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Platinum Execs' Fate Lies With Judge After Mixed Verdict

By **Jody Godoy**

Law360 (July 10, 2019, 10:25 PM EDT) -- Brooklyn federal prosecutors failed to convict top Platinum Partners executives on what they once described as "one of the largest and most brazen investment frauds perpetrated on the investing public," and the charges they convicted on are now in the hands of a skeptical judge — a far cry from the case's headline-grabbing origins.

Two and a half years after they were indicted, Platinum Partners co-founder Mark Nordlicht and former co-chief investment officer David Levy **were convicted** Tuesday of defrauding bondholders in portfolio company Black Elk Offshore Operations LLC. But the jury acquitted entirely on the crux of the case: that Nordlicht, Levy and others had run Platinum's key fund like a Ponzi scheme.

Former Platinum CFO Joseph SanFilippo was also accused of the scheme to defraud investors, and he was found not guilty. In all, the jury acquitted on 15 counts and convicted on six.

Una Dean of Fried Frank Harris Shriver & Jacobson LLP said that while the case took a number of twists and turns, the acquittal on the investment fraud scheme is not a total surprise given U.S. District Judge Brian Cogan's skepticism of the evidence.

"It's not common, and it definitely signals something about the nature or sufficiency of the evidence in the case — as perceived by the court at least," Dean said of the judge's rulings.

Nordlicht, Levy, SanFilippo and two others were charged with committing a complex fraud on investors in the Platinum Partners Value Arbitrage Fund between 2012 and 2016, as a number of those investors sought to pull funds out of the PPVA. The fund was stocked with oil and gas assets that were still in the exploration stage, making them difficult to sell.

Prosecutors alleged the group lied about the assets' valuation and liquidity, which precipitated a cash crunch as investors sought to leave, and then misled investors about the loans and repayments that went on in a scramble to shore up the fund.

That part of the case began with five defendants. Uri Landesman, former Platinum president and managing partner, died from illness before trial. Platinum marketing and investor relations staffer Joseph Mann took a deferred prosecution deal last year.

For the remaining defendants, the vast majority of the evidence at the 11-week trial was on the alleged \$1 billion investment fraud scheme, which ended in acquittals, rather than the bond fraud scheme, where Nordlicht and Levy were convicted.

But by the time the jury started deliberating last week, the government's case had already taken several hits.

One of the largest was Judge Cogan's ruling forcing prosecutors to abandon the claim that Nordlicht and others had fraudulently overvalued the assets in the PPVA. The judge found there was not enough evidence for a reasonable juror to make that conclusion.

That allegation had been central to the investment fraud case in the beginning. Then-U.S. Attorney

Robert Capers summed up the charges at a news conference in late 2016, calling the fund's high rate of return a mirage.

"In reality, their returns were the result of the overvaluation of their largest assets, which eventually led to Nordlicht and his co-conspirators operating Platinum like a Ponzi scheme, where they used loans and new investor funds to pay off existing investors," Capers said at the time.

When Judge Cogan cut out the valuation fraud claim, he left prosecutors to focus their investment fraud arguments on the alleged fraud Nordlicht, Levy and SanFilippo undertook to deal with the cash crunch prosecutors said was caused by the overvaluation.

While the jury considered those claims, it's possible the judge's instruction to jurors that they couldn't consider the valuation fraud claims they had heard throughout the trial had a broader subconscious effect, according to Dean, a former prosecutor in the Eastern District of New York who had no involvement in the Platinum case.

"Juries as a general matter are very good about following legal instructions, but it's difficult to say that that kind of a statement from a judge — who runs the courtroom and you look to for guidance on the law — doesn't have an impact psychologically on how the jury views the case and whether they should question the evidence in the case," Dean said.

The judge also frequently expressed skepticism about the government's theories, and had ruled ahead of trial that prosecutors could not put in evidence of the alleged \$1 billion loss.

Nordlicht and Levy were actually convicted on three counts each over a scheme to rig a vote on the terms of a bond indenture that prosecutors said allowed them to essentially raid Black Elk's coffers for the benefit of Platinum.

However, defendants have some cause to hope that will prove a Pyrrhic victory for the government. Judge Cogan suggested Tuesday that the verdict isn't the end of the case.

"As we know from these motions, it's not over yet," the judge said, referring to post-trial motions.

That comment has drawn differing interpretations from the defense bar. Christopher Nasson, a former federal prosecutor in Brooklyn who is now with K&L Gates LLP, said the fact that the bond fraud scheme was by far the more straightforward allegation bodes well for the conviction remaining intact.

The allegation about the number of votes needed to change the bonds' terms and the number of votes that were tied to ineligible Platinum bondholders comes down to "basic math," Nasson said.

"If you believe the government's theory and you think the evidence supported that theory, as this jury appears to have done, you'd think it was likely not a difficult decision for the jury to make," Nasson said. "And I think it will be a relatively straightforward decision for the court to make."

Dean said that while motions for acquittal or a new trial are routine, it's unusual for a judge to make such a remark at the end of a trial.

"It does seem like there is certainly something to be concerned about from the government's perspective," Dean said.

Judge Cogan denied an initial motion for acquittal on the bond fraud scheme last month at the close of evidence. He declined to weigh in on competing evidence over whether certain entities were actually affiliated with Platinum and therefore ineligible to vote.

The judge again denied similar motions before the government summed up its case, saying they were duplicative of the earlier attempt.

"That doesn't mean I'm not going to give every consideration to appropriate post-trial motions, if there is a conviction. But let's see what the jury does with the case," Judge Cogan said.

It is rare for a judge to grant an acquittal or new trial after a jury has reached its verdict. But it sometimes happens. Two years ago in Manhattan, a federal judge **threw out the conviction** of a construction CEO months after the trial had ended.

If the charges still stand at the end of the day, the next battle for the two executives will be sentencing.

How much investors who held \$50 million in bonds lost on the scheme will be a key question at that stage. A sentence based only on the bond fraud scheme is likely to be much lower than if Nordlicht and Levy had been convicted of investment fraud, where prosecutors pegged the alleged loss at \$1 billion.

Judges can consider acquitted conduct in sentencing, and Judge Cogan has done so before. But it's not clear prosecutors could get him to do so here, given the views he has already expressed on those charges.

Meanwhile, former Platinum Managing Director Daniel Small and ex-Black Elk CEO Jeffrey Shulse await their own trials on charges related to the Black Elk scheme.

While much remains up in the air, one thing is certain: After a trial where prosecutors offered relatively little evidence against him, SanFilippo is a free man.

His attorney Kevin O'Brien of Ford O'Brien LLP said Wednesday that he believed the case was not well thought out, but that the result was three years of his client being "crushed under this train."

"Sometimes the power of the government causes it to get carried away, and I think that's what happened here," O'Brien said. "It's terrifying. It really is."

However, several former prosecutors resisted the notion that the U.S. attorney's office has soul-searching to do after the result in the complex and hard-fought case.

"I think from their perspective, a win's a win," Nasson said.

--Additional reporting by Stewart Bishop. Editing by Breda Lund and Kelly Duncan.