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07 Aug 2012 at 12:29 PM 11TH CIRCUIT, ATTORNEY MISCONDUCT, BIGLAW, FEDERAL JUDGES, GREENBERG TRAUIG, IN-HOUSE COUNSEL, LEGAL ETHICS, LITIGATORS, LITIGATRIX, PARTNER ISSUES, SCOTT ROTHSTEIN, SCREW-UPS, SULLIVAN & CROMWELL

Benchslap of the Day: Judge Cooke Sanctions Greenberg Traurig and TD Bank

By DAVID LAT

As we mentioned yesterday in [Morning Docket](#), Judge [Marcia Gail Cooke](#) (S.D. Fla.) recently issued an omnibus order on multiple motions for sanctions in the high-profile case of [Coquina Investments v. TD Bank](#). The plaintiff, Coquina Investments, moved for sanctions related to various alleged discovery violations.



At a [contempt hearing](#) held back in May, Judge Cooke heard testimony from employees of [TD Bank](#) and current and former lawyers from [Greenberg Traurig](#), which previously represented the bank. She took the matter under advisement — but not before saying things like, “It is hard for me to describe in words the difficulty throughout this trial related to documents and discovery.”

Now Her Honor has ruled. What did she decide?

Not surprisingly, Judge Cooke doled out some [benchslaps](#). Here’s a dramatic account of the ruling from the [Daily Business Review](#) (via [Am Law Daily](#)):

In a blistering order, a Miami federal judge Friday blasted prominent law firm Greenberg Traurig as bumbling and inept and its client TD Bank for manipulating trial evidence in imposing sanctions for blatant discovery violations in a lawsuit brought by investors in one of Florida’s most notorious Ponzi schemes.

U.S. District Judge Marcia Cooke ordered the bank and law firm to pay attorneys fees and costs as sanctions and made crucial findings that will hurt the Cherry Hill, New Jersey-based bank’s appeal of a \$67 million jury award. The outcome favored an investment group that alleged it was cheated by ex-lawyer Scott Rothstein in his \$1.2 billion settlement financing fraud. The dollar amount to be paid by the bank and law firm will be determined later.

The judge faulted the bank’s in-house counsel for keeping Greenberg attorneys in the dark but also determined the vast trial team’s discovery work was negligent, the legal standard for professional malpractice.

But will TD Bank sue Greenberg Traurig for malpractice?
Probably not, since Judge Cooke’s order puts significant blame

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on the bank for the discovery problems, concluding that TD Bank “acted willfully in failing to comply with its discovery obligations and assist its outside counsel to properly litigate this case.” One of our readers, a lawyer in south Florida, offered this assessment: “By ruling that TD Bank acted intentionally, I suspect [the order] would undercut any malpractice-type claim against Greenberg.”

Still, even if Judge Cooke’s order might help GT avoid a malpractice suit, the firm can’t be happy about it. In the words of one of our Florida tipsters, “Greenberg comes away from this battered.” Battered by benchslaps like this one, fairly high up in the ruling (second page; emphasis added):

In many ways, this is a case of too many cooks spoiling the broth. Over 200 Greenberg Traurig attorneys were involved in this case. There were separate teams of Greenberg Traurig lawyers to handle banking issues, document production, and pretrial and trial practice. TD Bank retained two different firms to work on different aspects of the Rothstein fallout, but the firms did not have any mutual coordination. One of the firms, Sullivan & Cromwell, then hired a consultant to perform work, which was relevant to the Rothstein litigation, but no one ever informed Greenberg Traurig. **As a result, it often times appears that this litigation was conducted in an Inspector Clouseau-like fashion. However, unlike a Pink Panther film, there was nothing amusing about this conduct and it did not conclude neatly.**

Suffering snark from a federal judge isn’t fun. But, as a substantive matter, the sanctions imposed are even more significant. In addition to ordering Greenberg Traurig and TD Bank to pay the attorney’s fees and costs incurred by Coquina in connection with the sanctions motions, Judge Cooke ruled as follows:

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. *See* Fed. R. Civ. P. 37(b)(2)(A)(i). This sanction will prevent further prejudice to Coquina in an eventual appeal on that issue.

Ouch. What does that mean, as a practical matter, for the rest of this litigation, including appellate proceedings? One of our Florida sources explains:

The sanction against TD Bank is especially crippling. By ruling that the bank had actual knowledge of the fraud, the bank now needs the 11th Circuit to overrule this sanction order before proceeding with the same issue on appeal: that the evidentiary record did not support that it had actual knowledge of the fraud.

It’s a clever way for a trial judge to “bulletproof” her ruling for purposes of appeal, isn’t it? Appellate judges tend to defer to trial judges on matters like discovery sanctions. So now the Eleventh Circuit, if it wants to reverse on sufficiency of the evidence, needs to do two things: it needs to overturn the sanctions ruling, and then it needs to find the evidence insufficient as a substantive matter.

That’s the roughest part of Judge Cooke’s ruling for TD Bank and Greenberg Traurig. Let’s look on the bright

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side. Perhaps the biggest positive aspect of the ruling is that Judge Cooke declined to enter sanctions against any individual lawyers:

The individual Greenberg Traurig attorneys' handling of this case left much to be desired. The document review and production appears to have been conducted in an almost ad hoc manner. The attorneys failed to adequately conduct document searches in response to Coquina's counsel's requests and this Court's inquiries. The attorneys produced key documents on the eve of trial, and in the midst of trial, because of failures in their document search and production procedures. Although I recognize that the attorneys were dealing with a high volume of documents, the amount of production errors that occurred throughout these proceedings 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 actions.

Having reviewed the evidence, however, I do not find that sanctions, including a finding of contempt, are warranted against any of the individual attorneys. The evidence does not support a finding that any of them 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.

A reader who's sympathetic to Greenberg Traurig and TD Bank shared these additional points with us, which we pass along in the interest of balanced coverage:

1. Plaintiff's counsel accused Greenberg Traurig attorneys of acting in bad faith. The Court held that they did not.
2. Plaintiff's counsel accused Greenberg Traurig and TD Bank of intentionally doctoring or altering the CDD [Customer Due Diligence] document. The Court held that they did not.
3. Plaintiff's counsel complained that the words "high risk" on the CDD document had been hidden so he couldn't use those words at trial. The Court held that "Coquina used the [CDD] document [at trial] to show that the Bank knew the RRA accounts were "high risk."
4. Plaintiff's counsel complained that the heading on the CDD that read "high risk" was hidden from him. The Court held that plaintiff's counsel received a copy of the transcript of a deposition in which a TD Bank witness specifically testified that the place on the CDD that shows the "risk status" was "blacked out" on the copy of the document that she was being shown.
5. The Court's references to Greenberg lawyers acting "negligently" were made based on a record in which Greenberg lawyers were defending against shrill charges of intentional wrongdoing (see above). Is it really fair for a judge to make statements about conduct being negligent when that wasn't the issue before the Court, and therefore was not actually litigated?
6. The Court sanctioned TD Bank by simply declaring that it is now established (as a sanction) that TD Bank knew about Rothstein's fraud. But plaintiff already won the case. So the only way the "sanction" will have any impact is if the 11th Circuit overturns the jury verdict on appeal because of errors by Judge Cooke. It seems a bit unusual (and self-interested) for a judge to try to prevent getting reversed by declaring a contested fact to be established — as a "sanction." One has to wonder

what the 11th Circuit will make of Judge Cooke's decision.

Actually, trial judges try to protect themselves against reversal all the time; it's no big deal.

So what do the parties involved have to say for themselves? Here is what TD Bank told [Bloomberg](#):

"TD Bank respectfully disagrees with the court's order and will appeal it and the underlying jury verdict at the appropriate time," Maria Leung, a spokeswoman for Toronto-based TD Bank, said in an e-mail. "We do not believe that the record before the court supports the findings that were made regarding willfulness or the sanctions that were imposed."

Leung said the bank would continue to defend itself.

Greenberg Traurig — which has a major presence in south Florida, and which presumably appears before Judge Cooke with regularity — is taking a less confrontational tack. Through a firm spokesperson, Greenberg Traurig commented to ATL: "We will comply with Judge Cooke's ruling. We regret the deficiencies in the discovery that gave rise to this order."

Former GT shareholder Donna Evans, a significant figure in the controversy, declined to comment. Coquina's counsel, [David Mandel](#) of [Mandel & Mandel](#), declared himself "extremely pleased" with the sanctions ruling. (A press release from the Mandel firm is reprinted on the next page.)

In unrelated Greenberg Traurig news, last month the firm [issued a capital call](#) to the partnership. The firm seeks to raise [\\$24 million](#) from its equity shareholders. CEO Richard Rosenbaum [described](#) the call as "simply a prudent management step," explaining that "the modest increase in capital is a long-considered decision and there is no event, situation, settlement or other condition that requires us to raise capital at this time."

David S. Mandel

Back in June, a federal judge gave [preliminary approval](#) to a proposed settlement in a class action case that requires Greenberg Traurig to shell out \$61 million. But it appears that the tab is being covered by the firm's insurer, so this shouldn't be the reason for the capital call.

The call was not well received by some shareholders, according to Julie Kay of the [Daily Business Review](#):

Sources inside and outside the firm say the move — and its timing — were not well-received. Many shareholders were on vacation when the call was made and found out about it later. One partner reportedly uttered a profanity under his breath during the call led by Rosenbaum.

Greenberg initially asked shareholders to make the contributions by year-end but, after some shareholders balked, the firm agreed to accept payments in two installments, one by the end of 2012 and the other in early 2013, according to the partner. Firm executive chairman Cesar Alvarez is in the process of drawing up the documents, sources said.

If you have additional information about goings-on at Greenberg Traurig, feel free to [email us](#) or to text us (646-820-8477; texts only, not a voice line). In the meantime, you can check out Judge Cooke's full ruling (with some brief commentary from me), the Mandel & Mandel press release, and links to additional news articles, on the next page.