In re LIBOR: ‘More Light, Please!’—Questions and Observations As the Decision Dismissing Antitrust Claims for Lack of Antitrust Injury Now Faces Appellate Review

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(An in-depth article on In re LIBOR and antitrust injury is available ***here*** *under this title. The following is a preview of my article).*
(N.B.: In a coincidence of timing, on Jan. 28, 2015, the date of this posting and publication of the linked article, Judge Lorna Schofield of the federal district court for the Southern District of New York, in a case alleging a conspiracy to manipulate the benchmark rates in the $5.3 trillion/day foreign exchange market, denied the defendants’ motions to dismiss and expressly rejected the test used by the court in *In re LIBOR* for determining antitrust injury, discussed below. *In re Foreign Exchange Benchmark Rates Antitrust Litigation* (S.D.N.Y. 1/28/15).)

A key ruling by a New York federal district court almost two years ago, in *In re*

LIBOR-Based Financial Instruments Antitrust Litigation, can now finally proceed on appeal, and the implications are significant both in the law and for a number of financial markets dependent on benchmark mechanisms.

The district court ruled in March 2013 that alleged collusion by the defendant banks in setting a global interest rate benchmark—the London Interbank Offered Rate, or LIBOR—may have violated antitrust law but did not cause antitrust injury; it therefore dismissed antitrust claims filed by various investors, who claimed injury from the alleged concerted suppression of LIBOR, on the grounds that they lacked standing.

On January 21, 2015, in a lightning-fast decision issued barely six weeks after oral argument, the Supreme Court removed procedural roadblocks delaying prompt appeal. The district court's decision, so long on the vine (before appeal) that it appeared to be taken as accepted wisdom in some quarters, will now be put to the test and is already attracting heightened, critical attention.

The article examines the district court's antitrust ruling with a view to the upcoming appeal. Specifically, it explains the U.S. doctrine of private antitrust injury—"injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful"—an elusive and notoriously difficult principle to pinpoint and correctly apply (Part II); sets forth the facts of the case (III) and the court's rationale (IV); and dissects the court's reasoning (V).

The district court's rationale rests on two main findings: first, that the LIBOR-setting process is collaborative, not competitive, so any collusion by the banks in setting the rate did not displace competition, and any resulting harm therefore cannot result from a suppression of competition—hence, there was no antitrust injury; and second, that the injury alleged by the plaintiffs could have occurred even in the absence of the alleged collusion, that is, in normal competitive conditions—hence, the plaintiffs may have been injured but it was not antitrust injury.

The analysis of the first leg of the rationale focuses on the upstream interbank lending market, where each bank was expected to submit its daily estimated interbank borrowing costs, independently, to the British Banking Association (BBA), which then averaged them for the daily LIBOR fix; and on the downstream markets

for the sale by the defendant banks of various financial instruments indexed to LIBOR. The court's conclusion that the banks did not compete in LIBOR rate-setting in the interbank lending market, as a predicate for its conclusion that any injury resulting from the alleged collusion was not antitrust injury, invites scrutiny on at least three fronts:

- First—the plaintiffs alleged incentives on the part of the banks to compete in the interbank lending market, even if the LIBOR-setting process itself is collaborative; there was not simply a unilateral incentive on the part of each bank to understate its borrowing costs, to reflect a picture of stronger financial health, as noted by the court, but also an interplay of this incentive with the desire on the part of each bank not to substantially overstate or understate its estimated borrowing costs vis à vis those of the other banks contributing their data to the LIBOR fix, thereby prompting their alleged collusion;
- Second—the required independent submission by the banks to the BBA of their daily estimated interbank lending costs, on which they instead allegedly colluded, resembles the 'messenger model' in antitrust, and the similar structural safeguards in each of these two mechanisms against improper information exchange reflects the competitive interrelationship of the participants; and
- Third—LIBOR-setting resembles standard setting in that both are collaborative information-gathering processes, but with competitive effects; as the law recognizes the antitrust implications of abuse of standard setting, so it should recognize that LIBOR-setting, conducted by banks which compete with each other at least in the downstream markets, if not also in the upstream interbank lending market, may also have competitive effects and cause antitrust injury.

As for the downstream markets for the sale of LIBOR-indexed financial instruments to the plaintiff investors, in which the defendants clearly competed, the Supreme Court's teaching in *Brunswick v. Pueblo Bowl-O-Mat* on antitrust injury instructs that the "injury should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation." If the "violation" is the alleged collusion on LIBOR-setting by the banks, then the "anticompetitive acts made possible by the violation" are the defendants' pricing of the financial instruments where the plaintiffs allegedly paid more or received less than they

would have in a market free from the alleged collusion. Even assuming, for the sake of argument, and per the court, that the LIBOR-setting process was entirely collaborative, so that any collusion among the banks could not displace competition among them at that stage, it is not clear how the suppression of downstream competition does not constitute antitrust injury (as the anticompetitive acts made possible by violation).

The second leg of the rationale—that whatever harm the plaintiffs may have suffered is not antitrust injury because it could have occurred even in the absence of the alleged collusion, that is, in normal competitive conditions—similarly invites scrutiny. Although the district court appears to ground this reasoning on well-known Supreme Court precedent on antitrust injury, it appears to have misconstrued or at least misapplied it to the facts in *LIBOR*. Instead, as the article explains, the court appears to have fallen into the 'Trap of the Irrelevant Hypothetical'—a term coined by one commentator to describe "the fallacious proposition that any time one can construct a counterfactual hypothetical in which (a) the facts are changed such that there is no antitrust violation, yet (b) the plaintiff still suffers damage similar to the injury it actually suffered as a result of the violation, there is no antitrust injury." With respect to LIBOR, this translates to saying that if the alleged collusion is assumed away, the conduct that would be left—the independent submission of each bank's daily estimated interbank borrowing costs possibly resulting in the same kind of harm to plaintiffs—would not cause antitrust injury; indeed, it would not even violate the antitrust laws. Accordingly, the 'irrelevant hypothetical', taken to its logical extension, would eviscerate private antitrust litigation and the court's test therefore does not work: by proving too much, it proves nothing.

Although the doctrine of antitrust injury is somewhat 'plastic' and does not lend itself to easy or simple formulation, the proper question here, as the Supreme Court has instructed, is instead whether the conduct of which the plaintiffs complain enhances or reduces competition and whether, applied to the facts in *LIBOR*, a different result obtains. In sum, it does not appear that the district court correctly applied Supreme Court precedent on antitrust injury or that the second leg of its rationale supports its conclusion that the banks' alleged collusion could not cause antitrust injury. But the district court is not alone: a number of other courts have also stumbled over the doctrine, with some employing the exact same reasoning as the district court in *LIBOR*. Here, the article spotlights judicial

confusion of antitrust injury with either antitrust causation or harm to competition, with illustrations from other decisions.

Ultimately, the issues under discussion resolve to whether the district court in *LIBOR* correctly dismissed the antitrust claims for failure by the plaintiffs to plausibly allege antitrust injury. The dismissal, which appears to assume facts in question going to the issue of antitrust injury, of course precludes the plaintiffs even from obtaining discovery on this very question, let alone other substantive elements of their claims, yet the plaintiffs appear to have crossed the 'plausibility' pleading threshold of *Bell Atlantic Corp. v. Twombly*. The article suggests that the court's dismissal of the antitrust claims calls for a critical re-examination of the two principal legs of the rationale and, ultimately, reversal by the Second Circuit.