ABA SECTION OF ANTITRUST LAW
Promoting Competition Protecting Consumers

THE EXCHANGE

INSURANCE AND FINANCIAL SERVICES DEVELOPMENTS

American Bar Association | Summer 2019 | Section of Antitrust Law

In this Issue

Editor's Note
Jason S. Dubner 2

Co-Chairs' Report
Eric J. Stock and Gary W. Kubek 3

The Complexities of Criminal Antitrust Investigations in the Wake of *U.S. v. Connolly*
Benjamin Sirota.......... 4

Emerging Payment Products in Financial Services
Amanda Norton 8

EDITOR'S NOTE

Jason S. Dubner

The Insurance and Financial Services Committee is pleased to bring you this Summer 2019 edition of *The Exchange.*

In our opening piece, Benjamin Sirota of Kobre & Kim LLP analyzes the recent opinion out of the Southern District of New York in the LIBOR case, *U.S. v. Connolly*. Although Chief Judge McMahon did not overturn the conviction at issue in *Connolly*, the court's comments on the nature of the government's investigation and its reliance on outside counsel to conduct an arguably compulsory interview of the individual defendant may provide a cautionary tale going forward for both government attorneys and private practitioners alike. Next, Amanda Norton of Sidley Austin LLP recaps our Committee's May 22, 2019 lunchtime program in New York City on emerging payment products in the financial services industry. Special thanks to our panel of in-house counsel – Jonathan Lutinski (American Express), Hannah Sholl (Visa), Rob Pelkowski (Venmo/PayPal), and Joseph Vardner (Wells Fargo) – for their insights.

Interested in contributing to future editions of *The Exchange* or getting involved on other IFS Committee projects? We welcome your feedback and participation! Although, from a personal perspective, this marks the last edition of *The Exchange* that I will have the privilege of publishing, please reach out to Gary Kubek, who will continue as Chair of the Committee, or Jon Lutinski, Amanda Norton, Debbie Salzberger or John Snyder, who will continue as Vice Chairs, all of whom are listed on the back page of the newsletter, or feel free to share your views directly with other members of the Committee on Connect!

Competitively yours,

ABA SECTION OF ANTITRUST LAW
Promoting Competition Protecting Consumers

THE EXCHANGE

INSURANCE AND FINANCIAL SERVICES DEVELOPMENTS

American Bar Association | Summer 2019 | Section of Antitrust Law

CO-CHAIRS' REPORT

Eric J. Stock and Gary W. Kubek

Welcome to the Summer issue of our committee's newsletter, *The Exchange*. There continues to be a significant amount of antitrust and consumer protection litigation and enforcement activity in the insurance and financial services areas. This final issue of *The Exchange* for the 2018-2019 Antitrust Section year addresses an important court decision concerning the conduct of internal investigations and provides a review of our Committee's interesting recent program on new payment products in the financial services industry.

First, we have a report on a recent decision from the Southern District of New York in *U.S. v. Connolly,* in which the court affirmed a conviction in the LIBOR prosecutions but harshly criticized the government's reliance on an investigation conducted by counsel retained by the defendant's former employer. The court found that, under the circumstances presented, the defendant's participation in an interview conducted by the employers' counsel was effectively compelled, and thus the government could not use his statements during the interview without violating his Fifth Amendment rights. This decision provides lessons for both prosecutors and corporate counsel conducting investigations in response to a government criminal investigation.

Our second article summarizes a recent Committee program that discussed another important topic in the financial markets -- antitrust considerations raised by the creation and implementation of new payment technologies, which generally involve joint activites by parties that are also competitors in one another financial market. This article allows committee members who missed this interesting program to read about this developing area.

The Exchange is a key part of our committee's many continuing efforts to be at the forefront of news, information and analysis wherever antitrust and consumer protection issues intersect with the insurance and financial services industries. We also send out biweekly updates concerning important developments through Connect.

We are pleased to have published three issues of *The Exchange* during this Section year, and with your participation we hope to do so again during the coming year. We encourage you to become involved in the committee's activities, whether through submission of an article for the next issue of *The Exchange*, submission of posts to Connect or participation in our committee's programs. Please contact any member of the Committee's leadership if you would like to write an article or have thoughts on a potential program or ideas for how we can better serve you. We look forward to hearing from you.

ABA SECTION OF ANTITRUST LAW
Promoting Competition Protecting Consumers

THE EXCHANGE

INSURANCE AND FINANCIAL SERVICES DEVELOPMENTS

American Bar Association | Summer 2019 | Section of Antitrust Law

The Complexities of Criminal Antitrust Investigations in the *Wake of U.S. v. Connolly*

by Benjamin Sirota [1]

On May 2, 2019, Chief Judge McMahon of the Southern District of New York issued an opinion in the *U.S. v. Connolly*[2] LIBOR criminal case that holds profound implications for how internal investigations — particularly antitrust investigations — should be conducted going forward. Ruling on post-conviction motions by former Deutsche Bank trader Gavin Black, Judge McMahon found that because the government had effectively "outsourced" its investigation to corporate counsel, that counsel's interview of Black under threat of termination was tantamount to a compelled interview by the government. Consequently, Judge McMahon held, prosecutors' receipt of Black's statements from the interview ran afoul of his Fifth Amendment right not to incriminate himself. Judge McMahon did not mince words: if the government was "routinely outsourcing its investigations into complex financial matters" to corporate targets of the investigation, that would be "deeply troubl[ing]."

In the end, the Court did not upset the conviction because the government had not actually used Black's statements at trial. But any feeling of relief prosecutors may have experienced from this result was assuredly short-lived, as Judge McMahon's emphatic statements about the outsourcing issue threaten to upend long-established ways in which prosecutors, companies, and counsel interact in such matters. Particularly in the antitrust context, the government and practitioners must take note and adapt.

This article explores the novel analysis in Judge McMahon's opinion, how broadly its considerations may reach, and what changes we are likely to see in antitrust investigations as a result.

The Investigation into Gavin Black

The case against Gavin Black, brought by a team of prosecutors from DOJ's Criminal Division and the Antitrust Division, arose out of the Department's long-running investigation into the manipulation of LIBOR, a key benchmark rate. In addition to DOJ's criminal prosecutors, attorneys from the Commodity Futures Trading Commission ("CFTC"), the Securities and Exchange Commission ("SEC"), and a variety

---

1 Benjamin Sirota is an attorney with Kobre & Kim and former prosecutor from the Department of Justice Antitrust Division who handles white-collar criminal matters, regulatory enforcement and internal investigations, with a particular focus on global competition issues.

2 *United States v. Connolly*, 16-cr-370 (S.D.N.Y.).

of enforcers and regulators located abroad investigated, in parallel, possible criminal and civil violations by Deutsche Bank, several other banks, and multiple employees.

As one would expect, Deutsche Bank retained outside counsel to conduct an internal investigation into the extent of the bank's involvement in any misconduct. As part of their activities, these counsel interviewed Gavin Black, a swaps trader whose financial success turned, in part, on the level of LIBOR at any moment in time. At the beginning, Black was not a target of the investigation. He consented to be interviewed; but had he not, he could have been terminated by Deutsche Bank for failing to cooperate in the bank's investigation. During the interview, Black denied wrongdoing and gave innocuous explanations of statements that looked suspicious.

As frequently occurs in such matters, Deutsche Bank sought to assist with the government's investigation by "downloading" the government on the results of its many investigative activities. Some of these downloads included summaries for the prosecutors of what outside counsel had discussed with Gavin Black. The prosecutors did not use the statements, either directly or indirectly, when they ultimately went to trial against Black.

Judge McMahon's Opinion

A threshold issue in Judge McMahon's analysis was whether Black's interview with counsel for Deutsche Bank, his employer, was voluntary or compelled. Although there was nothing in writing stating that Black would absolutely be fired if he did not submit to an interview, the evidence established that such an outcome was generally understood. Accordingly, Judge McMahon found, the interview was compelled rather than voluntary. This finding was fairly conventional, given precedent that threat of termination — at least when mounted by the government — can amount to compulsion.

The other aspects of Judge McMahon's opinion, however, were eye-catching. Reviewing in detail the long and complicated history of the government's and outside counsel's investigation into Deutsche Bank, Judge McMahon concluded that the government had so strongly directed company counsel in its investigative efforts that those counsel were transformed into an "arm" of the government. Judge McMahon cited a number of factors in her decision; the following seemed paramount in her mind:

- That the CFTC — one of the initial enforcers on the scene — instructed Deutsche Bank at the outset that it should conduct an investigation and defined the parameters of what the bank should look into;
- The frequency of outside counsel's reports to the government, sometimes occurring on a weekly basis;
- The level of direction prosecutors gave to outside counsel regarding what issues or individuals they should turn to next;

- That outside counsel appeared to ask the government's permission to interview Black, their client's own employee, a fourth time; and
- That outside counsel submitted the findings of their internal investigation to the prosecutors, in the form of a lengthy "white paper."

As it pertained to Black himself, outside counsel's interviews were not just *generally* fairly attributable to the government; they were, in Judge McMahon's view, "government-engineered" interviews through and through.

Judge McMahon summed up her concerns about the investigation as follows:

> This was no ordinary "outside" investigation. Deutsche Bank did not respond to the Government's subpoenas by turning over documents without comment, and its employees were not subjected to government or regulatory depositions on notice, at which they were defended by company counsel. Indeed, Deutsche Bank did the opposite—it effectively deposed their employees by company counsel and then turned over the resulting questions and answers to the investigating agencies.
>
> In other words, Paul Weiss did everything that the Government could, should, and would have done had the Government been doing its own work.

Implications for Antitrust Investigations

What Judge McMahon perceived as the government's extreme level of involvement in the Deutsche Bank investigation was fairly conventional for criminal antitrust investigations. Typically, after an entity applied to DOJ's Antitrust Division through the Leniency Program, prosecutors would interact with company counsel on an iterative basis, to check whether the company was meeting its marks to satisfy the standards for leniency, but also to ensure that the government was obtaining the evidence it would need to bring criminal antitrust cases against others. Investigations rarely fit into binary distinctions: they were seldom "government-engineered" top to bottom, or, conversely, run fully autonomously by the corporate leniency applicant without any feedback from prosecutors.

It is unknown how much precedential effect Judge McMahon's opinion will have in the long term, given that her comments about government outsourcing did not affect the holding. In any event, in an abundance of caution, the Antitrust Division may decide to modify some of its longstanding practices. For example, the Division may:

- Interview more witnesses itself from the start, rather than letting outside counsel take the first crack;

- If the investigation has been disclosed, issue subpoenas to other parties to show ownership of the investigation by the government rather than sole reliance on what outside counsel for a leniency applicant brings to it;
- Identify obstacles an applicant may have meeting the criteria for leniency (*e.g.*, lack of U.S. nexus, no witness to support the corporate confession) but without making any concrete suggestions as to how the applicant should rectify those issues; and
- Create more of a demarcation between the internal investigation a company may be running for its own purposes, versus the company's provision of documents, witnesses and information for the *government*'s purposes.

How should the Division take into account – if at all – Judge McMahon's aversion to the level and frequency of information flowing from outside counsel to the government? Unclear. In a leniency context, it is imperative that the government receive comprehensive information from the applicant; that is the whole point of the leniency process. One possible solution would be to focus more heavily on the provision of the "raw" information and documents, rather than "tied up with a bow" summaries like the white paper of which Judge McMahon apparently disapproved.

For practitioners, it will be even more important than before to make clear that the company is making its own decisions about how best to get to the bottom of misconduct. That may, of course, involve cooperating with the government at certain junctures, but counsel must maintain a high level of autonomy and discretion, so it does not appear that it is simply following the government's about what it should do.

Finally, underlying the *Connolly* opinion is a sense that the "taint" of government direction began at the very start of the investigation and that, perhaps, there was little counsel could have done to "unring the bell" afterwards. A key lesson, therefore, is for the government and the parties to establish, early on, the goals that each respective side is trying to accomplish and to take action in line with those goals.

Emerging Payment Products in Financial Services

by Amanda Norton[1]

INTRODUCTION

From fintechs to traditional banks, what new payment technologies are being introduced into the marketplace and how might they disrupt competition and the incumbent players?

What types of competitor collaborations have we seen in this space and what are the anti-trust implications of these partnerships?

Given the emergence of these new payment technologies and collaborations, how should an antitrust practitioner think about the relevant market and has it expanded over time?

And how does antitrust fit with the other regulations emerging in this industry?

On May 22, 2019, the Insurance & Financial Services and Media & Technology Committees of the ABA Antitrust Section, together with the Antitrust Section of the New York State Bar Association, held a roundtable discussion examining these questions as they relate to emerging payment products. Jonathan Lutinski, VP & Sr. Anti-trust Counsel at American Express, moderated the discussion, which included:

- Rob Pelkowski, Sr. Director and Associate General Counsel at PayPal/Venmo;
- Hannah Sholl, Sr. Counsel, Global Litigation & Competition at Visa; and
- Joe Vardner, Antitrust Compliance Officer at Wells Fargo.

NEW PAYMENT TECHNOLOGIES: WHAT'S OLD IS NEW AND WHAT'S NEW IS OLD

Drawing from his experience at both American Express and PayPal/Venmo, Rob Pelkowski opened the conversation by reviewing a number of payment products that have emerged in the marketplace and explaining that, in many ways, the concepts and technologies that underlie these products have existed for years. He noted that payment companies have always targeted new revenue sources, and the products that firms are developing and introducing are, at their core, instruments for these firms to reach new customers. Pelkowski proceeded to examine similarities between newer and older products that have hit the market:

---

[1] Amanda Norton is an associate in the Antitrust/Competition practice group at Sidley Austin LLP in Washington, D.C.

Pelkowski recounted that, during his time at American Express, the company developed a payment platform called Serve, which was designed to reach the unbanked and underbanked. He then noted that today's newer companies are attempting to reach that same market segment, pointing to Square, Inc.'s recent announcement regarding its Cash App. Pelkowski also recalled Amex's earlier exploration of partnerships with telecommunications companies whereby prepaid, reloadable cards would be pre-installed on consumers' mobile phones. Today, tech powerhouses like Facebook, Apple, and Google are exploring similar concepts in the form of digital wallets and other proprietary, digital payment products. These comparisons illustrate Pelkowski's point that, despite apparently perceptible industry changes, underlying market forces remain steady.

Pelkowski also recalled how American Express had previously marketed Softcard, which made funds available to consumers via near-field communication (NFC) or Tap & Pay technology at points of sale. Despite the existence of this technology for years, Pelkowski observed how powerful supporters like Google Pay and Apply Pay are helping it mature and take root. He described how NFC is beginning to change the concept of the physical retail store with stores like Amazon Go, where consumers can pick up the items they wish to purchase and walk out without encountering a cashier. These stores deploy NFC technology to make the physical retail shopping experience increasingly seamless, easy, and frictionless.

Pelkowski also discussed the concept of peer-to-peer (P2P) transfers. As many as ten years ago, American Express started to consider tools that would make such transfers more efficient, so this concept is notnew. Today, however, we view Venmo as a disruptor in the payment space, championing that functionality. While companies like PayPal had been offering services to enable P2P transfers well before Venmo entered the market, Venmo's success in this space came by combining this technology with users' social networks and tapping the social aspect of payments. Pelkowski added that Venmo is now offering a physical card product, and questioned whether this was a step backwards in terms of innovation. He observed, however, that the physical card is necessary for consumers to bridge the gap that still exists between brick and mortar and digital spaces, and Venmo needed to fill that void in order to continue to grow its business beyond P2P transfers.

Pelkowski concluded that the successful disruptors of the payments landscape are able to deliver products that meet customer needs, whether the customer is the merchant or the consumer. On both sides of the market, customers value products and services that are low-friction, secure, reliable, and easy to use.

DEFINING COMPETITORS AND THE RELEVANT MARKET IN THE PAYMENT SPACE

Pivoting to the topic of the relevant market, Joseph Vardner commented that, because there have not been many published opinions that address market definition in the payment industry, the principles outlined in *Brown Shoe Co. v. United States*, namely the commercial realities of an industry, continue to govern the approach to market definition in the payment space. In terms of counseling clients about how to treat and interact with other players in the market, Vardner said practitioners need to look at the array of products and services that exist, and consider whether they compete with one another from a consumer's perspective, as well as from a firm's perspective.

In defining the market, Vardner said one can also take cues from government agencies. For example, in the Office of the Comptroller of the Currency's Semiannual Risk Perspective, which addresses fundamental risks in the United States banking industry, nearly a quarter of the report is dedicated to financial technology. The OCC's report states that fintech now accounts for the largest percentage of unsecured personal loan originations, and, ultimately, that fintech firms are competing with traditional banks.

Vardner noted that, just because fintech firms are offering new or more efficient products or processes, they are not necessarily operating in their own new markets. Instead, Vardner said, we are likely seeing the expansion of existing markets.

STANDARD SETTING ORGANIZATIONS AND COMPETITOR COLLABORATIONS IN FINTECH

Standard Setting Organizations

The discussion then transitioned to Standard Setting Organizations (SSOs) and competitor collaborations. Hannah Sholl explained that payments fuel today's digital economy and many market-wide movements in the payment space are developed in the context of SSOs. Sholl pointed out that the raised numbering on credit cards, the magstripe, and chip cards are all examples of innovations that were created by SSOs. These SSOs are designed to enable the industry to use open and transparent groups to achieve greater innovation that can be implemented around the world.

In this way, Sholl said the more firms that are able to participate in these SSOs, the greater the potential for new achievements. But with this reward comes greater risk as more competitors unite in these discussions: in the context of SSOs, Sholl remarked that, aside from the traditional antitrust concerns surrounding discussions among competitors, participants also need to be counseled about the growing body of case-law that cautions about the use of standards to impede innovation and entrench old technology.

Sholl said that, ultimately, this industry will continue to rely on SSOs to reach consensus across firms because, from both the merchant's and consumer's perspective, the need for standardization across terminals for use of different payment products is paramount.

Competitor Collaborations

Like SSOs, competitor collaborations are common in the payment industry. Indeed, Vardner said the payment industry is inherently collaborative: from the history of the industry—Visa and MasterCard began as joint ventures among banking institutions—to the processing of payments, collaboration is necessary for seamless and successful transactions. Vardner identified a number of examples of collaborations that exist today and cautioned about antitrust risk that arise in those contexts.

Key collaborations that exist today include Zelle, TruSight, and Clearing House Payments Company. Zelle is a collaboration among a group of U.S. banks that formed a digital payment network which allows individuals to transfer funds between U.S. bank accounts, regardless of the bank that holds the account. TruSight was formed by a consortium of financial institutions to serve as a risk assessment firm that can help financial players streamline and validate vendors and other third parties. The Clearing House Payments Company (TCH) is a joint venture of 24 U.S. banks that operates an automated funds-transfer system for domestic and international high value payment transactions in U.S. dollars. It is a real-time final settlement payment system that continuously matches, off-sets, and settles payments among international and domestic banks.

Vardner advised that participants in these consortia must be aware of antitrust risks that arise in the context of these closely collaborative settings, including risks of information exchange and other potentially collusive behavior.

With respect to information exchange in these contexts, Vardner noted that the type, timeframe, and granularity of information being exchanged is critical in determining whether the exchange might run afoul of antitrust laws. TCH, for example, received a Business Review Letter from DOJ that permitted TCH to operate in a way that prevents information regarding individual transactions from being shared among its member banks. Vardner noted that regulators in the U.S. and Europe have had recent success challenging improper exchanges of information, and this is an area of continued enforcement.

CONCLUSION AND WHAT'S NEXT

As the discussion concluded, the panelists reviewed industry-wide trends that they have been monitoring closely.

Sholl said the Business-to-Business space is experiencing enormous growth, and, in particular, practitioners should watch for developments in technologies that facilitate real-time payments between these entities. Sholl commented that many traditional payment companies have made acquisitions that position them for entry into the B2B space. For example, in March 2019, MasterCard acquired Transfast, a global cross-border account-to-account money transfer network. In May 2019, Visa acquired Earth-port, a company that provides cross-border payment services to banks, money transfer service providers and businesses via the world's largest independent ACH network. Sholl is also monitoring the use of QR codes to make payments to merchants. Sholl said the Chinese and Japanese markets already have adopted this technology quite widely, but it is unclear what traction this payment method will gain in the United States.

Pelkowski noted that, to this point, the panel discussion had focused on the dimension of the market pertaining to payments and the introduction of new products that increase convenience for consumers in that space. Pelkowski observed that, in the same way, the dimension of the market pertaining to lending is also using technology to reduce friction for consumers. He noted that both traditional and nontraditional market participants are originating loans in novel ways. Pelkowski said that, like the payment aspect of the market, the lending side is becoming increasingly digital. Loan originators are running digital and mobile advertisements that allow consumers to apply for loans on-the-go rather than via more traditional methods, like making appointments at a physical branch of a bank. Vardner substantiated that point, noting that Wells Fargo now allows consumers to apply for a home mortgage using the company's mobile phone application. Further, Vardner and Pelkowski both observed that, in addition to typical sources of data like FICO scores, market participants are using data from consumers' digital footprints to assess creditworthiness.

The panelists all agreed that, ultimately, in the space of lending as well as payments, market participants should be mindful that despite the advent of attractive new products, those innovations are still likely to be subject to the same antitrust rules and other regulations that govern traditional products in those spaces.

INSURANCE AND FINANCIAL SERVICES COMMITTEE LEADERSHIP	
Gary W. Kubek *Co-Chair* gwkubek@debevoise.com	**Eric J. Stock** *Co-Chair* estock@gibsondunn.com
Jason S. Dubner *Vice Chair* jdubner@porterwright.com	**Deidre Johnson** *Vice Chair* deidre.johnson@ropesgray.com
Jonathan R. Lutinski *Vice Chair* jonathan.r.lutinski@aexp.com	**Amanda Norton** *Vice Chair* anorton@sidley.com
Deborah Salzberger *Vice Chair* dsalzberger@mccarthy.ca	**John Snyder** *Vice Chair* john.snyder@alston.com
Joseph Vardner *Young Lawyer Representative* joseph.vardner@wellsfargo.com	Please visit us on **Connect**

DISCLAIMER STATEMENT

The Exchange is published by the Insurance and Financial Services Committee of the American Bar Association, Section of Antitrust Law. The views expressed in the Exchange are the authors' only and not necessarily those of the American Bar Association, the Section of Antitrust Law or the Insurance and Financial Services Committee (or its subcommittees). To comment on the contents of the Exchange, please write to:

American Bar Association
Section of Antitrust Law
321 North Clark Street
Chicago, IL 60654-7598

Copyright 2019 American Bar Association. The contents of this publication may not be reproduced, in whole or in part, without written permission of the ABA. All requests for reprint should be sent to: Director, Copyrights and Contracts, American Bar Association, 321 N. Clark, Chicago, IL 60654-7598, FAX: 312-988-6030 e-mail:copyright@abanet.org