

## **Gurumurthy Kalyanaram on Lawsuit, NYIT, UT Dallas**

### **Gurumurthy Kalyanaram - Reports on Rajat Gupta's Conviction in Insider Trading Lawsuit**

Dean Emeritus [Gurumurthy Kalyanaram](#) and former professor NYIT and UT Dallas reports on Rajat Gupta's conviction in insider trading and affirmation of the conviction by the Appeals court in the criminal prosecution/lawsuit.

Upon filing of criminal complaint/lawsuit by the US government in the District Court, and after a jury trial, Rajat Gupta was convicted of three counts of security fraud (insider trading) and one count of conspiracy to commit fraud. Consequently, Gupta was sentenced to two years of jail and asked to pay a fine of \$5 million in November 9, 2012.

Gupta appealed the conviction, but the Appeals Court denied any relief to Gupta and affirmed the lower court's decision of conviction, and jail time and fine on March 25, 2014.

Since this is a facts-intensive case/lawsuit, there is no credible basis to appeal to the U.S. Supreme Court – the Supreme Court is Court of law, and not a Court of errors and facts. So, this is the end of legal options for Gupta. Here is a summary of the appeal arguments by Gupta.

In his oral arguments before the Second Circuit Court of Appeals in New York on May 21st, 2013 Rajat Gupta's attorney Seth Waxman, argued that Gupta deserved a new trial because the recordings of September 24th and October 24th, 2008 calls through wiretaps should not have been admitted as evidence, and because Gupta's daughter's (Gitanjali's) testimony was limited. Assistant US Attorney Richard Turlowe countered that Gupta got a fair trial, and that the jury's verdict should not be overturned

The arguments were heard by a panel of three judges (Judges Amalya Kearse, Jon Newman, and Rosemary Pooler) of the Second Circuit Court of Appeals. It was apparent that the appellate court was searching for answers to two central questions:

1. Was Gupta's September 23rd, 2008 call to Rajaratnam (within seconds of the Goldman Sachs Board Meeting) and the immediate large trades by Rajaratnam just a "coincidence"? Judge Newman honed in on this.
2. Even if the Court evidence of two wiretaps were excluded and even if Gitanjali's testimony was not truncated, would the jury have arrived at a different conclusion?

Gupta's call to Rajaratnam on September 23rd about 3:56 PM immediately after the Goldman Sachs Board is central. In that call, Gupta spoke very briefly (for less than 30-40 seconds) with Rajaratnam. Immediately, in the next 3 minutes or so Rajaratnam placed large trades of Goldman stocks.

While US government argued that it was preposterous to state that the September 23rd call by Gupta to Rajaratnam was anything but a tip, Gupta's lawyer argued that there was simple and

innocent explanation. The explanation is that Gupta was calling Rajaratnam about Rajaratnam's withdrawal of \$25 million from the Voyager international fund and Gupta's own loss of about \$10 million. The timing of Gupta's call was simply coincidental, according to his lawyer, because Gupta was simply trying to squeeze as many calls as possible before his 4 PM previously scheduled call that day.

Gupta's lawyer argued that if the lower court had allowed Gupta's daughter, Gitanjali, to testify that her father was upset with Rajaratnam because he had withdrawn \$25 million from the Voyager fund the jury would have heard a plausible explanation for the September 23rd call. Further, if the wiretaps of September 24th and October 24th conversations of Rajaratnam with Galleleon trader(s) had not been admitted, there would have been substantial doubt cast on government's theory.

Those two arguments of Gupta were not unreasonable, because Gitanjali's testimony would have been based on her personal knowledge, and the two telephone recordings (wiretaps) could be considered hearsay.

Even the US Assistant Attorney appeared to concede that "hearsay" interpretation for the October 24th call was not unreasonable. But he stood firm that the admission of September 24th call from Rajaratnam to a trader where Rajaratnam boasts of information that he received from a Goldman Sachs board member was correct. With regard to Gitanjali's testimony, the government attorney pointed out that Gitanjali was able to testify that her father was very "upset" with Rajaratnam. The US attorney argued that incremental additional testimony (namely, that Rajaratnam withdrew \$25 million from the Voyager fund without the knowledge of Gupta) would not have made any material difference and in any case Gupta was able to tell the jury about that withdrawal in the summation arguments in the lower court.

It appeared that the panel of judges was persuaded that the admission of the October 24th call was questionable. Judge Rosemary Pooler was very specific on this. However, it was not apparent that the panel felt that admission of September 24th call was improper or that Gitanjali's additional testimony would have altered the jury's decision.

If the panel had been persuaded that the admission of the September 24th call was also questionable, and that Gitanjali's additional testimony would have materially bolstered Gupta's defense then Gupta would have gotten a new trial. Essentially, the appellate court had to credit Gupta with all his requests – exclude the two wiretaps, and include extended testimony of Gitanjali.

[Gurumurthy Kalyanaram](#) strongly felt that Gupta's burden was too large to successfully to overturn the conviction.

**Gurumurthy Kalyanaram, Dean Emeritus and Professor NYIT and UT Dallas - Reports on Rajat Gupta's Appeal of His Ban by Securities and Exchanges Commission**

Dean Emeritus Gurumurthy Kalyanaram, and former professor NYIT and UT Dallas, reports here on Rajat Gupta's appeal (lawsuit) against his life-time ban from all financial institutions in US, and attendant penalty by Securities and Exchanges Commission. This essay summarizes the status of the appeal lawsuit.

In response to Gupta's lawsuit/appeal of his ban by the Securities and Exchange Commission (SEC), SEC has filed a response asking the Second Circuit appeals court to affirm the district court's decision that Gupta pay a \$13.9 million penalty and be banned for life from serving as director of a public corporation. SEC has argued that the district court acted well within its discretion by permanently barring Gupta from associating with brokers, dealers, and investment advisers, permanently barring him from serving as an officer or director of a public company.

Will Rajat Gupta be able to overturn SEC's seriously adverse decision? We will not know the answer till the Appeals Court delivers its ruling and that ruling is probably 6-8 months away.

It is the opinion of [Gurumurthy Kalyanaram](#) that the Second Circuit has been adopting an increasingly expansive view of what is required to establish civil liability for insider trading.

A clue to the Appeals Court's thinking and precedent on this matter is evident in its [Contorinis](#) decision. The following analysis of [Contorinis](#) decision has been provided by Joel Haims, Kayvan B Sadeghi of Morrison &Forester LLP.

On Feb. 18, 2014, the Court of Appeals for the Second Circuit affirmed an order requiring Joseph Contorinis to personally disgorge more than \$7 million in insider trading profits realized by a fund he co-managed, even though he did not personally receive those profits. In doing so, the court continued its expansive reading of civil liability for insider trading. In 2012, in *SEC v. Obus*, the Second Circuit held that actual knowledge of a breach of a duty was not required to establish civil liability for either a tipper or a tippee.

The recent Second Circuit opinion arose out of a subsequent civil lawsuit brought by the SEC seeking disgorgement from Contorinis of the profits obtained by the Paragon Fund. The district court granted summary judgment for the SEC and ordered disgorgement of \$7,260,604, reflecting the fund's profits, prejudgment interest of \$2,485,205 on the entire disgorgement amount, and a civil penalty of \$1 million. Contorinis appealed the judgment insofar as it required him to disgorge the amount obtained by the Paragon Fund and related prejudgment interest, arguing that it was a misapplication of the principle of disgorgement.

The court ruled that the arguments for disgorgement under the facts before it, of a tippee trading for the benefit of others, was even stronger than the case for disgorgement against a tipper. A tipper may not know the extent to which the tippee will trade, and thus would have no idea of the potential exposure to disgorgement. In contrast, Contorinis "controlled the size and timing of the trades" and received financial and other reputational benefits from the trades.

Notably, the court made clear that disgorgement of gains that accrue to innocent third parties was not mandatory, but rather within the discretion of the district court. The court remarked on disgorgement's remedial purpose: "disgorgement is imposed not to punish, but to ensure illegal actions do not yield unwarranted enrichment" — and held that "[d]istrict courts possess the equitable discretion to determine whether disgorgement liability should fall upon third parties or violators."

The implications of Contorinis may also be informed by Rajat Gupta's appeal of the \$13.9 million civil penalty assessed against him for providing information to Raj Rajaratnam, which is presently before the Second Circuit. There, the court assessed no disgorgement, but rather a civil penalty of three times the relevant trading profits gained by Rajaratnam, even though Gupta received no profits himself. If the lower courts read Contorinis to mean that insider traders may be liable for profits they did not personally receive, Gupta may soon inform whether and when they can also be held liable for multiples of that amount.

Contorinis is the most recent reflection of the Second Circuit's broad view of civil liability for insider trading. As such, it may embolden the SEC's pursuit of insider trading cases and of civil recoveries beyond the reach of criminal forfeiture of personal profits, and extending to any profits channeled to others. And with another high-profile civil insider trading case on its docket, we can expect to hear more from the Second Circuit in the near future.