ahead of time.[28]

The jury was shown a chat in which Usher and one of his co-defendants "informed each other [that] they were both due to sell hundreds of millions of dollars' worth of euros at the fix rate."[29] After the fix had been set, Usher's co-defendant typed in The Cartel chat, "Well done mate, nice work." Usher replied, "I made so much money. Cheers for saying you were the same way, helped me go early."[30]

The defense lawyers' informal "truly foolish chat" standard had obviously been met. But had there actually been criminal price fixing?

The defense called an expert who testified that "when a trader reveals to another forex market player an interest to trade, or 'shows you an ax,' in trader parlance, it's an accepted industry norm that you don't try to front-run them."[31] "'You don't take advantage of them,' the expert said. "That's the way business is done in this market, a trust relationship that you don't take advantage of."[32] The language that the traders used had been explicit, sure enough, but that reflected the fact that what they were discussing was assertedly in line with market norms.

A trader who had sat next to one of the defendants on the trading desk administered the final blow to the prosecution's case. She testified that interbank chats of this sort had been commonplace, describing them as "forums for trusted colleagues to share information, 'market color' and trading opportunities."[33] "The stuff you've seen on these chats, it's just what everyone did to do their jobs," she told the jury.[34] As for her former colleague's calling the chat group "The Cartel," she said, this was "probably the worst joke in the history of the FX world."[35]

The jury rendered acquittals all around. As in *Litvak*, the problem had been a divergence between the prosecution's theory and how participants understood their markets.

2. 'Front Running' in *Johnson* and *Bogucki*

As prosecutors pored over chats relating to the WM/R fix, they uncovered a whole other realm of seemingly criminal conduct in the FX markets, “front running” or “trading ahead.” The two key prosecutions in this area so far have produced opposite results. In one, *United States v. Johnson,* the defendant’s conviction has been upheld on appeal. In the other, *United States v. Bogucki,* all charges were dismissed at the close of the prosecution’s case.

i. Johnson

Mark Johnson was the former head of FX cash trading at HSBC, based in London.[36] In 2011, Cairn Energy, an oil and gas company based in Scotland, hired HSBC to convert $3.5 billion in U.S. dollars into British pounds.[37] This money was going to be generated from Cairn’s sale of its interest in a foreign subsidiary.[38]

During an RFP process, Johnson’s employer, HSBC, and Cairn entered into a confidentiality agreement in which HSBC agreed that it would use information about the transaction only for evaluating and conducting Cairn’s FX transaction.[39] This was a massive trade, and it had the prospect of moving the market. If Cairn decided to transact at the fix price, HSBC indicated that it would “drip feed” its own prior purchases of pounds to avoid spiking the fix price. HSBC also made general statements that it would act in Cairn’s “best interest.”[40]

Once HSBC had been selected, the parties signed a “Mandate Letter,” providing that the transaction would be governed by an International Swap Dealers Association (ISDA) agreement.[41] Importantly, the ISDA agreement contained language that HSBC was “not acting as a fiduciary or an advisor to [Cairn].”[42]

Cairn, aided by expert FX consultants whom it had hired to assist it with the transaction, decided that Cairn would indeed do the exchange with HSBC at the WM/R fix number. Johnson told Cairn that HSBC would “quietly” acquire pounds to enable HSBC to fill Cairn’s order without ramping up the fix.[43] This would help HSBC reduce its own risk in having to transact with Cairn at the still-to-be-determined fix price.

The indictment against Johnson charged him with conspiracy to commit wire fraud and several counts of wire fraud.[44] The prosecution had two principal theories.

First, it asserted a “misappropriation theory,” alleging that Johnson unlawfully used Cairn’s confidential information to buy pounds ahead of the fix. The prosecution argued that the misappropriation theory — typically used in insider trading cases — “can be applied to wire fraud as well as securities fraud.”[45] Johnson argued that the misappropriation theory did not apply here because there had been no fiduciary relationship between HSBC and Cairn and, in any event, HSBC’s approach had been fully disclosed and was consistent with industry standard.[46]

Second, the prosecution asserted that Johnson had deprived Cairn of its “right to control” its assets[47] by failing “quietly” to execute its own purchases of pounds as had been promised, thereby causing the price of the pound at the fix to “spike.”[48]

The jury found Johnson guilty.

On appeal, the Second Circuit held that there was sufficient evidence to uphold Johnson’s conviction under the right-to-control theory and decided, therefore, that there was no need to address the misappropriation theory. The court stated, “The standard is clear: A defendant who executes a fixing transaction engages in criminal fraud if he intentionally misrepresents to the victim how he will trade ahead of the fix, thereby deceiving the victim as to how the price of the transaction will be determined.”[49] Applying that standard to Johnson’s conduct, the court focused on his assurances to Cairn before the deal that HSBC would acquire the British pounds to fill Cairn’s order “quietly” without ramping up the fix. In light of Johnson's trading, the court concluded, this had been a material misrepresentation.[50]

ii. Bogucki

The *Bogucki* case stands in stark contrast to the *Johnson* case.

In early 2018, Robert Bogucki — the former head of foreign currency exchange trading for Barclays PLC's New York office — was charged with wire fraud and conspiracy.[51] The alleged scheme was similar to that alleged in *Johnson.* As in *Johnson*, there had been an ISDA reflecting the absence of any fiduciary duty on Barclays' part, and Bogucki had gone on to preposition or pre-hedge in advance of anticipated customer flow.

As before, the prosecution presented two theories of guilt. It contended that Bogucki had committed wire fraud by misappropriating confidential information in violation of a duty of trust and confidence. In the alternative, the prosecution contended that Bogucki had deprived its customer of its property through material misrepresentations and half-truths.[52]

At trial, the prosecution's key witness was an employee of the customer. The witness had had a team of finance experts working under him and had long managed FX transactions in the hundred-plus countries in which his company operated.[53] As in *Johnson*, then, the customer easily could be said to have had expert-level knowledge about FX.

Not only that, but the witness acknowledged that he had been "cagey" and "elusive" with Bogucki, "bluffing" him throughout the transaction. In so doing, he had been pressing for a better price.[54]

Had the *customer* actually been the "Litvak" in this story? And, in any event, was the prosecution's theory out of line with real-world practices and understandings?

The trial judge certainly seems to have thought so. At the close of the prosecution case, the judge granted a judgment of acquittal.[55] In support of his decision, he wrote, "Here, the government has pursued a criminal prosecution on the basis of conduct that violated no clear rule or regulation, was not prohibited by the agreements between the parties, and indeed was consistent with the parties' understanding of the arms-length relationship in which they operated."[56]

D. Spoofing, Wire Fraud, and RICO

Spoofing occurs when a trader places and then almost immediately cancels orders that the trader had never intended to be executed. Such orders can manipulate because they can inject false information into the market and generate a misleading appearance of market supply or demand.

In 2010, the Dodd–Frank Wall Street Reform and Consumer Protection Act took aim at this practice.[57] The Act, among other things, added provisions to the Commodities Exchange Act (CEA) outlawing spoofing by name on futures and derivatives exchanges. In particular, Section 4c(5)(c) of the CEA now prohibits "any trading practice, or conduct on or subject to the rules of a registered entity that … is of the character of, or is commonly known to the trade as, 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)."[58]

In *United States v. Coscia*, the DOJ secured its first criminal spoofing conviction. Michael Coscia, a principal of Panther Energy Trading LLC, allegedly had "developed and implemented a[n] HFT [high-frequency trading] strategy that allowed him to enter and cancel large-volume orders in a matter of milliseconds."[59] Coscia used this strategy to create a "false impression regarding the number of contracts available in the market and fraudulently induce other market participants to react to the deceptive market information that he created."[60] Using his strategy, Coscia "reaped approximately $1.5 million in profits in less than three months."[61]

After Coscia unsuccessfully challenged the new statute for being too vague,[62] Coscia went to trial and was found guilty of six counts of spoofing.[63]

The prosecution's success in that case aside, though, there can be real problems of proof in spoofing cases, particularly when there are only limited instances of quick cancellation. Even human trading can move extraordinarily fast. There are plenty of legitimate reasons for a trader to cancel orders soon after placing them — fat fingers, intervening orders, changes in market conditions, and more. Thus, it can be difficult to distinguish spoofing from legitimate, good-faith trading. In the absence of truly foolish chats, proof of criminal intent can be elusive.

In 2018, prosecutors saw a Connecticut jury acquit former UBS trader Andre Flotron in what was the second-ever spoofing case to go to trial. And the following year, a jury deadlocked in the trial of Illinois software executive Jitesh Thakkar. The prosecution dropped that case after a mistrial had been declared.[64]

But the DOJ is not backing off, even in the face of these difficulties.

1. Wire Fraud?

Whether the DOJ could prosecute spoofing as wire fraud was, until relatively recently, questionable. Two judges in the Northern District of Illinois have recently reached the conclusion that the DOJ may do so. This is a boost to the prosecution. The anti-spoofing statute under the CEA has a five-year statute of limitations.[65] Wire fraud has a 10-year statute of limitations when, as it inevitably does, the conduct affects a financial institution.[66]

In *United States v. Vorley*, the defendants — two precious metals futures traders — moved to dismiss the indictment, arguing that the prosecution could not prove a scheme to defraud under the wire fraud statute because it could not show that the defendants had made a materially false statement or misrepresentation, or that they had concealed a material fact. Specifically, the defendants argued that — regardless of their intent — in placing "real, at-risk orders that were capable of being filled, and often were filled, before defendants could cancel them," they had made no false or misleading statements.[67] The defendants further argued that their orders on the trading platform had made no "implied representation about anything, let alone the trader's subjective hopes and intentions about the potential future cancellation of the order."[68] Moreover, defendants "owed no fiduciary [or other] duty" to disclose such intentions to other market participants.[69]

Several financial industry advocacy groups submitted amicus briefs backing the defendants' motion and voicing concern that the prosecution's theory of spoofing would, if accepted, put at risk various legitimate trading strategies. The industry groups also stressed the defendants' point that real orders — orders that very well could have been filled after they were placed — could not constitute fraudulent or materially false statements.

Rejecting these arguments, the trial court denied the motion to dismiss the indictment, concluding that "[e]ven 'real' and 'at risk' orders can be fraudulent where they inject inaccurate information into the market."[70]

In *United States v. Bases,* another judge in the Northern District of Illinois followed *Vorley* in denying a motion to dismiss wire fraud charges against two other commodities traders, largely on the same grounds.[71]

In September 2020, the *Vorley* defendants were found guilty. And then in August 2021, the *Bases* defendants were found guilty.

The *Vorley* defendants are appealing their judgments, and likely will ask the court to revisit the scope of the wire fraud statute. The *Bases* defendants may follow suit.

2. RICO Conspiracy?

The DOJ has further upped the ante in *United States v. Nowak*. In August 2019, Michael Nowak, a supervisor on JPMorgan's precious metals desk, and two others were indicted in the Northern District of Illinois.[72] The men were alleged to have been part of a years-long scheme to defraud other participants in the market via thousands of spoofing orders.[73]

Among the criminal statutes alleged to have been violated: the Racketeer Influenced and Corrupt Organizations Act (RICO). The indictment alleges that the JPMorgan metals desk was itself a "criminal enterprise" as that term is defined under RICO. This "marks the first time in recent memory that federal authorities have charged RICO conspiracy in a Wall Street market manipulation case."[74]

Last year, the defendants moved to dismiss the indictment, arguing that the conduct alleged in the indictment was not "racketeering activity" because the spoofing conduct alleged in the indictment did not, for the reasons argued by the *Vorley* and *Bases* defendants, violate the wire fraud statute or bank fraud statute. The conduct, therefore, cannot serve as the "predicate acts" for a RICO conspiracy.[75]

The motion to dismiss has not yet been ruled upon and, in the interim, the case is proceeding toward trial, scheduled for later this year.

E. Key Fifth Amendment Issue: Compelled Testimony

In the United States, a trader may decline to testify before the Securities & Exchange Commission, asserting a Fifth Amendment privilege. Under the Supreme Court's ruling in *Baxter v. Palmigiano*,[76] the S.E.C. will likely enjoy an "adverse inference" in a follow-on regulatory case. But at least the trader does not have to help build a criminal case.

Depending on the jurisdiction, though, a trader may or may not realistically have the option of refusing to submit to questioning by regulators. In the U.K., for instance, traders face criminal penalties if they refuse to answer questions posed by the U.K.'s Financial Conduct Authority (FCA).[77]

This cross-border legal issue tanked a key LIBOR prosecution.

In *United States v. Allen*, referenced above, the FCA questioned two Rabobank traders, Allen and Conti. The FCA also questioned several other Rabobank employees, including trader Paul Robson. In late 2013, the FCA informed Robson of its intention to take further action against him. "Consistent with U.K. law, the FCA provided Robson with transcripts of [Allen's and Conti's] compelled testimony, which Robson reviewed over the course of a few days, annotated, and even authored five pages of notes during his review."[78]

Meanwhile, the DOJ — in cooperation with the FCA and other authorities — was also investigating. The DOJ indicted Robson and two other Rabobank traders in April 2014.[79] Robson decided to cooperate with the U.S. prosecutors, pleaded guilty, and submitted to several interviews with the DOJ.[80] Shortly thereafter, the DOJ brought wire fraud and conspiracy charges against Allen and Conti.[81]

Allen and Conti argued, pursuant to *Kastigar v. United States*,[82] that the Fifth Amendment prohibited the use, however indirect, of the defendants' compelled statements to the FCA because a violation of the Fifth Amendment occurred not when those statements were made, but rather when they were subsequently used by the prosecution.[83]

Allen and Conti's compelled statements were indirectly used in the prosecution, the argument went, because: (1) they were "reviewed" by and likely "influenced" Robson, a key witness, both in his deciding to cooperate and in his ultimate testimony;[84] and (2) Robson's tainted testimony influenced the prosecutors and then the grand jury when determining whether to proceed with a case.[85] This, according to the defendants, required dismissal of the indictment or, in the alternative, suppression of Robson's testimony and all evidence derived from Robson's testimony.[86]

In response, the prosecution argued that the Fifth Amendment affords no protection when the compelled testimony is elicited by a foreign official without U.S. government involvement. Even were that the case, the prosecution argued, the evidence it had presented was wholly independent of the compelled testimony.[87]

The trial court declined to throw out the case. The defendants appealed their convictions, and in July 2017, the Second Circuit overturned their convictions, holding that their Fifth Amendment rights had been violated.[88] The court held that "[t]he Self-Incrimination Clause's prohibition of the use of compelled testimony … appl[ies] in American courtrooms even when the defendant's testimony was compelled by foreign officials."[89] Moreover, the panel found that the DOJ's "bare, generalized denial of taint" was insufficient.[90] The DOJ had failed to demonstrate that the compelled testimony had not tainted Robson's testimony — testimony that had been central to both the grand jury proceeding and the trial.[91]

F. Conclusion

Traders make appealing targets for the prosecution. But, as the cases discussed here demonstrate, the cases are a lot easier for prosecutors to bring than to win.

Notes

1. *See United States v. Litvak,* No. 13-cr-00019, Doc. No. 1, Indictment , at ¶¶ 33, 47-48 (Jan. 25, 2013); *see also* Press Release, DOJ — USAO, D. Ct., Connecticut Rmbs Trader Charged With Securities Fraud, Defrauding Tarp Program (Jan. 28, 2013), *at* https://www.justice.gov/usao-ct/pr/connecticut-rmbs-trader-charged-securities-fraud-defrauding-tarp-program.

2. *United States v. Litvak,* 808 F.3d 160 (2d Cir. 2015) (*Litvak I*).

3. *United States v. Litvak,* 889 F.3d 56 (2d Cir. 2018) (*Litvak II*).

4. *See Litvak I*, 808 F.3d at 181-83.

5. *See id.* at 183 ("With such testimony before it, a jury could reasonably have found that misrepresentations by a dealer as to the price paid for certain RMBS would be immaterial to a counterparty that relies not on a 'market' price or the price at which prior trades took place, but instead on its own sophisticated valuation methods and computer model. The full context and circumstances in which RMBS are traded were undoubtedly relevant to the jury's determination of materiality.").

6. *Litvak II*, 889 F.3d at 63-64.

7. *Id.* at 68.

8. *See United States v. Anthony Allen et al.*, No. 14-cr-00272, Doc. No. 24, Superseding Indictment (S.D.N.Y. Oct. 16, 2014).

9. *See* Press Release, DOJ Office of Public

Affairs, Two Former Rabobank Traders Indicted for Alleged Manipulation of U.S. Dollar, Yen Libor Interest Rates (Oct. 16, 2014), *at* https://www.justice.gov/opa/pr/two-former-rabobank-traders-indicted-alleged-manipulation-us-dollar-yen-libor-interest-rates (hereinafter Two Rabobank Traders Indicted) ("[Paul] Robson and Takayuki Yagami, a former Rabobank derivatives trader, each pleaded guilty earlier this year to one count of conspiracy in connection with their roles in the scheme.").

10. *United States v. Matthew Connolly and Gavin Campbell Black,* No. 16-cr-00370, Doc. No. 1, Indictment (S.D.N.Y. May 31, 2016).

11. *See* Two Rabobank Traders Indicted, note 9, *supra* ("Rabobank traders entered into derivative contracts containing USD or Yen LIBOR as a price component and they allegedly asked others at Rabobank to submit LIBOR contributions consistent with the traders' or the bank's financial interests, to benefit the traders' or the banks' trading positions."); Press Release, DOJ Office of Public Affairs, Two Former Deutsche Bank Employees Indicted on Fraud Charges in Connection With Long-Running Manipulation of Libor (June 2, 2016), *at* https://www.justice.gov/opa/pr/two-former-deutsche-bank-employees-indicted-fraud-charges-connection-long-running (hereinafter Two DB Employees Indicted) ("In order to increase Deutsche Bank's profits on derivatives contracts tied to the USD LIBOR, Connolly allegedly directed his subordinates, and Black allegedly asked Curtler and others at Deutsche Bank, to submit false and fraudulent LIBOR contributions consistent with the traders' or the bank's financial interests rather than the honest and unbiased costs of borrowing.").

12. *United States v. Connolly and Black,* No. 16-cr-00370, Doc. No. 203, Thoughts on the Proof Necessary for Government to Establish Wire Fraud as Charged in This Case (McMahon, C.J.) (Mar. 29, 2018) (hereinafter Thoughts Memo.) (quoting superseding indictment brought against Connolly and Black).

13. *See United States v. Allen,* 160 F. Supp. 3d 698 (S.D.N.Y. 2016) (addressing defendants' post-trial motion in which they had argued: (1) "that no rational juror could find that they participated in a scheme to defraud by means of false or fraudulent representations because defendants' LIBOR submissions were not actionable misstatements under the wire fraud statute"; and (2) "Defendants argue, for example, that because counterparties decided to enter swap contracts with Rabobank several years before the LIBOR submissions that were claimed to have been affected by Rabobank traders' preferences, counterparties could not have been influenced by defendants' alleged fraud").

14. *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017).

15. *See* note 12.

16. Thoughts Memo., *supra* note 12, at 5 (quoting *United States v. Greenberg,* 835 F.3d 295, 306 (2d Cir. 2016)).

17. *Id.*

18. *Id.* at 7-8.

19. *Id.* at 5-6 (emphasis in original).

20. *Id.* at 6.

21. *See* Two DB Employees Indicted, *supra* note 11.

22. Stewart Bishop, *Ex-Deutsche Bank Traders Dodge Prison for Libor Rigging*, Law360 (Oct. 24, 2019).

23. *Id.*

24. *Id.*

25. *Id.*

26. *See United States v. Connolly,* Case No. 19-3944, Doc 78, Brief for Defendant-Appellant-Cross-Appellee Gavin Black, at 21-61 (2d Cir. May 5, 2020) (arguing that (1) the government failed to prove falsity because, among other things, there was no evidence (a) that any DB LIBOR submission did not comply with the BBA's instructions to panel banks, (b) that the rate DB submitted fell outside of the permissible range, (c) that defendants requested that DB submit a rate outside the permissible range; and (2) the government failed to prove materiality because there was no evidence that (a) DB's adjustment of its LIBOR submission mattered to the BBA or (b) that such conduct was material to a reasonable market participant, given that there was evidence that those market participants knew that the BBA allowed banks to submit within a range).

27. Press Release, DOJ Office of Public Affairs, Three Former Traders for Major Banks Indicted in Foreign Currency Exchange Antitrust Conspiracy (Jan. 10, 2017), *at* https://www.justice.gov/opa/pr/three-former-traders-major-banks-indicted-foreign-currency-exchange-antitrust-conspiracy.

28. Stewart Bishop, *Ex-UBS Forex Trader Says 'Cartel' Used Chats to Collude*, Law360 (Oct. 12, 2018).

29. *Id.*

30. *Id.*

31. Stewart Bishop, *Expert in Forex 'Cartel' Trial Says Trades Seem Legit*, Law360 (Oct. 22, 2018).

32. *Id.*

33. Stewart Bishop, *'Cartel' Traders Cleared of Forex-Rigging*, Law360 (Oct. 26, 2018).

34. *Id.*

35. *Id.*

36. *United States v. Johnson et al.,* No. 16-cr-00457, Doc. No. 9, Indictment, at ¶1 (S.D.N.Y. Aug. 16, 2016).

37. *Id.* at ¶ 4.

38. *See id.* at ¶ 11.

39. *Id.* at ¶ 12.

40. *Id.* at ¶ 17.

41. *United States v. Johnson,* No. 18-1503, Doc. No. 60, Brief and Special Appendix for Defendant-Appellant, at 19 (2d Cir. Aug. 30, 2018) (hereinafter Johnson Appellate Brief).

42. *Id.*

43. *Id.* at 16.

44. *See* note 36, *supra*.

45. Stewart Bishop, *Ex-HSBC Banker Gets 2 Years in Prison for Forex Fraud*, Law360 (Apr. 26, 2018) (quoting Brian Young of the fraud section of the DOJ's Criminal Division).

46. Johnson Appellate Brief, *supra* note 41, at 28-38.

47. *Id.* at 40-49.

48. *Id.* at 6.

49. *United States v. Johnson,* 945 F.3d 606, 616 (2d Cir. 2019).

50. *Id.* at 613-14 ("[H]ere, Johnson represented to Cairn that the price of the FX Transaction would be determined under particular conditions. Most importantly, Johnson assured Cairn, HSBC would purchase pounds 'quietly' without ramping the 3 p.m. fix rate. Johnson thus suggested that HSBC would seek a profit of just 'a few pips for [its] account.' Instead, Johnson directed Cahill, his trader, to ramp the fix

rate to just under 1.5730, 100 pips above where the GBP/USD rate had started. Johnson therefore deceived Cairn with respect to both how the FX Transaction would be conducted and the price of the FX Transaction. For this reason, we conclude that Johnson's misrepresentations provided sufficient evidence for a reasonable jury to find beyond a reasonable doubt that he intended to defraud Cairn.") (internal citations omitted).

51. Press Release, DOJ Office of Public Affairs, Former Head of Barclays New York Foreign Exchange Operation Indicted for Orchestrating Multimillion-Dollar Front-Running Scheme (Jan. 16, 2018), *at* https://www.justice.gov/opa/pr/former-head-barclays-new-york-foreign-exchange-operation-indicted-orchestrating-multimillion.

52. *See United States v. Bogucki*, No. 18-cr-00021, Doc. No. 1, Indictment at ¶ 15 (N.D. Cal. Jan. 16, 2018).

53. Walter Pavlo, *The Misguided Prosecution of Barclays' FX Trader Robert Bogucki*, Forbes (Oct. 28, 2019).

54. *Id.*

55. *United States v. Bogucki,* No. 18-cr-00021, 2019 WL 1024959, at *1 (N.D. Cal. Mar. 4, 2019).

56. *Id.* at *7.

57. Pub. L. 111-203, H.R. 4173 (Jul. 21, 2010).

58. 7 U.S.C. § 6c(a)(5)(C).

59. Catriona Coppler, *The Anti-Spoofing Statute: Vague as Applied to the 'Hypothetically Legitimate Trader,'* 5 Am. Univ. Bus. L. Rev. 261, 268 (2017) (quoting *United States v. Coscia,* 100 F. Supp. 3d 653, 655 (N.D. Ill. 2015)).

60. *Id.* (quoting *Coscia,* 100 F. Supp. at 655).

61. *Id.*

62. *Coscia,* 100 F. Supp. at 658-59. Coscia appealed this decision to the Seventh Circuit, which also concluded that the definition of spoofing in the CEA provided sufficient notice of the conduct prohibited and, thus, was not vague. *Coscia v. United* States, 866 F.3d 782, 795 (7th Cir. 2017) ("At bottom, Mr. Coscia's vagueness challenge fails. The statute clearly defines the term spoofing, providing sufficient notice. Moreover, Mr. Coscia's actions fall well within the core of the anti-spoofing provision's prohibited conduct, precluding any claim that he was subject to arbitrary enforcement. Furthermore, even if his behavior were not well within the core of the anti-spoofing provision's prohibited conduct, the statute's intent requirement clearly suggests that the statute does not allow for ad hoc or subjective prosecution.").

63. On appeal, the Seventh Circuit found that Coscia's conduct fell "well within the provision's prohibited conduct," noting that while there might be "legal trades … cancelled only following a condition subsequent," Coscia "did not place orders with the intent to cancel *under certain circumstances*." *Coscia*, 866 F.3d at 795, n.45. Instead, "he placed orders with the intent to *always cancel* the large orders. His purpose was not to trade on those orders, but rather to use them to shift the market up or down." *Id.*

64. Jody Godoy & Jon Hill, *Feds' Spoofing Case Against JPMorgan Traders Turns Heads*, Law360 (Sept. 17, 2019) (hereinafter Spoofing Case Turns Heads).

65. 18 U.S.C. § 3293.

66. 18 U.S.C. 3282(a).

67. *United States v. Vorley et al.,* No. 18-cr-00035, Doc. No. 76, Memo. in Supp. of Defs' Motion to Dismiss Indictment, at 1-4, 9, 11 (N.D. Ill. Nov. 15, 2018).

68. *Id.* at 9.

69. *Id.*

70. *United States v. Vorley,* 420 F. Supp. 2d 784, 802 (N.D. Ill. 2019).

71. *United States v. Bases*, 2020 WL 2557342 (N.D. Ill. May 20, 2020).

72. *United States v. Smith et al.,* No. 19-cr-00669, Doc. No. 1, Indictment (N.D. Ill. Aug. 22, 2019).

73. *Id.* at ¶ 25.

74. Spoofing Case Turns Heads, *supra* note 64.

75. *See United States v. Nowak*, No. 19-cr-00669, Doc. No. 114, Defs.' Memo. of Law in Supp. of Joint Mot. to Dismiss the Indictment and to Strike Surplusage (N.D. Ill. Feb. 28, 2020).

76. *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

77. Financial Services and Markets Act of 2000, at Part XI, §§ 171, 172, 177. *See also* Linda Fuerst, *The Privilege Against Self-Incrimination: Disclosure in Cross-Border Investigations, at* http://www.litigate.com/files/15286_The%20Privilege%20Against%20Self-Incrimination.pdf.

78. Marc P. Berger & Justin Florence, *Questions on Use of Compelled Testimony in LIBOR Convictions*, N.Y. L.J. (Feb. 25, 2016).

79. *United States v. Robson et al.,* No. 14-cr-00272, Doc. No. 5, Indictment (S.D.N.Y. Apr. 28, 2014).

80. *See* Press Release, DOJ Office of Public Affairs, Former Rabobank LIBOR Submitter Pleads Guilty for Scheme to Manipulate Yen LIBOR (Aug. 18, 2014), *at* https://www.justice.gov/opa/pr/former-rabobank-libor-submitter-pleads-guilty-scheme-manipulate-yen-libor.

81. *See* Two Rabobank Traders Indicted, *supra* note 9.

82. *Kastigar v. United States*, 406 U.S. 441 (1972).

83. *See United States v. Allen,* No. 14-cr-00272, Doc. No. 76, Memo. of Law in Supp. of Defs.' Motion to Dismiss Superseding Indictment (S.D.N.Y. July 17, 2015).

84. *Id.* at 11-13.

85. *Id.* at 14-16.

86. *Id.* at 17.

87. *See United States v. Allen,* No. 14-cr-00272, Doc. No. 95, Memo. in Opp. to Defs.' Motion to Dismiss Based on *Kastigar* (S.D.N.Y. Aug. 6, 2015).

88. *United States v. Allen,* 864 F.3d 63 (2d Cir. 2017).

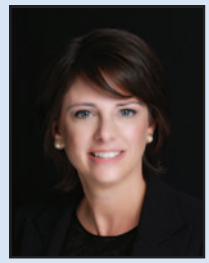
89. *Id.* at 82.

90. *Id.* at 101.

91. *See id.* ("In this prosecution, defendants' compelled testimony was 'used' against them through evidence provided by a tainted witness, a key cooperator and prominent witness both at trial and (via a hearsay presentation) before the grand jury. This tainted testimony was significant both at trial and in the grand jury because it provided the only first–hand eyewitness account that refuted the defendants' central argument for acquittal, and was therefore not harmless beyond a reasonable doubt.").

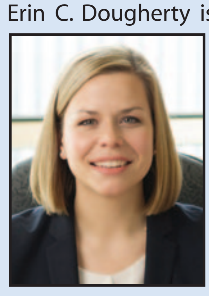
About the Authors

Susan E. Brune is Principal at Brune Law PC. She focuses her work on trial practice and on white collar defense, in internal investigations, regulatory, and criminal matters.



Susan E. Brune
Brune Law P.C.
New York, New York
212-668-1900
Email SBrune@brunelaw.com
Website www.brunelaw.com

Erin C. Dougherty is Counsel at Brune Law PC. She advises individuals and entities in white collar and related civil matters. Her representations have covered all stages of litigation, from inception through appeals.



Erin C. Dougherty
Brune Law P.C.
New York, New York
212-668-1900
Email EDougherty@brunelaw.com
Website www.brunelaw.com