When One Door Closes, Does Another Open? The Second Circuit's LIBOR Decision

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Antitrust standing requires that a plaintiff suffer an "antitrust injury," and that the plaintiff be an "efficient enforcer" of the antitrust laws. On May 23, 2016, the United States Court of Appeals for the Second Circuit reversed the Southern District of New York's March 29, 2013 dismissal of plaintiffs' antitrust claims in *In re LIBOR-Based Financial Instruments Antitrust Litigation,[1]* concluding that the plaintiffs had sufficiently alleged that they had suffered antitrust injury inasmuch as consumers who "pay prices that no longer reflect ordinary market conditions, . . . suffer 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'"[2] However, the Second Circuit left open the possibility that (at least some) plaintiffs may nevertheless lack antitrust standing under the "efficient enforcer" requirement.

The immediate impact of the Second Circuit's decision was to require that the antitrust claims arising from an alleged cartel to manipulate the London Interbank Offered Rate ("LIBOR"). to go forward. More importantly, however, the Second Circuit's opinion may have led to a strategy shift among antitrust defendants—at least in the Second Circuit—involving whether plaintiffs are "efficient enforcers" of the antitrust laws to justify their bringing suit.

Background

LIBOR is the most-widely used interest rate in the world, underpinning trillions of dollars' worth of financial instruments. It has been described as "the world's most important number."[3] Despite its prevalence, no regulatory agency oversees LIBOR.

During the relevant period, LIBOR was set each business day for ten currencies and fifteen maturities ("tenors"). In order to determine the rates, a private trade group, the "British Bankers' Association," polled the world's largest banks (so called "Panel Banks") with the following question: "At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 am?" The Panels submitted their rates for each tenor (and often, multiple currencies) to Thomson Reuters, which determined the arithmetic mean of the middle 50% of submissions for each currency and tenor. This became the published LIBOR, which, along with each Panel Bank's submissions, was published daily by roughly 11:30am.

In May 2008, a series of news articles appeared suggesting that the Panel Banks were submitting U.S. Dollar LIBORs ("USD-LIBORs") that were lower than their actual borrowing costs. Nearly three years later, on March 15, 2011, UBS became the first bank to publicly disclose that it was under government investigation for alleged LIBOR-related misconduct. The following day, the *Financial Times* reported that in Fall 2010, all of the Panel Banks charged with setting USD-LIBOR "received informal requests for information" from government regulators.[4]

A short time later, myriad types of investors who had purchased financial instruments linked to LIBOR filed putative class actions. In general, these lawsuits alleged that the sixteen USD-LIBOR Panel Banks entered into a conspiracy to suppress USD-LIBOR between 2007 and 2010 in violation of Section 1 of the Sherman Act. The plaintiffs alleged that they purchased LIBOR-linked financial instruments and paid more or received less than they would have absent the alleged conspiracy. On August 12, 2011, the Judicial Panel on Multidistrict Litigation transferred these cases to the United States District Court for the Southern District of New York "for coordinated or consolidated pretrial proceedings."

The Motion to Dismiss

On June 29, 2012, the defendants filed a motion to dismiss the consolidated suit. The bulk of the defendants' argument was that the plaintiffs had not adequately alleged an antitrust conspiracy, but the defendants also argued that the plaintiffs did not suffer antitrust injury. As to antitrust injury, the defendants contended that the plaintiffs had not adequately alleged "any competition-reducing aspects of USD LIBOR" because, *inter alia*, they did not compete with one another in the setting of USD LIBOR.[5] In response, plaintiffs pointed out that the defendants had not cited a single "case holding that a party who pays more, receives less, or both because of collusive price-fixing has not suffered an antitrust injury," and that "such a holding would be (to borrow the Supreme Court's words from another context) 'nothing less than a frontal assault on the basic policy of the Sherman Act.'"[6] In reply, the defendants argued that because "[t]here [was] no 'market for reporting USD LIBOR,'' there was no restraint of trade.[7]

Despite the parties focusing their briefing on the plausibility of the alleged conspiracy, the District Court didn't reach that issue. Instead, it dismissed the antitrust claims on the basis of antitrust standing.[8] Specifically, the District Court concluded that because the LIBOR setting process was designed to be cooperative, the defendants' conduct in setting that rate could not be anticompetitive. In reaching this conclusion, the District Court relied on the Supreme Court *Brunswick* decision for the proposition that because "plaintiff could have suffered the same harm under normal circumstances of free competition," there could be no antitrust injury.[9]

The Second Circuit Decision

The Second Circuit reversed the District Court on May 23, 2016.[10] The Circuit Court explicitly rejected the District Court's rationale as to the permissible cooperative nature of the LIBOR setting process. According to the Circuit Court: "[T]he machinery employed by a combination for price-fixing is immaterial." . . . The Banks were indeed engaged in a joint process, and that endeavor was governed by rules put in place to prevent collusion. But the crucial allegation is that the Banks circumvented the LIBOR-setting rules, and that joint process thus turned into collusion.[11]

However, the Second Circuit left open the possibility that some plaintiffs may not be "efficient enforcers" of the claimed antitrust violations and, notwithstanding their antitrust injury, lacked antitrust standing because their alleged damageswould necessarily be "highly speculative." As to that, the case presents some unusual challenges. The disputed transactions occurred at rates that were negotiated, notwithstanding that the negotiated component was the increment above LIBOR. And the market for money is worldwide, with competitors offering various increments above LIBOR, or rates pegged to other benchmarks, or rates set without reference to any benchmark at all.[12] Accordingly, the Circuit Court remanded the case for a determination of whether plaintiffs were efficient enforcers.[13]

Impact of the Second Circuit's Decision

Prior to the Second Circuit's reversal, antitrust defendants had, on occasion successfully, been arguing that *LIBOR I* provided an easy off ramp.[14] The Second Circuit's opinion appears to have resulted in antitrust defendants abandoning this argument.[15] Instead, antitrust defendants now appear to be attempting to squeeze every plaintiff, including direct purchasers, through the "efficient enforcer" door cracked open by the Second Circuit.[16] Time will tell whether this shift in strategy is successful.

Footnotes

[1] 935 F. Supp. 2d 666 (S.D.N.Y. 2013) ("*LIBOR I*").

[2] *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 772 (2d Cir. 2016) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1977)) (citing authorities).

[3] http://www.bbalibor.com/news-releases/bba-libor-the-worlds-most-important-number-now-tweetsdaily.

[4] Brooke Masters, Patrick Jenkins & Justin Baer, "Banks served subpoenas in Libor case," FT.com, available at http://www.ft.com/cms/s/0/52958d66-501f-11e0-9ad1-00144feab49a.html#axzz1sJNEDIiI

[5] Mem. of Law in Supp. of Defs.' Mot. to Dismiss Pls.' Antitrust Claims at 22, ECF No. 166 (filed June 29, 2012)

[6] Pls.' Joint Mem. of Law in Opp. to Defs.' Mot. to Dismiss Pls.' Antitrust Claims at 38, ECF No. 211 (filed Aug. 28, 2012) (quoting *Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 695 (1978)).

[7] Reply Mem. of Law in Supp. of Defs.' Mot. to Dismiss Pls.' Antitrust Claims at 8, ECF No. 228 (filed Sept. 27, 2012)

[8] *LIBOR I*, 935 F. Supp. 2d at 690 ("[T]he injury plaintiffs suffered from defendants' alleged conspiracy to suppress LIBOR is the same as the injury they would have suffered had each defendant decided independently to misrepresent its borrowing costs to the BBA. Even if such independent misreporting would have been fraudulent, it would not have been anticompetitive . . . .")

[9] *Id.* at 689.

[10] The Second Circuit initially declined to hear the appeal on procedural grounds, which was subsequently reversed by the Supreme Court. *Gelboim v. Bank of Am.*, 135 S. Ct. 897 (2015).

[11] *Gelboim*, 823 F.3d at 775 (quoting *United States v. Socony–Vacuum,* 310 U.S. 150, 223 (1940) (other internal citations omitted). The Second Circuit also concluded that the plaintiffs had plausibly alleged an antitrust conspiracy. *Id.* at 781 (“Close cases abound on this issue, but this is not one of them . . . .”)

[12] *Id.* at 780 (quoting *Assoc. Gen. Contractors,* 459 U.S. at 542).

[13] The parties are presently briefing this issue in the District Court.

[14] *Compare Laydon v. Mizuho Bank, Ltd.,* No. 12 Civ. 3419(GBD), 2014 WL 1280464, at *8 (S.D.N.Y. Mar. 28, 2014) (dismissing antitrust claims because “the setting of the USD LIBOR benchmark rate is not competitive; rather it is a cooperative effort wherein otherwise competing banks agreed to submit estimates of their borrowing costs to facilitate calculation of an interest rate index”); *7 W. 57th St. Realty Co., LLC v. Citigroup, Inc.*, No. 13 CIV. 981 PGG, 2015 WL 1514539, at *17 (S.D.N.Y. Mar. 31, 2015) (similar); *with In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 596 (S.D.N.Y. 2015), *appeal withdrawn* (Apr. 27, 2015) (“*LIBOR I*'s conclusion that the plaintiffs in that case had not demonstrated antitrust injury was explicitly based on that court’s understanding that the LIBOR-setting process was a ‘cooperative endeavor’ . . . The Fix, by contrast, is set by actual transactions in a market where Defendants are supposed to be perpetually competing . . . .”); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2016 WL 1241533, at *6 (S.D.N.Y. Mar. 28, 2016) (similar); *cf. Merced Irrigation Dist. v. Barclays Bank PLC*, No. 15-CV-4878 (VM), 2016 WL 861327, at *5 (S.D.N.Y. Feb. 29, 2016), *reconsideration denied,* No. 15-CV-4878 (VM), 2016 WL 1317951 (S.D.N.Y. Apr. 1, 2016) (rejecting antitrust injury arguments; although defendants had raised *LIBOR I*in their motion to dismiss briefing, the court did not address the case).

[15] *See In re: Zinc Antitrust Litig.*, No. 14-CV-3728 (KBF), 2016 WL 3167192, at *12 (S.D.N.Y. June 6, 2016) (“In contrast to the defendants’ initial round of motions to dismiss the CAC, defendants no longer raise any challenge to plaintiffs' antitrust standing to bring their remaining claims.”).

16] *See* ECF No. 615, *In re Foreign Exchange*, Case No. 1:13-cv-7789 (S.D.N.Y. June 2, 2016) (arguing that*Gelboim*’s concerns regarding “the broad scope of plaintiffs’ claims, the speculative nature of plaintiffs’ alleged damages, and the presences of multiple regulatory investigations” required the court to dismiss direct purchasers for lack of antitrust standing).

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