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How Manhattan Boutique Levine Lee Unraveled the Government's Final LIBOR Conviction

"What we've advocated since before the indictment is if you simply read the actual rule, the question of LIBOR must have an answer: There was no crime here and that's where our representation started and that's where we are at this point ending up," Seth Levine says.

By Ross Todd
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"Could."

The word was right there in the middle of the British Bankers' Association's instruction for the banks who participated in the process to set the London Interbank Offered Rate, or LIBOR. At a certain time each day, a bank participating in the group cooperating to set LIBOR was required to submit the rate "it could borrow funds" on the interbank market for loans of a certain size and length.

Not that it "had."

Or even that it "would."

What it "could."

Those submissions — after the elimination of some high and low outliers — would then be used to calculate LIBOR, a rate that was central to many of the derivatives and complex financial instruments that traded hands each day on the global financial markets.

For the better part of a decade, **Seth Levine** and his colleagues at **Levine Lee** tried to get the people deciding the fate of their client, former Deutsche bank trader Gavin Black, to look at that "could" language and think about it.

It's hypothetical.

It's squishy.

When I spoke with Levine and his colleague **Scott Klugman** earlier this week, they were quick to concede the inherent conflict in having banks who trade potentially valuable financial instruments based on a standard participate in setting that standard. It's a good reason for a regulatory change, they say. But it's not a federal crime.

Courtesy photos

Scott B. Klugman(L) and Seth L. Levine(R) of Levine Lee .

But federal prosecutors investigating whether Black had committed fraud by influencing the bank's submissions to the LIBOR panel to benefit the bank's trading positions didn't buy that argument. Based on a theory that there was only one true interest rate the bank could have submitted each day, they filed fraud charged against Black, who was based in London, and his New York-based Deutsche Bank colleague Matthew Connolly, who was represented by a team at **Paul Hastings** led by **Kenneth Breen** and **Phara Guberman.**

Prosecutors alleged the traders caused the bank to make LIBOR submissions that fraudulently benefitted their trading positions. A Manhattan federal jury agreed and convicted the two Deutsche Bank traders in 2018.

At oral argument before the Second Circuit last year, Levine argued that the government hadn't

proven that any of the bank's LIBOR submissions were unreasonable, let alone false and misleading, as required under the fraud statute.

He offered up the following hypothetical: If there were a reasonable range between six and seven, and a submitter pulled a 6.6 out of a hat and picked the same number based on a trading position, the same number could be both true and false under the government's theory. "Respectfully, this is nonsense," Levine said. "6.6 is either truthful, or it is not. It is either believed to be within the range, or it is not. The motivation for the selection does not impact truthfulness," he said.

This time, the argument landed. In an opinion handed down late last month, the Second Circuit reversed the convictions of the two traders. "The government failed to show that any of the trader-influenced submissions were false, fraudulent or misleading," the panel wrote in an opinion that highlighted the hypothetical "could" language in the underlying rule.

Aside from Levine and Klugman, Black's defense team includes their colleagues **Miriam Alinikoff, Chad Albert, Dylan Stern** and **Ellen Sise**, as well as UK counsel **Jonathan Brogden** and **John Bramhall** at **DAC Beechcroft.**

"It comes down to the fact that if you read the one-sentence instruction, the word is 'could,'" Levine said.

"I think it really is an important point that the court ultimately decided to read the rule as it was written," he said. "What we've advocated since before the indictment is if you simply read the actual rule, the question of LIBOR must have an answer: There was no crime here and that's where our representation started and that's where we are at this point ending up."

There were some pretty significant happenings in between though.

Most notably, Deutsche Bank agreed in 2015 to pay $2.5 billion in fines to resolve LIBOR-related charges in the U.S. and the U.K. A London unit of the bank pleaded guilty to a wire fraud count. The company's resolution with the government came after a significant internal investigation conducted by the bank's lawyers at **Paul, Weiss, Rifkind, Wharton & Garrison**, an investigation running 5 years and costing the bank $100 million, that itself was the subject of significant litigation earlier in Black's case.

Black spoke with Paul Weiss lawyers multiple times as part of their internal investigation, and the Levine lawyers argued that the interviews amounted to compelled testimony. Had Black not cooperated, he would have lost his job. The Levine Lee lawyers contended the government had effectively out-sourced its investigation to Paul Weiss, who reported back to the government.

U.S. District Judge Colleen McMahon agreed and held Black's statements during the Paul Weiss interviews were compelled in violation of his Fifth Amendment rights against self-incrimination. But she ultimately denied Black's motion for an acquittal finding the government hadn't relied on Black's statements in those interviews to secure the indictment or conviction.

Cleary Gottlieb Steen & Hamilton litigator **Victor Hou**, who has been following the case, said that McMahon's decision is a good reminder to lawyers to strike the right balances when weighing a corporate client's need to cooperate with regulators.

"I think it's a reminder that we don't just do the government's bidding. We don't abandon our advocacy," Hou said.

Hou, who called Levine's work on Black's case "masterful," added that the ultimate outcome is a valuable lesson in perseverance.

"He just shows the importance of continuing to make arguments even when you're shot down. He didn't just give up on it," Hou said. "And it turned out to be right where it matters most."

Levine turns the credit back to his client. "Individuals who have their liberty at stake are the only people willing to stand up and fight on these matters of principle," Levine said. "And of course one of the problems is that many people don't have the moral fortitude or the wherewithal to have a long-term battle with the Department of Justice."

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