

Historic ruling by US judge levels tough sanctions on TD Bank



'Willful' abuses tied to AML controls led to ruling that will bring massive costs to bank

Lacing her words with synonyms that put a kinder tone on her scorn, disbelief and aspersions on the ethics and competence of TD Bank employees who helped Greenberg Traurig lawyers defend a lawsuit by a victim of a major fraud, federal District Judge Marcia G. Cooke did something Friday, August 3 no other judge had ever done.

She sanctioned the bank for willful misconduct in its handling of evidence that was produced, improperly withheld or presented in altered form, before, during and after the trial that has become a guidepost on the liability of financial institutions to victims of fraud.



Judge Marcia G. Cooke

The 30-page "Omnibus Order on Motions for Sanctions" does much more.

On its face it imposes no monetary penalties except to require TD and Greenberg to pay the opposing party's attorney's fees for the extra work their misconduct caused. Nevertheless, the ruling will have nine-figure consequences for TD for the "findings of fact" it contains.

Ruling has far-reaching, very costly consequences

Other victims of the \$1.4 billion criminal enterprise of Scott Rothstein, a former TD customer and imprisoned ex-attorney, will benefit from Cooke's "findings of fact" that the bank knew about the fraud scheme, participated in it, and had money laundering and fraud controls that were "unreasonable."

The legal doctrine of "collateral estoppel" may prevent TD from denying these established facts in other cases.

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The bank, which Cooke said engaged in a pattern of "denial, deception and delay," previously settled with the Razorback Group, a victim, for a reported \$170 million. Another "investor," Emess Capital, is awaiting the start of trial, now armed with Cooke's findings and a ruling that allows it to seek treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO). (Title 18, US Code Sec. 1962)

Order emasculates TD appeal of \$67 million verdict

Cooke's decision also emasculates TD's appeal pending at the 11th Circuit Court of Appeals, in Atlanta. It is contesting the \$67 million verdict Coquina won in January, which included \$35 million in punitive damages.

Coquina's lead lawyer is David Mandel, of Mandel & Mandel in Miami, who with his wife Nina Mandel and another lawyer in their firm tried the case before Cooke.

The 76-day trial, in which some 70 Greenberg Traurig attorneys and 100 TD Bank lawyers and other employees faced the four-person Mandel team, resulted in a 15-minute jury decision that the bank was liable. They took four hours to decide the damages they would award Coquina. They limited the punitive damages to one-quarter of the \$140 million Mandel had asked them to award.

In her order, Cooke speculates on how the jury may have ruled if it had seen all the evidence that TD Bank did not produce or suppressed.

Textbook case on bank liability for ignoring AML, fraud controls

The landmark verdict is the first time a financial institution has been found liable to a fraud victim on the grounds it "aided and abetted fraud" by shutting down its anti-money-laundering and fraud controls to foster a customer's fraud and money laundering scheme.

During the trial, Cooke heard substantial rebutted evidence of improper conduct by TD Bank employees, including:

- orchestration of meetings for victims staged by Rothstein on bank premises,
- presentation of false bank statements prepared by Rothstein on bank stationery and given to the victims by TD employees,
- staging of scripted "shows" for the victims where their expected "investment" returns were extolled,
- presentation of false "lock letters" on TD stationery to the victims, which told them their money would not be used for extraneous purposes, a falsity that may have been the key to convincing the jury that TD "aided and abetted fraud."

The jury also heard TD Regional Vice-President Frank Spinosa assert the Constitution's 5th Amendment privilege against self-incrimination some 150 times to questions by Mandel about his business and personal relationship with Rothstein. Rothstein has testified he gave Spinosa a "rock star lifestyle," including private jet trips, money, tickets to major sporting events and other gratuities.

Advent of e-discovery in financial crime regulation, litigation



The case is also significant because it symbolizes the advent of electronic discovery in financial crime, regulatory, and judicial matters. Judge Cooke referred to the principal e-discovery federal norm, Rule 26 of the Federal Rules of Civil Procedure, as the guidepost on the "Duty to Disclose" and the sanctions it specifies in civil matters. (Rule 26(g)(3)).

David S. Mandel The Coquina-TD Bank trial disclosed many records, including e-mails between Rothstein and TD employees, which became evidence. The "electronically stored information," or ESI, was so voluminous that TD hired outside service provider, Stroz Friedberg, to manage it. Cooke cited Greenberg's failure to search for and obtain the ESI that Stroz maintained.

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Cooke imposed sanctions under Rule 37, of the same set of rules of civil procedure. Named "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions," this rule permits a wide range of sanctions against lawyers and clients.

OCC has taken no action against TD as 3rd anniversary of case nears

Few bank regulatory agencies have ever had such a rich source of information, including sworn testimony, about the breakdown of a financial institution's money laundering and fraud controls as the Office of the Comptroller of the Currency has about TD Bank in this affair.

This includes five weeks of recent sworn testimony by Rothstein as he attempts to reduce his prison term. Given under the watchful eye of his FBI and IRS Criminal Investigation handlers, it is replete with stories of corrupt payments and favors to bankers and revelations of how he gamed the financial institutions's money laundering controls.

Since the Rothstein scandal broke on October 30, 2009, the OCC has taken no action against TD Bank, including a cease-and-desist order, monetary penalty or other action.

An OCC spokesperson told ACFCS.org late last month that he knew of no pending enforcement action against TD Bank.

Last month, the OCC was excoriated in a report by the US Senate Permanent Subcommittee on Investigations, chaired by Sen. Carl Levin, of Michigan, for poor supervision of HSBC. The report found HSBC had engaged in a long pattern of money laundering and other lawlessness that scoffed at US money laundering and anti-terrorism sanctions laws.

Cooke pointedly criticized Greenberg Traurig

Cooke leveled tough criticism at TD's outside law firm. She said "Greenberg Traurig attorneys' handling of this case left much to be desired. (They)... failed to adequately conduct document searches in response to Coquina's... requests and this Court's inquiries. (They)... produced key documents on the eve of trial, and in the midst of trial, because of failures in their document search and production procedures."

"(T)he amount of production errors that occurred... were simply incredible, especially coming from lawyers in a well regarded firm like Greenberg Traurig, which in many ways earns its reputation from being able to litigate large, complex transactions," she added.

"I find that Greenberg Traurig acted negligently in failing to comply with its discovery obligations..., and TD Bank acted willfully in failing to comply with its discovery obligations and assist its outside counsel to properly litigate this case...,," she concluded.

She ruled, however, "that sanctions... are (not) warranted against any of the individual attorneys. The evidence does not support a finding (they) acted willfully or in bad faith. Although they certainly acted with negligence, I am not prepared, on this record, to enter sanctions personally against them."

Cooke softens Coquina's injury by 'establishing' key facts

Cooke said the discovery violations reduced Coquina's "ability to prove that TD Bank's actions were unreasonable and (that) it had knowledge of the fraud." She added that Coquina is facing post-trial motions challenging the sufficiency of the evidence "on these issues."

She took care of that powerfully by ruling, "I will therefore direct that the facts that TD Bank's monitoring and alert systems were unreasonable and that TD Bank had actual knowledge of Rothstein's fraud be taken as established for purposes of this action."

To make sure her findings are heard by the 11th Circuit, Cooke said, "This sanction will prevent further prejudice to Coquina in an eventual appeal on that issue."

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Ruling suggests subterfuge by TD house counsel

Cooke also alluded to possible subterfuge by TD's in-house attorneys, concluding that "TD Bank willfully concealed relevant evidence from its trial counsel. In doing so, TD Bank prevented trial counsel on both sides from fully and accurately presenting the issues..., and interfered with the judicial process."

"TD Bank's in-house counsel were conspicuously absent from any involvement in supervising or assisting in the litigation of this matter," she said, adding that TD "compartmentalized its groups of attorneys and segregated information from the trial attorneys."

TD Bank says it will fight on, challenges judge's findings

Mandel told ACFCS.org, "We're extremely pleased... Judge Cooke recognized the bank's misconduct for what it was, willful and in bad faith. Her ruling establishes once and for all that TD Bank knowingly participated in the Rothstein Ponzi scheme. The implications of the... findings and legal conclusions will be far reaching."

Rebecca Acevedo, TD Bank spokesperson, said, "TD Bank respectfully disagrees with the... order and will appeal it and the underlying jury verdict.... We do not believe that the record before the court supports the findings... regarding willfulness or the sanctions that were imposed. The bank plans to continue to vigorously defend itself."

Greenberg Traurig did not respond to a request for comment prior to this post.

TD Bank dismissed Greenberg Traurig after a crucial document materialized after the Coquina trial and Judge Cooke called a hearing to explore holding the bank and the law firm in contempt. The bank hired the national firm, McGuireWoods, as its lawyers in the case.

View the "Omnibus Order on Motions for Sanctions" [Here](#)

(The case against TD Bank for "aiding and abetting fraud" will be dissected from legal, compliance and regulatory angles and the advent of e-discovery-discovery in financial crime cases and regulation will be explored at the ACFCS Financial Crime Conference, Sept.13-15, 2012, in New York.

David Mandel, Coquina's attorney; Mark Nurik, Scott Rothstein's attorney; Michael Benardo, FDIC Chief of Financial Crime; and John Haried, a top Department of Justice expert on e-discovery-discovery; Paul Neale, a leading e-discovery-discovery litigation support expert, among others, will be speakers. To register, or to see the 15 panels, 37 speakers and 13 networking events go to www.FinancialCrimeConference.com)

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