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Malawer: Foreign exchange dealings and Virginia

By STUART S. MALAWER

Virginia Attorney General Ken Cuccinelli has gotten it right. Intervening in the pending whistleblower litigation in the Fairfax County Circuit Court against the Bank of New York Mellon, involving the Virginia Retirement System, is good public policy.

It is argued in the case that the bank intentionally charged the VRS different rates for converting dollars to foreign currencies and that the bank pocketed the differences and reported inaccurate data to mislead the VRS.

Some facts: It is alleged in the private lawsuit in the Fairfax County Circuit Court against Bank of New York Mellon that the bank cherry-picked prices and then falsely reported foreign exchange transactions.

Specifically, when the bank was buying foreign currency for the VRS so it could participate in global financial markets, the bank would buy foreign currencies at a lower price during the day but report to the VRS that it had paid a higher exchange price. Foreign exchange rates trade in a range during a day that may be quite significant. Thus, the bank got more foreign currency at the lower price but remitted a smaller amount of the foreign currency to the VRS, saying that it had to pay more for the foreign currency than it actually did. The bank would similarly overcharge when the pension fund sold foreign currencies.

An analogy to buying and selling a home makes this situation perfectly clear. What if a broker went to a house closing, filled out a HUD 1 form, and told the buyer that the price was \$1 million, when in fact the property price was \$800,000, and then pocketed the difference? We would be talking about criminal sanctions, or at a minimum, a breach of fiduciary duty and the duty of good faith. That's what we may have here — an unethical bank practice of improper charges and transactions. In addition, we might have a breach of fiduciary duty by the officers and directors of the VRS who allowed this to go on undetected.

I do not know what is going on with national banks. During the same week that the foreign-exchange transactions of the Bank of New York Mellon became public, JPMorgan was sued for breaching its fiduciary obligations to a number of parties by profiting from its dealings with Bernie Madoff when the bank closed its eyes to questionable and poorly documented transactions. Madoff said from prison that he was amazed by the failure of banks to rein him in.

Public pension funds have doubled their international transactions in the past 15 years. Recently, it was reported that some of the nation's largest investment firms were overcharged in their foreign-currency transactions. For example, Black Rock, Inc., the world's largest fund manager, identified questionable pricing issues with the Bank of New York's buying or selling currency at prices favorable to the bank under "standard instructions" rather than at the most beneficial prices for its customer, Black Rock, Inc.

A national bank that is trying to systematically profit improperly at the expense of the Commonwealth of Virginia and its pension fund should be called to answer in the courts of Virginia for its double-dealing.

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