

## Judge in Merrill Lynch case rules commodities spoofing is not a 'scheme' offense

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(Reuters) - An Illinois federal judge has ruled that commodities spoofing is not a scheme offense, tossing one charge against a former trader at Merrill Lynch and potentially limiting prosecutors' use of the anti-spoofing statute in other cases against traders at large financial institutions.

U.S. District Judge John Lee in Chicago ruled on Friday that because the anti-spoofing law criminalizes the "practice" of making fake orders in order to manipulate a commodities market but does not mention "schemes" involving such conduct, prosecutors must pinpoint a discrete instance of spoofing when bringing the charge. Because prosecutors had not done so in their case against former Merrill trader John Pacilio, the judge agreed with his attorneys at Kobre & Kim that the charge must be dismissed. Pacilio still faces multiple wire and commodities fraud charges.

The government could seek to appeal the ruling or to bring the case back before a grand jury in order to bring the charge again within the ruling's parameters.

David McGill of Kobre & Kim declined to comment on the ruling on Monday. A spokesman for the Department of Justice's Fraud Section, which is prosecuting the case and others like it, did not immediately reply to a request for comment.

Pacilio, who worked for Merrill Lynch Commodities and Morgan Stanley, was charged with his former Merrill colleague Edward Bases in 2018 with spoofing the precious metal futures market between 2008 and 2014. Prosecutors brought a 20-count superseding indictment in the case in February, charging both men with wire fraud, conspiracy and commodities fraud, and also charging Pacilio with spoofing.

The ruling dismissing the sole spoofing count in the case has the potential to affect how prosecutors charge violations of the anti-spoofing statute. Attorneys at Kobre & Kim have made the same argument in another spoofing case where they represent Gregg Smith, a former JPMorgan Chase trader who is accused alongside three colleagues with spoofing while employed at the bank. U.S. District Judge Edmond Chang of Chicago has yet to rule on the motion.

However, the anti-spoofing statute has only been one part of the Department of Justice's crackdown on the practice.

Congress passed the anti-spoofing statute as a part of the Dodd-Frank Act in 2010, providing for a five-year statute of limitations. To reach older conduct, prosecutors have used other statutes such as wire fraud that carry longer statutes of limitations.

Two former traders at Deutsche bank were convicted of wire fraud at a federal spoofing trial in Chicago in late September. The pair have moved for acquittal or a new trial.

The case is U.S. v. Bases et al., case number 18-cr-00048, in U.S. District Court for the Northern District of Illinois.

For the government: Avi Perry of the U.S. Department of Justice

For Pacilio: David McGill of Kobre & Kim

## References

BLACKROCK ENERGY AND RESOURCES INCOME TRUST PLC; DEUTSCHE BANK AG; JPMORGAN CHASE AND CO; KOBRE AND KIM (UK) LLP; MORGAN STANLEY; UNITED STATES DEPARTMENT OF JUSTICE (THE)

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