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WHITE-COLLAR CRIME

# LIBOR and FX Prosecutions End With Government Defeats

By Elkan Abramowitz and Jonathan Sack

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For years we have watched the same white-collar criminal drama enacted many times. The drama goes something like this.

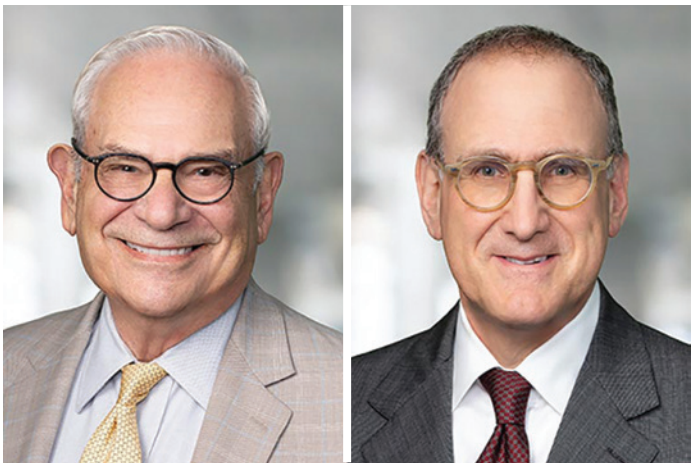
In Act One, the Department of Justice (DOJ) launches an investigation of a common market behavior alleged to be illegal.

In Act Two, financial institutions cooperate with the authorities and enter into non-prosecution agreements (NPAs), deferred prosecution agreements (DPAs), or guilty pleas, pursuant to which some wrongdoing is acknowledged.

In Act Three, individuals are prosecuted on the premise that their actions were dishonest or unfair.

In Act Four, a small number of individuals are indicted and a smaller number go to trial, many of whom are acquitted or have convictions reversed on appeal.

This drama came to an end very recently in two separate venues. In *Johnson v. United States*, 144 F.4th 133 (2d Cir. July 17, 2025) the Second Circuit granted a highly unusual writ of coram nobis and set aside a conviction that arose from DOJ's prosecution of foreign exchange (FX) trading.



Courtesy photos

Elkan Abramowitz, left, and Jonathan Sack.

In *R (Respondent) v Hayes (Appellant)* [2025] UKSC 29, the Supreme Court of the United Kingdom quashed a trial conviction for alleged fraudulent fixing of the London Inter-bank Offered Rate (LIBOR).

We begin by describing the underlying DOJ investigations and then explain how the prosecution of

individuals ultimately exposed flaws in the government's theories of criminal violations.

We conclude with a note on the impact on individuals of the use of criminal law enforcement to punish, and change, common financial market conduct.

**FX Trading Investigation**

In late 2013, the DOJ Antitrust Division began a probe of alleged collusion and manipulation of the "fixes" for trading certain currency pairs. The "fix" referred to benchmark exchange rates published daily by third-party pricing services.

Chats among traders suggested that, from approximately 2007 through mid-2013, traders may have colluded to place aggressive "buy" or "sell" orders to distort the fix to increase trading profits. The investigation focused on the EUR/USD currency pair, and later on Central and Eastern European, Middle Eastern and African (CEEMEA) currencies.

In May 2015, four banks agreed to plead guilty to price-fixing in violation of the Sherman Antitrust Act, 15 U.S.C. §1, and to pay criminal penalties totaling more than $2.5 billion relating to the EUR/USD currency pair.

A fifth bank, UBS AG, which had come forward with information, was found to be in breach of an unrelated Dec. 2012 NPA and agreed to pay a criminal penalty of $203 million. In Jan. 2018, the DOJ announced a plea deal with BNP Paribas USA, pursuant to which the bank admitted to participating in a price-fixing conspiracy in CEEMEA currencies.

Between 2016 and 2018, the DOJ charged eight individuals with wire fraud and price fixing. In *United States v. Usher, et al.*, 17-cr-19 (S.D.N.Y.), three individuals went to trial on price fixing charges and were found not guilty.

In *United States v. Johnson, et al.*, 16-cr-457 (E.D.N.Y.), the government charged two individual defendants with wire fraud and conspiracy. One of the defendants successfully fought extradition to the U.S.

The other individual, Mark Johnson, was convicted of wire fraud in 2017 and sentenced to a 24-month term of imprisonment. The Second Circuit affirmed Johnson's conviction, *United States v. Johnson*, 945 F.3d 606 (2d Cir. 2019), but the legal drama did not end there, as discussed below.

In *United States v. Aiyer*, 18-cr-333 (S.D.N.Y.) the government charged the defendant with price fixing (CEEMA currencies); he was found guilty by a jury and sentenced to eight months imprisonment. Two other dealers of CEEMEA currencies pleaded guilty to a price-fixing conspiracy. *See United States v. Cummins*, 17-cr-26 (S.D.N.Y.); *United States v. Katz*, 17-cr-03 (S.D.N.Y.).

***U.S. v. Johnson* FX Trading Prosecution**

Following the Supreme Court's decision in *Ciminelli v. United States*, 598 U.S. 306 (2023), Mark Johnson filed a petition for a writ of coram nobis (the common law writ to correct an error of law in the court's original judgment).

The gravamen of the government's case at trial was that Johnson had engaged in a "front-running" scheme through currency transactions that benefited HSBC at the expense of its client, Cairn Energy.

The government advanced two theories of wire fraud: (1) Johnson breached a duty owed to Cairn by misappropriating the company's confidential information (misappropriation theory); and (2) Johnson deprived Cairn of pricing information necessary for the company to make

discretionary economic decisions (right-to-control theory). When it found Johnson guilty, the jury was not required to specify on which theory Johnson was guilty.

In his petition, Johnson contended his conviction should be set aside because the right-to-control theory of liability had been invalidated in *Ciminelli*, and the jury might have found him guilty on that basis.

The district court denied the writ, holding that the government's reliance on a right-to-control theory was harmless: the jury could reasonably have convicted Johnson of wire fraud under the alternative misappropriation theory.

On July 17, 2025, the Second Circuit reversed the district court, holding that the government had not satisfactorily established at least two elements of the misappropriation theory. First, the Court doubted that a reasonable jury could have found that Johnson had entered into a relationship of trust with Cairn.

It was "unlikely" that a reasonable jury would have reached unanimity given evidence at trial of an explicit disclaimer of fiduciary liability, and given the absence of a contract breach.

Second, the court questioned whether Johnson had misappropriated Cairn's confidential information at all. In the foreign exchange context, dealers with an upcoming fix transaction "*must* trade ahead of the fix to execute the deal and *can* further trade ahead… to hedge against the risk of an unfavorable fix price." (Emphasis in original).

The court expressed "grave doubt" that a properly instructed jury would have reached a unanimous agreement on the "substantially more complicated" theory of misappropriation when the evidence presented a "textbook case of right-to-control fraud."

**LIBOR Fixing Investigation**

Following the global financial crisis, the DOJ and the U.K.'s Serious Fraud Office (SFO) launched criminal investigations into allegations that traders at major banks were allegedly conspiring to manipulate LIBOR—a benchmark interest rate for interbank lending that underpinned trillions of dollars of loans and derivative products.

Before being phased out beginning in 2021, LIBOR was determined by averaging the submissions of a panel of global banks that reported the interest rate they paid, or expected to pay, to borrow money from each other. 35 LIBORS were published each business day based on combinations of five currencies and seven maturities. Emails and phone records indicated that some traders asked each other to submit specific rates to support their trading positions.

In 2012, after the DOJ announced an NPA with Barclays Bank, seven financial institutions resolved wire fraud charges through DPAs, another institution entered an NPA, and one pleaded guilty.

The premise of these resolutions was that the banks had engaged in fraud and/or price fixing by making false LIBOR and Euro Interbank Offered Rate (EURIBOR) submissions insofar as the submissions took into account the positions of their derivatives traders.

From 2012 to 2015, the DOJ brought wire and bank fraud charges against 14 individuals. In 2013, three former ICAP brokers were charged with fraud for alleged manipulation of the Yen LIBOR. *United States v. Read, et al.*, 13-mj-2224 (S.D.N.Y.). The brokers were also charged in the U.K., and following their acquittal at trial there, DOJ dismissed its charges in 2016.

In *United States v. Robson, et al.*, 14-cr-272 (S.D.N.Y.), seven individuals connected to Rabobank were charged with fraud for false Yen LIBOR submissions. One defendant remains a fugitive. Four defendants pleaded guilty to wire and bank fraud conspiracy, and two other defendants were convicted of fraud and conspiracy at trial.

In 2017, the Second Circuit reversed the two individuals' trial convictions based on Fifth Amendment challenges regarding the government's misuse of testimony compelled in foreign proceedings. *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017).

In *United States v. Connolly, et al.*, 16-cr-370 (S.D.N.Y.), two traders were indicted on fraud charges for their alleged manipulation of Deutsche Bank's U.S. dollar LIBOR submissions. They were convicted at trial and sentenced to time served and supervised release, including six- and nine-month terms of home confinement.

The Second Circuit reversed their convictions due to insufficient evidence to support a finding that the LIBOR submissions at issue had been false. *United States v. Connolly*, 24 F.4th 821 (2d Cir. 2022).

Two other individuals were charged with wire fraud and conspiracy counts in *United States v. Hayes, et al.*, 12-mj-3229 (S.D.N.Y.) for their involvement in alleged false Yen LIBOR submissions by UBS. The government moved to dismiss that indictment following the Second Circuit's *Connolly* decision.

The U.K.'s SFO did not bring criminal charges against companies (U.K. regulators fined them heavily), but it charged nearly 40 individuals for fraud related to LIBOR/EURIBOR manipulation. Nine senior bankers were convicted and sentenced to prison, two of whom—Tom Hayes and Carlo Palombo—had their convictions overturned last month by the U.K's highest court.

**'Hayes UK LIBOR Prosecution'**

In Aug. 2015, former trader, Tom Hayes, was convicted of conspiracy to defraud for manipulating LIBOR rates. The SFO alleged that Hayes caused dishonest rates to be submitted for his own benefit.

At trial, the judge instructed the jury that a bank is prohibited from taking into account its commercial interests when determining its LIBOR submissions, and an honest submission is an "assessment of the single cheapest rate at which the panel bank…could borrow at the time of submission."

Hayes and Palombo, who was similarly convicted of having conspired to manipulate EURIBOR rates, appealed their convictions. They argued *inter alia* that the judge had incorrectly instructed the jury on the definitions of LIBOR/EURIBOR.

The U.K. Court of Appeal rejected that contention, but in 2023, the Criminal Case Review Commission referred their convictions back to the Court of Appeal for another review following the Second Circuit's decision in *Connolly* in which the Second Circuit had reached a different legal conclusion on similar facts.

In *Connolly*, the Second Circuit reversed the convictions of Matthew Connolly and Gavin Black who had been tried on a theory of fraud similar to that in Hayes' and Palombo's prosecutions. U.S. prosecutors argued that banks had only one correct interest rate or number that could honestly be submitted to establish the LIBOR.

The Second Circuit disagreed, concluding that the evidence demonstrated that banks were not limited to one true rate, and that banks were not

prohibited from considering their own interest-rate-sensitive derivatives when inputting a rate, so the government had failed to prove the falsity element of wire fraud.

On Hayes' and Palombo's second appeal, following *Connolly*, the U.K. Court of Appeal rejected their argument that the jury instructions (called "directions" by the U.K. judiciary) had omitted a key question of fact, but the court certified for further review two questions concerning the proper construction of the LIBOR/EURIBOR definitions.

On July 23, 2025, the Supreme Court of the United Kingdom unanimously quashed the appellants' convictions. The Supreme Court concluded that the jury instructions in Hayes' and Palombo's trials were incorrect as a matter of law because the instructions did not allow the jury to consider the submitters' mental states.

The court held that the error concerned the defendants' intent to make submissions they knew to be false—similar to the issue addressed by the Second Circuit in *Connolly*. In *Hayes*, the judge directed the jury that if the defendant took into account the commercial interest of the bank or a trader, the submitted rate was not a genuine or honest submission.

The judge's direction wrongly took away from the jury the key issue of Hayes' and Palombo's alleged knowing falsity.

Before the Supreme Court's decision, Hayes had served five-and-a-half years of an 11-year sentence, and Palombo had served two years of a four-year sentence (both men were released in 2021). The SFO announced that "it would not be in the public interest for us to seek a retrial" of Hayes or Palombo.

**Conclusion**

The outcome of these investigations and prosecutions is subject to different interpretations. In one view, prosecutors grossly overreached by engaging in "regulation by prosecution," only to be chastened when individuals fought and won cases.

A different view is that prosecutors reasonably used their authority to punish and clean up market practices that needed reform. We will not settle this dispute here.

We can be sure of one thing: the financial and human cost on individuals of arguable "overcriminalization" is enormous, and defense counsel certainly wonder whether that damage can be justified in light of the ultimate legal outcomes of the white-collar dramas we witness.

**Elkan Abramowitz** *and* **Jonathan S. Sack** *are members of Morvillo Abramowitz Grand Iason & Anello. Mr. Abramowitz is a former chief of the criminal division in the U.S. Attorney's Office for the Southern District of New York. Mr. Sack is a former chief of the criminal division in the U.S. Attorney's Office for the Eastern District of New York.* **Emily Smit**, *an associate at the firm, assisted in the preparation of this column.*

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