

Software Exec's Acquittal Could Rein In Spoofing Cases

By **Lauraann Wood**

Law360 (April 5, 2019, 9:53 PM EDT) -- An Illinois software executive's midtrial acquittal on a charge he conspired to create a program he knew would be used to manipulate the commodities market might make the government rethink how far its spoofing prosecutions extend, experts say.

After the acquittal, prosecutors are still moving forward with charges that software creator Jitesh Thakkar aided and abetted a U.K.-based trader's "flash crash" spoofing scheme and are set to deliver closing arguments Monday. But U.S. District Judge Robert Gettleman on Thursday wiped out a conspiracy charge against the programmer, ruling prosecutors didn't present jurors with any evidence from which they could find a conspiracy between Thakkar and trader Navinder Sarao.

What happened to the conspiracy charge was not necessarily surprising since Sarao himself, a cooperating witness, testified that he didn't think the two were in any kind of criminal cahoots when he asked for the program, some attorneys say.

But the judge's ruling, coupled with the fact that prosecutors' only full spoofing conviction came in their first trial, shows "they ought to be reevaluating the kinds of cases they're bringing" as they tackle market spoofing, said Marc Mukasey of Mukasey Frenchman & Sklaroff LLP.

"If they cannot convict traders of spoofing charges, they ought to think twice before they extend the charges beyond the traders," said Mukasey, who secured the first spoofing acquittal on behalf of former precious metals trader Andre Flotron. "This is pretty universal rejection."

Spoofing is a form of market manipulation in which traders place large orders that fake the impression of supply or demand on one side of the market and cancel them at the same time a smaller order is placed on the opposite side.

The case against Thakkar, owner of Edge Financial Technologies Inc., is the third to go to trial since the government's 2010 enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act made the trading practice illegal. It also appears to represent the first time the government has attempted to hold a software engineer accountable for another person's use of a program to spoof the market.

The government alleges that Thakkar and other Edge Financial employees worked with Sarao, who is deemed responsible for triggering the 2010 Dow Jones "flash crash," to implement an automated

program containing a so-called back-of-the-book function that would modify the quantity of an order he placed and then send it to the back of the line so all the orders before it would have to be filled first.

Prosecutors say Thakkar led and oversaw the software's development and served as the point person in communicating about the project with Sarao. Sarao pled guilty in 2016 and was later ordered to pay nearly \$40 million in penalties as part of a U.S. Commodity Futures Trading Commission suit connected to his conduct. Thakkar pled not guilty to the charges in February 2018.

With one conviction and one acquittal having come before Thakkar's spoofing trial, his case serves as somewhat of a tiebreaker, said Laura Brookover of Covington & Burling LLP. Brookover had been working at the CFTC when the agency staged its sweeping attack on the trading practice, which led to millions of dollars in fines as well as indictments against Thakkar and several others.

Because Judge Gettleman gave Thakkar only a partial win on his motion for acquittal, it shows the judge thinks there is still a possibility he could be convicted for aiding and abetting Sarao's criminal conduct based on what evidence the jury has seen, Brookover told Law360.

"I think we still need to see how this goes," she said. "You also have to consider that this testimony is coming from a cooperating witness. For a cooperating witness, this testimony is not a very strong condemnation of Thakkar, and I think the defense was able to effectively use that to their advantage."

The remaining two aiding and abetting charges are based on two Sarao trades cited in Thakkar's indictment, and the jury will be tasked with determining whether Thakkar knowingly participated in the criminal activity and tried to make it succeed.

Stacie Hartman, who co-chairs the financial services group at Steptoe & Johnson LLP, said proving those charges will be "a real challenge" for the government because the jury will get to consider the same evidence that brought the conspiracy acquittal.

"Mr. Sarao's testifying that he considered Mr. Thakkar to be knowledgeable about trading and that he could 'put two and two together' seems to fall short of knowing participation and trying to make the spoofing succeed," she told Law360. "I'm not aware that there's evidence of any communications between Mr. Sarao and Mr. Thakkar about those trades, and I think there's going to be a lack of evidence enough to prove the charge at the end of the day."

Brookover agreed that Thakkar's conspiracy acquittal could cause the government to "be more cautious about these types of cases" when considering whether to extend a criminal spoofing indictment beyond traders themselves.

"That said, I'm not sure how much the government was going to focus on software programmers anyway," she said.

Thakkar could be considered a "special circumstance" in the sense that the government might have felt particularly offended that the software engineer, who served on a CFTC subcommittee addressing potential harms technology could cause the market, allegedly was giving Sarao a discount on the software he wanted in exchange for Sarao's help marketing and selling that software around the same time, Brookover told Law360.

"Unless and until another case is brought against a software programmer, I think we can look at Thakkar as an outlier," she said.

The government is represented by Mark Cipolletti, Matthew Sullivan, Michael O'Neill and Patrick Mott of the U.S. Department of Justice's Criminal Division.

Thakkar is represented by Renato Mariotti, Holly Campbell and Richard Reibman of Thompson Coburn LLP.

The case is U.S. v. Thakkar, case number 1:18-cr-00036, in the U.S. District Court for the Northern District of Illinois.

--Editing by Jill Coffey and Kelly Duncan.