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Antitrust and Financial Benchmark Litigation: The LIBOR, Foreign Exchange, and Platts Cases

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I. INTRODUCTION

In the aftermath of the 2008 financial crisis, government investigations into how global financial benchmarks are set and influenced by market participants spawned dozens of class action and individual lawsuits. Plaintiffs have alleged that the benchmarks have been manipulated to benefit the banks and other market participants which had a role in how the benchmarks were determined, asserting antitrust claims under federal and state law, manipulation under the Commodities Exchange Act ("CEA"),[2] RICO,[3] and common law claims for fraud and unjust enrichment.

Three benchmarks have been the particular subject of recent litigation: (i) the London Interbank Offered Rate ("LIBOR" - the average interest rate estimated by leading banks that they would be charged if borrowing from other banks); (ii) a foreign exchange ("FX") benchmark known as "WM/Reuters" (used in settling FX forwards and other financial contracts); and (iii) the Platts' North Sea Dated Brent benchmark (used to price crude oil and as a reference rate in a range of over-the-counter and exchange-traded derivatives).

This past March, Judge Naomi Reice Buchwald of the United States District Court for the Southern District of New York, in the first substantive decision in the benchmark cases, granted the defendants' motion to dismiss the Sherman Act antitrust conspiracy claims.[4] She held that LIBOR was never intended to be a competitive rate-setting process and, therefore, the plaintiffs' alleged injuries from investing in products tied to LIBOR were not the type of injury the antitrust laws were intended to prevent, leaving the plaintiffs without standing to assert their Sherman Act claims.

Although, as of this writing, it is uncertain whether and when the United States Court of Appeals for the Second Circuit will review Judge Buchwald's dismissal of the antitrust claims,[5]

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[2] 7 U.S.C. § 1 *et seq.*

[3] 18 U.S.C. § 1961 *et seq.*

[4] *In re LIBOR-Based Financial Instruments Litigation*, 935 F. Supp. 2d 666 (S.D.N.Y. 2013). (In re LIBOR). Judge Buchwald also dismissed some but not all of the remaining CEA, RICO, and state law claims brought against the banks that served on the LIBOR rate-setting panel.

[5] The plaintiffs whose claims Judge Buchwald dismissed in their entirety appealed to the Second Circuit. Those appeals were dismissed by a Second Circuit panel that concluded the Court lacked jurisdiction over the dismissed cases because they were part of consolidated proceedings involving other parties and claims that had not yet been finally resolved. *In re LIBOR-Based Financial Instruments Antitrust Litigation*, Nos. 13-3565 (L), 13-3636 (Con) (2d Cir. dismissed Oct. 30, 2013). In a December 16, 2013 Order, the Second Circuit denied the plaintiffs' motions for

the reasoning supporting her decision could be instructive to courts considering similar claims in other benchmark litigation, including the FX and Platts cases. Sorting out the similarities and differences among those benchmarks and the antitrust claims asserted with respect to them will most certainly be part of any such considerations.

II. THE *IN RE LIBOR* OPINION

LIBOR is a primary benchmark for short-term interest rates worldwide. Calculated for ten currencies, including the United States Dollar, LIBOR is based on a daily survey of what rate member or "panel" banks estimate they would be charged if borrowing from other banks. LIBOR is calculated and published by Thompson Reuters on behalf of the British Bankers' Association, a trade association for the United Kingdom banking and financial sector. Each business day, the panel banks each report the rate at which they believe they can borrow money from each other. Thompson Reuters ranks the quotes in descending order and then calculates the arithmetic mean to determine LIBOR.[6]

In the wake of multiple global regulatory investigations into the LIBOR rate-setting process, some of which have resulted in high profile government settlements with several banks in the United States and Europe, numerous private suits were filed in the U.S. alleging that panel banks artificially suppressed their rate estimations during the LIBOR polling process to appear more economically secure in the midst of the financial crisis and to benefit their investments in financial products tied to LIBOR. Many of those cases were consolidated under the federal multi-district litigation rules for pre-trial purposes and transferred to Judge Buchwald in *In re LIBOR.*[7]

The *In re LIBOR* cases alleged price-fixing claims under Section 1 of the Sherman Act and California's Cartwright Act antitrust statute, CEA and RICO claims, and claims for unjust enrichment under state law.[8] The plaintiffs in the cases include: (1) "over-the-counter" investors who allegedly purchased financial products tied to LIBOR directly from the defendants; (2) "exchange-based" plaintiffs who traded Eurodollar futures and options contracts on the Chicago Mercantile Exchange that were allegedly affected by the LIBOR rate; (3) "bondholder" plaintiffs that allegedly owned debt securities that paid interest tied to LIBOR; and (4) the Charles Schwab Corporation and certain of its subsidiaries (the "Schwab plaintiffs") which allegedly purchased fixed and floating rate notes from defendants that were tied to LIBOR.

In her March 29, 2013 Order on the defendants' motion to dismiss, Judge Buchwald dismissed the plaintiffs' Sherman Act, Cartwright Act, and RICO claims, granted in part and denied in part plaintiffs' CEA claims, and dismissed the Schwab and exchange-based plaintiffs'

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reconsideration of this ruling and reinstatement of the appeal. *In re LIBOR-Based Financial Instruments Antitrust Litigation*, Nos. 13-3565 (L), 13-3636 (Con) (2d Cir. Dec. 16, 2013). Any Second Circuit review of Judge Buchwald's decision may, therefore, need to await final resolution of the other claims and parties at issue in the consolidated LIBOR cases before Judge Buchwald.

[6] *See* In re LIBOR, 935 F. Supp. 2d at 678-79.

[7] *In re LIBOR-Based Financial Instruments Litigation*, 1:11-md-02262-NRB (S.D.N.Y. Aug. 12, 2011).

[8] The bank defendants in *In re LIBOR* include Bank of America Corp., Barclays Bank PLC, Citibank, N.A., Credit Suisse Group AG, Deutsche Bank AG, HSBC Holdings PLC, J.P. Morgan Chase & Co., Lloyds Banks Group PLC, The Royal Bank of Scotland, The Norinchukin Bank, UBS AG, WestLB AG, Rabobank, HBOS PLC, Bank of Tokyo-Mitsubishi UFJ Ltd., Royal Bank of Canada, Societe Generale, Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., and Bank of Nova Scotia.

other state law claims. In dismissing the antitrust claims, Judge Buchwald held that plaintiffs suffered no antitrust injury because LIBOR was never intended to be a competitive rate-setting process.[9] She reasoned that defendants had not restrained competition in the market for LIBOR-based financial instruments because any alleged collusion did not harm competition between buyers and sellers of those instruments, holding that plaintiffs' alleged injury would have been the same if each defendant had decided independently to misrepresent its estimated borrowing costs.[10]

Judge Buchwald explained that any allegations that the defendants skewed LIBOR to portray themselves as economically healthier than they were or to benefit their LIBOR-based investments were "consistent with normal commercial incentives facing defendants."[11] Noting that the alleged conduct might be actionable as misrepresentations or fraud, Judge Buchwald held that it nonetheless did not cause the type of injury the antitrust laws were intended to prevent.[12]

III. *IN RE LIBOR'S* IMPACT ON PLATTS AND FX

The extent to which Judge Buchwald's Sherman Act rulings in *In re LIBOR* will impact the Platts and FX cases is yet to be determined. The Second Circuit's recent orders dismissing the appeals of those rulings as premature may defer any appellate review until after all of the consolidated LIBOR cases before Judge Buchwald are finally resolved as to all claims and all parties. In the interim, clear parallels among the cases will most certainly be examined. Indeed, although the benchmarks in the cases were set differently, Judge Buchwald's antitrust analysis should be applicable to and could be dispositive of the Sherman Act claims alleged in the FX and Platts cases.

Like LIBOR, the FX and Platts benchmarks are set through a process administered by third parties who calculate and publish the applicable rates. The benchmark in the foreign exchange cases is called WM/Reuters, published by a company of the same name, a joint venture between WM Company (owned by State Street Trust) and Thomson Reuters. To calculate the benchmark, WM/Reuters takes the median of actual trades and order rates in actual transactions through which foreign currencies are exchanged during a one minute "fix" period once every hour or half-hour, depending on the currency.

The Platts cases involve a similar but distinct rate, called "Dated Brent," the primary benchmark for the pricing of Brent Crude Oil. Platts, the energy news and data unit of McGraw-Hill, determines daily Dated Brent rates based on bids, offers, and trades voluntarily reported to Platts during a 30 to 45 minute "window" period by traders registered with Platts Global Alert, the company's screen-based news and pricing network. In addition to the trade data supplied by registered companies, Platts considers pricing information it obtains through other sources of market information. The Platts reporters evaluate this trade and other data to set a "market-on-

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[9] *In re LIBOR*, 935 F. Supp. 2d at 688-89.
[10] *Id.* at 689-90.
[11] *Id.*
[12] *Id.*

close spot oil price" through pricing methodologies that Platts has developed and refined over time.[13]

As in *In re LIBOR*, the FX and Platts plaintiffs allege, among other claims, that market participants who supplied information to the rate-setters conspired in violation of the Sherman Act to manipulate the benchmark to benefit their investments tied to the rate.[14] In FX, a pension fund and a South Korean corporation brought class action cases, alleging that financial institutions involved in substantial FX trading illegally conspired to (i) complete off-setting trades in order to eliminate risk; (ii) "trade ahead" of their clients in the short trading "window" WM/Reuters used set the benchmarks; and (iii) charged their clients ambiguous fees or "fat" spreads.[15] Plaintiffs in the Platts cases similarly allege that trading in the applicable window was manipulated to impact the benchmark used in Brent Crude oil futures contracts and options.[16] These cases seek damages based on trades made at allegedly artificial prices purportedly as the result of defendants' alleged manipulation of the rates set by Platts.

While the benchmarks at issue in these cases, and the conduct alleged, may differ somewhat from the benchmarks and conduct alleged in *In re LIBOR*, Judge Buchwald's rationale for dismissal of the Sherman Act claims may nonetheless apply. Like LIBOR, none of the defendants in Platts or FX competed in the setting of the applicable rates. Rather, Platts and FX rates were set by a third party using data that reflected actual market trades and, in both cases, the methodologies used by the third parties which calculated the rate considered additional sources of market information. That independent, third party assessment of data to determine the published rates was not a competitive process in which defendants participated. As a result, as in *In re LIBOR,* any harm to plaintiffs caused by Platts or FX benchmark rates arguably was not the result of any cognizable restraint of trade that impaired competition.

Similarly, as in the LIBOR cases, the competition in which the defendants allegedly engaged in the Platts and FX cases was competition in the underlying markets, including the markets in which they traded with each other and third parties in financial products that used the benchmarks as reference rates. Such competition arguably was distinct from any competition in the setting of the rate. And to the extent such trading was allegedly fraudulent, deceptive, or manipulative, those allegations — like similar assertions made in *In re LIBOR* —may sound in fraud or misrepresentation but not give rise to claims under the Sherman Act.

IV. CONCLUSION

When viewing the financial benchmark cases through the lens of the Sherman Act, Judge Buchwald's decision addresses a fundamental question: To what extent is the setting of a

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[13] *See* Complaint, *Prime International Trading, Ltd. v. BP plc, et al.,* No. 1:13-cv-03473 (S.D.N.Y. May 22, 2013)

[14] In addition to Sherman Act claims, the FX and Platts plaintiffs also allege CEA and state law claims.

[15] *See, e.g.*, *Simmtech Co. v. Barclays Bank PLC*, No. 1:13-cv-07953-UA (S.D.N.Y. November 8, 2013); *Haverhill Retirement System v. Barclays Bank PLC*, No. 1:13-cv-07789-ER (S.D.N.Y. November 1, 2013).

[16] *See e.g.,* Complaint, *Prime International Trading, Ltd. v. BP plc et al.*, No. 13-CV-3473 (S.D.N.Y. 2013); *see also* Peg Mackey and Alex Lawler, *EU oil price probe puts Platts in spotlight*, Reuters, May 15, 2013. Over a dozen of these cases have been filed, including by individual traders and private placement funds. Nearly all of these cases have been consolidated for pre-trial purposes in the Southern District of New York in *In re North Sea Brent Crude Oil Litigation*. No. 1:13-md-02745-ALC-SN (S.D.N.Y. Oct. 22, 2013).

benchmark rate, which is administered, calculated and published by a third party, a competitive process the alleged manipulation of which is a harm that the antitrust laws are intended to prevent? If, as Judge Buchwald concluded, there is no competition in the setting of the rate (as opposed to the competition that occurs with respect to underlying products tied to the rate), then the antitrust laws may not provide a basis upon which private litigants can assert claims under the Sherman Act challenging conduct that allegedly impacts the applicable benchmark. One thing is clear: Judge Buchwald's decision will be considered by many as a significant part of how those issues should be resolved.