

“Conspiracy of Fools” by Kurt Eichenwald that was written in 2005. He warned us that what was happening was just a tremor leading up to a massive earthquake that was about to happen. We did not listen. Are we listening now?

I am going to be working with my colleagues to offer several amendments on the floor to strengthen this legislation, to make it the strongest legislation possible, to be accountable to my constituents, and to make sure we are putting derivatives back into the clear light of day.

Madam President, I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

IMPROPER PRACTICES ON WALL STREET

Mr. SPECTER. Madam President, I thank the Chair. I have sought recognition to comment briefly on a hearing which will be held by the Criminal Law Subcommittee of the Committee on the Judiciary on May 4 concerning allegations of improper practices on Wall Street.

In light of the allegations of misconduct on Wall Street in recent years and the consequential damages to the economy of the United States and worldwide, serious consideration should be given to whether civil liability and fines are sufficient or whether jail sentences are required to deal with such conduct and as a deterrence to others. With civil liability or a fine, the companies or individuals calculate it as part of the cost of doing business, but a jail sentence is enormously different.

The charges brought by the Securities and Exchange Commission accusing Goldman Sachs of securities fraud in a civil lawsuit has brought intense public concern to conduct on Wall Street which has long been questioned. According to the SEC complaint, Goldman permitted a client who was betting against the mortgage market to heavily influence which mortgage securities to include in the portfolio. Goldman then sold the investments to pension funds, insurance companies, and banks. The client was betting the securities would decline in value based on his knowledge of the underlying value. Similar practices have been defended by investment bankers on the ground that the investors are sophisticated and have a duty to protect themselves without relying on the investment counsel. There is a contention that the only issue is whether the investments are suitable, with the denial that there is a fiduciary duty. That defense further contends that there is no conflict of interest.

Some of the issues to be considered at the hearing to be held by the Criminal Law Subcommittee of the Judiciary Committee on May 4 are the following:

First: Precisely what are the structures of the complex commercial transactions involving securitizing mortgages, selling short hedge funds, derivatives, et cetera?

Second: Under what circumstances, if any, do the investment bankers have a fiduciary duty to the investors?

Third: Where, if at all, do conflicts of interest arise in such transactions?

Fourth: Is there a legitimate distinction between the investment council's duty to provide only a “suitable” investment without a fiduciary duty involved?

Fifth: When the investment banker recommends or offers an investment, is there an implicit representation that it is a good investment?

In my judgment, Congress should examine these complicated transactions with a microscope and make a public policy determination as to whether such conduct crosses the criminal line. Congress should investigate and hold hearings to find the facts. Congress should then define what is a fiduciary relationship, what is a conflict of interest, and what conduct is sufficiently antisocial to warrant criminal liability and a jail sentence.

As a starting point, it should be emphasized that the SEC complaint contains allegations which have yet to be proved. The numerous newspaper stories and other media reports are hearsay, so the task remains to find the facts. These inquiries on Wall Street practices are being made in the context that they triggered or at least contributed to a global financial crisis.

Larry Summers, on March 13, 2009, said:

On a global basis, \$50 trillion in global wealth has been erased over the last 18 months. That includes \$7 trillion in the U.S. stock market wealth which has vanished, \$6 trillion in housing wealth which has been destroyed, 4.4 million jobs which have already been lost, and the unemployment rate now exceeds 8 percent.

In the intervening year, a total of 6.5 million jobs are now the total lost, and the unemployment rate stands at 9.7 percent.

I have long been concerned about the acceptance of fines instead of jail sentences in egregious cases. There are many illustrative cases, but three will suffice to make the point. In each of these cases, I registered my complaint with the Department of Justice.

First: On September 2, 2009, Pfizer agreed to pay \$2.3 billion to resolve criminal and civil liability for committing health care fraud for selling Bextra, for off-label uses the FDA declined to approve because they were unsafe. For a company with revenues in excess of \$48 billion and an income in excess of \$8 billion in fiscal year 2008, it was chalked off as the cost of doing business.

The second case: On December 15, 2008, Siemens AG entered guilty pleas to violations of the Foreign Corrupt

Practices Act and agreed to pay \$1.6 billion in fines, penalties, and disgorgements with no jail sentences. Again, that amounts to a calculation as part of the cost of doing business for a company which had revenues of \$104 billion and a net income of \$2.5 billion in fiscal year 2008, after the penalty.

The third case, briefly: On May 8, 2007, Purdue Pharma agreed to pay \$19.5 million to 26 States to settle complaints that Purdue encouraged physicians which prescribed excessive doses of OxyContin in violation of an FDA ruling which resulted in numerous deaths. Company officials paid fines, nobody went to jail; again, part of the cost of doing business.

From my days as district attorney of Philadelphia, where my office convicted the chairman of the Housing Authority, the Stadium Coordinator, the deputy commissioner of Licenses and Inspections, and others, my experience has convinced me that criminal prosecutions are an effective deterrent.

The deterrent effect of prison was succinctly stated by Mr. William Mercer, chairman of the Sentencing Guideline Subcommittee of the Attorney General's Advisory Committee, on behalf of the Department of Justice, in a 2003 publication. He said:

[W]e believe that the certainty of real and significant punishment best serves the purpose of deterring fraud offenders and particularly white collar criminals. [O]ffenders usually decide to commit fraud and other forms of white collar crimes not with passion, but only after evaluating the cost and benefits of their actions. If the criminally inclined think the risk of prison is minimal, they will view fines, probation, home arrest, and community confinement merely as a cost of doing business. We aim to remove the price tag from a prison term. We believe that if it is unmistakable that the automatic consequence for one who commits a fraud offense is prison, many will be deterred, and at least those who do the crime will indeed do the time.

These are some of the considerations which will be taken up at the subcommittee hearing.

I thank the Chair and I yield the floor.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

EXECUTIVE SESSION

NOMINATION OF DENNY CHIN TO BE UNITED STATES CIRCUIT JUDGE

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to consider the following nomination which the clerk will report.

The legislative clerk read the nomination of Denny Chin, of New York, to