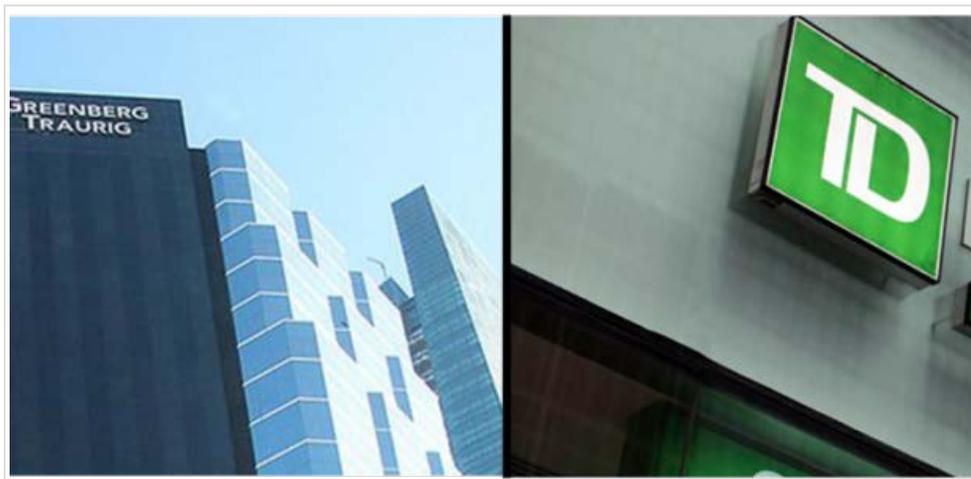




Money Laundering, Fraud, Corruption, Compliance and Enforcement Under One Roof

Judge grills TD Bank, Greenberg Traurig for tampered and missing evidence as sanctions threat looms



May 21, 2012
By: ACFCS Staff

Last week, US district Judge Marcia G. Cooke was treated to a modern-day David and Goliath face-off.

On one side of her courtroom in Miami on May 17 and 18 was a phalanx of some of the biggest law firms in the world: Greenberg Traurig (1,800 attorneys), McGuireWoods (918 attorneys), Duane Morris (619 attorneys), Buchanan Ingersoll & Rooney (415 attorneys), Kasowitz, Benson, Torres (355 attorneys). They were there to represent either TD Bank, or employees of the bank, or the bank's former lawyers at Greenberg Traurig.

On the other side was Mandel & Mandel (4 attorneys), led by former federal prosecutor David Mandel, who represents Coquina Investments. Coquina was a victim of Scott Rothstein, a disbarred attorney who operated a fraud scheme through his accounts at TD Bank and is now serving a 50-year prison sentence. Coquina sued TD Bank in January 2011, and after a 72-day trial, an eight-person jury in January 2012 awarded Coquina a \$67 million verdict, which included \$35 million in punitive damages.

The verdict, one of the most significant ever achieved against a financial institution, establishes the principle that a financial institution may be held liable to the victims of a fraud perpetrated by its customer if it ignores repeated warnings of the fraud and money laundering and helps lull the victims through the actions and inaction of its employees. This new legal theory of bank liability is called "aiding and abetting fraud."

After the trial, Mandel filed motions for sanctions against TD Bank and Greenberg Traurig in which he accused them of doctoring and concealing

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Judge Marcia G. Cooke evidence at trial, leading Judge Cooke to set the hearing held last week.

Two crucial documents went astray before trial

The sanctions hearing before Judge Cooke focused on allegations that TD and lawyers at Greenberg altered a key document, the "Customer Due Diligence form," they produced during the Coquina trial. The form is a routine document that all financial institutions are required by federal regulations under the Bank Secrecy Act to fill out on their customers.

Judge Cooke also issued a rule to show cause to TD Bank and certain Greenberg lawyers to prove why they should not be held in contempt for failing to produce a document called the "Standard Investigative Protocol," which they had repeatedly said did not exist.

Both documents were part of the money laundering and fraud controls the bank maintained when Rothstein became a customer. He used his accounts at TD Bank to execute a \$1.2 billion fraud.

After two days of contentious argument under her watchful eye, Judge Cooke said the punishment she may inflict on the bank and the Greenberg lawyers will be defined at a future date after she holds at least one more hearing and reviews the record. Her temperate approach underscores the gravity of the sanctions she may impose, which she said might include the finding of criminal contempt.

TD, Greenberg altered and hid records to bolster their defense, Mandel said

The electrified, packed courtroom audience at the two-day hearing heard Mandel open with an impassioned, structured presentation that vacillated between pointed accusations at the bank and the Greenberg lawyers. He accused them of "no-holds-barred, Rambo litigation tactics" and "dirty tricks" while weaving in methodical recitations of events and trial statements that he said underscored the gross misconduct.

Mandel said the bank and lawyers acted in "bad faith" and committed "repeated misconduct." The "final nail in the coffin for the bank," he said, was that it "knew its anti-money laundering controls were not reasonable" because it had determined that Rothstein was "HIGH RISK." If the true Customer Due Diligence form been produced at trial, Mandel argued, it would have undermined the bank's defense which was based on its assertion that Rothstein was a "low risk" customer.

Judge considering 'criminal contempt,' raises possibility of striking TD appeal

Judge Cooke told Mandel that the jury had given him everything he asked for except the full measure of punitive damages he requested. She him asked Mandel what remedy was appropriate in view of the favorable jury verdict, which awarded \$35 million in punitive damages instead of the \$140 million Mandel requested.

Mandel suggested that one available sanction was for Cooke to strike the bank's pleadings, including the "Notice of Appeal" it filed with the US 11th Circuit Court of Appeals, in Atlanta. Rule 37 of the Federal Rules of Civil Procedure gives federal judges wide latitude in imposing sanctions, including monetary penalties.

Mandel argued that "to do nothing rewards misconduct, because the documents go to the heart of their defense." "If the court doesn't take action, we are giving away the store," he said, "We are saying to every litigant — you can lie, you can alter documents, you can deceive."

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A skeptical Judge Cooke says it is 'difficult to understand' a copying error

The version of Rothstein's Customer Due Diligence form that was produced at trial had a nondescript bland black banner at the top without any visible words. After the trial, Mandel found an unaltered version in a related case, with the words "HIGH RISK" blaring across the top in a red banner.

Mandel argued that this alteration was intentional. He presented data showing that TD Bank had a 216-person trial team, including 79 from Greenberg and 111 from the bank. Mandel and Judge Cooke questioned how this could happen with so many persons and resources devoted to searching for and producing documents for the litigation. (Exhibits presented at the hearing can be viewed by the links supplied below.)

"I'm not a technological wiz," Cooke told lawyers for TD and Greenberg, "but I do know the difference between black and white and color."

She greeted the new lead attorney for TD Bank, Robert Plotkin, a McGuireWoods partner in Washington, with the comment he was "at a disadvantage" in trying to show that the bank altered the document accidentally and did not become aware of the error until after the trial.

'Not Greenberg's first day at the litigation rodeo,' says federal judge

"It is hard for me to describe in words the difficulty we had throughout this trial with documents and discovery. The bank treated Coquina like the boy who cried wolf and said here, 'We looked under every rock' for the document. It's hard for me to understand," the veteran judge told Plotkin.

"This was not Greenberg Traurig's first day at the litigation rodeo," Judge Cooke added, noting the firm specializes in complex litigation with tens of thousands of documents. "It's a little surprising that nobody picked up on this."

TD downplays importance of altered and missing records

Plotkin argued that TD Bank did not know the importance of the Customer Due Diligence form and that it was produced in altered form by a mid-level employee, Sarah Pinkus, who testified she had no prior experience handling documents for litigation.

Pinkus said Greenberg attorney Donna Evans had requested the customer due diligence form in paper after the bank produced it in native format to an e-discovery contractor, Stroz Friedberg. Plotkin asserted that the Customer Due Diligence form was not typically used in anti-money laundering efforts. Mandel called this statement "preposterous."

Bank points finger at Greenberg Traurig

Jessica Smith, of technology consulting firm Stroz Friedberg, was called as a witness by Plotkin in an effort to show that the bank complied with its discovery obligations. Since June 2010, Stroz has scanned, compiled and produced documents in several Rothstein-related cases for TD Bank. She said TD had paid her firm "in the seven figures" for services in the Coquina case, including the creation of a database with all pertinent documents on Rothstein for use by Greenberg lawyers at trial, including the Due Diligence Form and the Standard Investigative Protocol.

Pinkus testified that Greenberg attorney Donna Evans did not obtain documents to be used in the case from the Stroz-created database, but sought them directly from TD.

TD Bank lawyers blamed Greenberg for the discovery violations. "TD was relying on experienced counsel to handle documents properly," said Plotkin. "Clients do not look over their lawyer's shoulders. That has not been my experience."

TD employees deny plot to conceal or doctor evidence

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At the second day of the hearing on May 18, TD Bank Senior Vice President for Global Anti-Money Laundering, Vincent Auletta, testified about the belated post-trial appearance of the "Standard Investigative Protocol." Mandel cross-examined him about his prior testimony about the Protocol and showed him his prior e-mails that attached four documents titled "Standard Investigative Protocol."

"Is it true you agreed to sign anything to help defeat Coquina at trial?" said Mandel, referring to a sworn affidavit Auletta provided in January in which he denied the existence of the Protocol.

Auletta said he believed another document he used in his work, called "Standard Investigative Tools," also referred to the Protocol, and that the Protocol document dealt with matters outside the purview of his department. He denied any intention to conceal evidence. Amanda Spencer, another TD employee who previously stated the Protocol did not exist during the Coquina trial, gave similar testimony at the May 17 hearing.

Greenberg attorneys offer copious apologies, but blame 'technology' for missteps

A procession of present and former Greenberg Traurig attorneys uttered profuse apologies and testified they were blameless. Evans, who has since left the firm, said she had asked Auletta and Spencer several times if there was a Protocol, and was told no. She expressed regret for her incorrect statements at trial and apologized to Mandel for accusing him of "inventing" the Protocol.

Steven Zack, partner at Boeis Schiller and former president of the American Bar Association, was one of the attorneys representing Greenberg. He apologized to the court but blamed "technology [as] the culprit here." He assured Judge Cooke the missing Protocol and the altered Customer Due Diligence form were honest mistakes due to the complexity of the case and the volume of documents. Holly Skolnick and Mark Schnapp, two Greenberg partners who led the Coquina trial team, took the stand after being administered the oath and tendered apologies. Mandel did not cross-examine any of the Greenberg attorneys.

In an unusual move for a huge global law firm, Cesar Alvarez, the Chief Executive of Miami-based Greenberg Traurig, spoke from counsel table. He acknowledged to Judge Cooke the gravity of the charges and apologized. "I am sad for the firm and sad for the lawyers," he said. No TD Bank representative offered apologies.

Cooke issued no ruling, will continue sanctions hearing

Judge Cooke did not rule on the sanctions or contempt but told the parties to submit motions and exhibits by June 4. She said she will schedule a hearing on Mandel's Fifth Motion for Sanctions, which he filed under seal on May 14.

Judge Cooke said, "This is obviously very serious. I have to determine if this was inadvertent, negligent, absentmindedness, or a deliberate effort to mislead opposing counsel and the court."

[View Mandel's Exhibits from the Hearing Here](#)

(The ACFCS International Financial Crime Conference, Sept. 13-15, 2012, in New York, will dissect the legal, compliance and regulatory aspects of the TD Bank-Coquina case. Two of the many speakers will be the winning Coquina attorney, David Mandel, and Mark Nurik, lawyer of convicted megafraudster, Scott Rothstein, who is providing substantial testimony in depositions for the government and his victims. To register and for information, visit financialcrimeconference.com or please click here or call Alex Garcia at 786-517-2702.)

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