LIBOR Manipulation Litigation: Current Litigation and the Changing Landscape *by David A. Elliott and S. Kristen Peters*

LIBOR, the world's most popular floating-rate index number, has undoubtedly lost reliability in the wake of the 2008 financial crisis. In 2008, news sources began to cast doubt on "the world's most reliable number," and subsequent investigations revealed that contributor banks, in fact, manipulated LIBOR rates. Lawsuits filed by lenders, municipalities, individuals, and a host of other plaintiffs ensued. However, what at first appeared to be the largest antitrust case in history has since been whittled down. It remains to be seen what the effect LIBOR manipulation will have on current and future lawsuits as judges across the country continue to rule.

I. OVERVIEW

A. What is LIBOR?

LIBOR--the London InterBank Offered Rate--is the estimated interest rate banks are willing to loan to each other on an unsecured basis.[1] The British Bankers' Association ("BBA"), a trade association comprised of over 200 member banks for the banking and financial services sector, selects a panel of banks to contribute (the "Contributor Panel") for each currency. Currently, LIBOR is calculated in ten currencies with fifteen maturities for each currency.[2] The Contributor Panel's submission is based on the response to the following question, which has been in place since 1998: "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?"[3] As such, the interest rates are purely estimates. By 11:10 am London time each business day, the Contributor Panel submits its estimated interest rates to Thomson Reuters. Thomson Reuters then ranks each rate and excludes the highest and lowest quartiles. The middle two quartiles are averaged to get the LIBOR fix. By 11:30 am London time, Thomson Reuters publishes the rates as well as each Contributor Panel bank's submitted rates along with the name of the bank. As of July 8, 2013, the New York Stock Exchange Euronext Rate Administration Limited is the administrator for LIBOR.[4]

---

[1] The BBA defines LIBOR as: "The rate at which an individual contributor panel bank could borrow funds, were it to do so by asking for and then accepting inter-bank offers in reasonable market size, just prior to 11:00am London time." BBA LIBOR, Definitions, http://www.bbalibor.com/explained/definitions (last visited Aug. 14, 2013).

[2] BBA LIBOR, Historical Perspective, http://www.bbalibor.com/explained/historical-perspective (last visited Aug. 14, 2013).

[3] BBA LIBOR, The Basics, http://www.bbalibor.com/explained/the-basics (last visited Aug. 14, 2013).

[4] NYSE, News Releases, http://www.nyse.com/press/1373365567815.html (last visited Aug. 14, 2013).

In the early 1980s, banks began trading forward rate agreements and sought a benchmark that would create uniformity and allow them to set rates on syndicated debt.[5] By using a standard rate, banks could assure customers that the interest rates offered to them were close to their own cost of borrowing.[6] The first LIBOR rates were published in 1986, and because of its long history, LIBOR has traditionally been one of the most reliable numbers in the world.

Today, LIBOR serves as the primary benchmark for short-term interest rates and is tied to trillions of dollars in loans and derivatives. LIBOR affects the bond market, the stock market, LIBOR-based derivatives, adjustable-rate mortgages with LIBOR reset, interest rate swaps, student loans, and other financial products.

B. The World's Most Reliable Number?

LIBOR is a key indicator of bank health and tends to rise when banks are in trouble. On the other hand, a low LIBOR rate indicates strong bank health. Beginning in 2008 and during the financial crisis, people started questioning LIBOR's reliability.[7] LIBOR and the default-insurance market typically moved together, and the cost of insurance against banks defaulting on their debt rose as people speculated about possible bank failures in January 2008.[8] However, LIBOR failed to reflect the rising cost of insurance; in fact, LIBOR dropped.[9] The divergence led many to question whether LIBOR accurately reflected bank health.

At the outset, many believed banks submitted manipulated rates to avoid the perception that they were struggling. However, in June 2012, the U.S. Department of Justice entered into a Non-Prosecution Agreement with Barclay's Bank PLC and, for the first time, it was suggested that banks manipulated the LIBOR rate for financial incentive.[10] As bankers began to face conspiracy charges[11] and banks faced investigation by various states, the focus shifted to banks' manipulating rates to profit on trades rather than simply to appear healthier than they were.[12]

---

[5] Mollenkamp, Carrick, *Libor Fog: Bankers Cast Doubt on Key Rate Amid Crisis*, WALL ST. J., Apr. 16, 2008, at A1; BBA LIBOR, Historical Perspective, http://www.bbalibor.com/explained/historical-perspective (last visited Aug. 14, 2013).

[6] Mollenkamp, *supra* note 5.

[7] *See id.*; Mollenkamp, Carrick, *Libor Surges After Scrutiny Does, Too; Banks May Be Reacting as BBA Speeds Probe; Impact on Borrowers*, WALL ST. J., Apr. 18, 2008, at C1; Mollencamp, Carrick & Whitehouse, Mark, *Study Casts Doubt on Key Rate: WSJ Analysis Suggests Banks May Have Reported Flawed Interest Data for Libor*, WALL ST. J., May 29, 2008, *available at* http://online.wsj.com/article/SB121200703762027135.html (last visited Aug. 14, 2013).

[8] Mollencamp & Whitehouse, *supra* note 7.

[9] *Id.*

[10] *See* Barclays Bank PLC, U.S. Dep't of Justice Non-Prosecution Agreement (June 26, 2012), *available at* http://www.justice.gov/iso/opa/resources/337201271017335469822.pdf.

[11] Werdigier, Julia & Protess, Ben, *Britain Charges Former Trader in Libor Inquiry*, N.Y. TIMES, June 19, 2013, at B4.

[12] Protess, Ben, *State Regulators Widen Libor Investigation*, N.Y. TIMES, Aug. 15, 2012, *available at* http://dealbook.nytimes.com/2012/08/15/state-regulators-widen-libor-investigation/.

II. RECENT CHANGE TO THE LIBOR MANIPULATION LITIGATION LANDSCAPE

In 2011, entities began filing private lawsuits, including class actions, against Contributor Panel Banks alleging harm suffered from LIBOR manipulation.[13] The Judicial Panel on Multidistrict Litigation transferred several of these cases to the United States District Court for the Southern District of New York on August 12, 2011.[14] Plaintiffs have been comprised of, for example, lenders alleging that the suppression of LIBOR prevented them from collecting the full measure of interest income in connection with adjustable rate mortgage;[15] municipalities alleging financial losses from trading in LIBOR-based derivatives;[16] and financial institutions that purchased LIBOR-based derivatives and paid an artificially low return.[17] Judge Naomi Buchwald is the presiding judge over the MDL cases.

While some heralded LIBOR manipulation litigation as the largest antitrust case in history,[18] Judge Buchwald's opinion issued on March 29, 2013, dismissed antitrust claims central to LIBOR manipulation litigation actions.[19] In addition, Judge Buchwald dismissed plaintiffs' RICO claims and, significantly, ruled that the statute of limitations on LIBOR-based claims began running in May 2008 when the *Wall Street Journal* began reporting on suppressed LIBOR rates.[20] Judge Buchwald's opinion specifically affected four categories of plaintiffs: (1) over-the-counter ('OTC') plaintiffs;[21] (2) exchange-based plaintiffs,[22] (3) bondholder plaintiffs;[23] and (4) Charles Schwab plaintiffs ("Schwab plaintiffs").[24] Of those four cases, all but the Charles Schwab plaintiffs were class actions.[25]

In the cases consolidated before Judge Buchwald, plaintiffs alleged a violation of Section 1 of the Sherman Act alleging that they were injured by defendants' conspiracy in restraint of trade.[26] The court found that to demonstrate standing, plaintiffs must show that they suffered an antitrust injury and that they were a proper plaintiff under the "'efficient enforcer' factors."[27] The court first said that an antitrust injury was one "attributable to an anti-competitive aspect of the

[13] *See In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 11 MD 2262-NRB (S.D.N.Y. Mar. 29, 2013) (Buchwald, J.)

[14] *See In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 11 MD 2262-NRB (S.D.N.Y. Mar. 29, 2013) (Buchwald, J.) (citing *In re Libor-Based Fin. Instruments Antitrust Litig.*, 802 F. Supp. 2d 1380, 1381 (J.P.M.L.); 28 U.S.C. § 1407 (2006)).

[15] *See The Berkshire Bank v. Bank of Am. Corp.*, Case No. 1:12-cv-05723-NRB (S.D.N.Y. July 25, 2012).

[16] *See City of Baltimore v. Bank of Am. Corp.*, Case No. 1:11-cv-05450-NRB (S.D.N.Y. Aug. 5, 2011).

[17] *See Charles Schwab Bank, N.A. v. Bank of Am. Corp.*, 1:11-cv-06411-NRB (S.D.N.Y. Apr. 30, 2012).

[18] Downey, Kirstin, *Is LIBOR the Biggest Antitrust Case in History?*, 810 FTC:Watch 1 (2012).

[19] *See In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 11 MD 2262-NRB (S.D.N.Y. Mar. 29, 2013) (Buchwald, J.).

[20] *See id.*

[21] *City of Baltimore v. Bank of Am. Corp.*, Case No. 1:11-cv-05450-NRB (S.D.N.Y. Aug. 5, 2011).

[22] *FTC Capital GmbH v. Credit Suisse Group*, 11 Civ. 2613 (S.D.N.Y. filed Apr. 15, 2011).

[23] *Gelboim v. Credit Suisse Group*, 12 Civ. 1025 (S.D.N.Y. filed Feb. 9, 2012).

[24] *Schwab Short-Term Bond Market Fund v. Bank of Am. Corp.*, 11 Civ. 6409 (S.D.N.Y. filed Sept. 14, 2011); *Charles Schwab Bank, N.A. v. Bank of Am. Corp.*, 11 Civ. 6411 (S.D.N.Y. filed Sept. 14, 2011); *Schwab Money Market Fund v. Bank of Am. Corp.*, 11 Civ. 6412 (S.D.N.Y. filed Sept. 14, 2011).

[25] *Id.*

[26] *Id.* at 26.

[27] *Id.*

practice under scrutiny."[28] Notably, the court determined that the process of setting LIBOR was never intended to be competitive as LIBOR is not tied to products and the alleged collusion occurred in an arena that was never intended to be competitive.[29] Finding that plaintiffs failed to demonstrate an antitrust injury, the court dismissed their antitrust claims.

In support of their RICO claim, the Schwab plaintiffs alleged that defendants violated Sections 1962(c) and 1962(d) of RICO.[30] Specifically, the Schwab plaintiffs alleged that defendants were part of an association whose purpose was to cause the BBA to set LIBOR artificially low and allow defendants to increase their revenues by making artificially low payments to investors.[31] First, the court found that the Private Securities Litigation Reform Act of 1995 ("PSLRA") barred the Schwab plaintiffs' RICO claim as it amends RICO to provide that "no person may rely upon any conduct that would have been actionable in fraud in the sale of securities to establish a violation of section 1962."[32] Broadly interpreting this provision, the court found that the Schwab plaintiffs' claims were barred by the PSLRA because they could be subject to a securities fraud action brought by the Schwab plaintiffs or the SEC.[33] The court also dismissed the Schwab plaintiffs' RICO claims on the separate basis that they were based on conduct outside of the United States and, thus, violated *Morrison*'s extraterritoriality provision.[34]

Plaintiffs claimed that defendants violated the Commodity Exchange Act ("CEA") by manipulating Eurodollar futures and argued that defendants were vicariously liable for aiding and abetting such manipulation. Defendants moved to dismiss arguing that the CEA cannot be applied extraterritorially and that the claims were time-barred. Addressing defendants' argument that plaintiffs sought to apply CEA extraterritorially, the court found that the CEA is applied domestically if the claim involves (1) commodities in interstate commerce or (2) futures contracts traded on domestic exchanges.[35] The court determined that plaintiffs' claims plainly involved manipulation of the price of domestically traded futures contracts and found that plaintiffs did not seek to apply the CEA extraterritorially.

Turning to defendants' argument that plaintiffs' CEA claims were time-barred, the court applied an inquiry notice analysis. The court first noted that plaintiffs did not inquire into their injury prior to March 15, 2011.[36] Because the statute of limitations on a claim on under the CEA is two years, the court said that if the circumstances suggested that plaintiffs had been defrauded prior to March 15, 2009, then claims based on Eurodollar contracts purchased before such date were barred.[37] The court went on to find that as of May 29, 2008, prominent national news sources published several articles, and referenced one report, suggesting that LIBOR had been manipulated.[38] In response, plaintiffs argued that they were not on inquiry notice until March 15, 2011 when UBS

[28] *Id.* (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)).
[29] *Id.* at 31, 157.
[30] *Id.* at 126.
[31] *Id.* at 126 (citing Schwab Bank Am. Compl.,¶ 219).
[32] *See* 18 U.S.C. § 1964(c).
[33] *Id.* at 127.
[34] *Id.* at 140-41 (citing *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010)).
[35] *Id.* at 52.
[36] *Id.* at 56.
[37] *Id.*
[38] *Id.* at 60.

released its annual report revealing investigations into its interest rate submissions.[39] Further, plaintiffs argued that news articles failed to put them on inquiry notice because they were based on speculation and, at the time, banks denied that interest rates were manipulated.[40] Rejecting plaintiffs' arguments, the court held that claims that accrued prior to March 15, 2009 were time-barred.

III. CURRENT LITIGATION AND THE FUTURE OF LIBOR MANIPULATION LITIGATION

Judge Buchwald's opinion will undoubtedly shape much of the LIBOR manipulation litigation going forward, regardless of whether claims are pending in the Southern District of New York. And while her opinion has likely forestalled antitrust and RICO claims, Judge Buchwald suggested that claims based in fraud and breach of contract will be more viable. Thus, plaintiffs are filing complaints--and amending complaints--to include such claims.[41] In light of the decision, plaintiffs will also be required to overcome statute of limitations issues.

Equally challenging for plaintiffs will be proving damages. Some suggest that plaintiffs will be required to unwind complicated transactions to point to specific losses.[42] Defendants will likely require plaintiffs to "net" any alleged losses against any gains realized as a result of a suppressed LIBOR rate.[43] In other words, plaintiffs will be required to analyze their entire portfolio and set off losses from LIBOR-related transactions against gains from other LIBOR-related transactions.

For example, in *Salix Capital US, Inc. v. Banc of America Securities LLC*,[44] investment fund plaintiffs filed suit against contributor panel banks alleging, among other things, breach of contract and fraud. Relying on facts made public from Barclays, UBS, and RBS's settlements with the FSA, CFTC, and DOJ's Fraud Section, plaintiffs pointed to the banks' admissions that they intentionally manipulated LIBOR to make a profit.[45] Plaintiffs entered into basis packages with the panel banks which were comprised of corporate fixed-rate bonds, credit default swaps, and interest rate swaps, which were meant to hedge credit risk.[46] Plaintiffs alleged that LIBOR lowered the payments received on swaps and defeated the fund's hedging strategy on the bonds. Plaintiffs further alleged that misrepresenting the LIBOR rate, upon which the floating rate described in the ISDA Master Agreement was based, constituted a breach of contract and breach of the duty of good faith and fair dealing. To overcome potential statute of limitations issues, plaintiffs argued that defendants' conduct constituted a continuing violation, that defendants concealed the fraud,

---

[39] *Id.* at 72.

[40] *Id.*

[41] *See*, *e.g.*, No. 651823/2013 (N.Y. Sup. Ct. May 20, 2013), *removed*, *Salix Capital US Inc. v. Banc of Am. Secs LLC*, No. 13-cv-4018 (S.D.N.Y. June 12, 2013); *Mayor & City Council of Baltimore v. Credit Suisse Group AG*, MDL No. 2262, Master File No. 1:11-md-2262-NRB (S.D.N.Y. May 17, 2013); *Metzler Investment v. Credit Suisse Group AG*, MDL No. 2262, 11 Civ. 2613, Case No. 1:11-md-2262-NRB (S.D.N.Y. May 23, 2013).

[42] Brian Murray, LIBOR Manipulation Litigation: Latest Trends & Developments: Pursuing & Defending Individual and Class-Action LIBOR-Related Actions, Strafford Webinar, July 11, 2013.

[43] *Id.*

[44] No. 651823/2013 (N.Y. Sup. Ct. May 20, 2013), *removed*, *Salix Capital US Inc. v. Banc of Am. Secs LLC*, No. 13-cv-4018 (S.D.N.Y. June 12, 2013).

[45] *Id.* at ¶¶ 56-97.

[46] *Id.* at ¶¶ 149-50.

and that the *American Pipe* doctrine equitably tolled their claims.[47] Currently pending before the court is plaintiffs' motion to remand to state court, and it remains to be seen whether plaintiffs' arguments regarding the statute of limitations will enable claims to survive.

Judge Shira Scheindlin in the U.S. District Court for the Southern District of New York recently narrowed potential LIBOR manipulation litigation claims even further. In *Gusinsky v. Barclays PLC*, purchasers of Barclays American Depository Shares ("ADS") filed a putative class action against Barclays, its CEO, and the chairman of the board of directors alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.[48] Plaintiffs alleged that defendants made misleading statements regarding Barclays's compliance with laws and regulations and submission rates, and failed to disclose its contingent liabilities as required by the International Accounting Standards ("IAS") Board and SEC.[49] Defendants moved to dismiss plaintiffs' second amended complaint, and the court granted their motion.

The court first said that to sustain a claim under Section 10(b), plaintiff must demonstrate: (1) a material misrepresentation or omission; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation.[50] The court determined that statements related to Barlcays's business practices were not actionable because, pursuant to Second Circuit precedent, generalized statements about a company's business practices are insufficient to support a Rule 10b-5 claim and that the allegations were non-actionable puffery.[51] In addition, the court found that the allegations relating to business practices were not tied to Barclays's LIBOR practices.[52]

Turning next to plaintiffs' allegations that Barclays failed to disclose contingent liability, the court rejected plaintiffs' argument that Barclays's obligation to disclose arose when the illegal conduct first occurred.[53] Instead, the court said that the disclosure obligation would not arise until the illegal conduct was first investigated and, even then, the language of IAS 37 did not require disclosure.[54] Accordingly, the court dismissed plaintiffs' fraud claims based on Barclays's failure to disclose.[55]

Finally, the court found that plaintiffs were unable to show loss causation with respect to Barclays's false LIBOR submission rates. Plaintiffs' allegations were based on submissions that occurred between 2007 and 2009. The court determined that plaintiffs failed to show that the submission rates were false and misleading such that the ADS price would have remained artificially inflated until 2012, since they did not allege that the rate submissions from 2009 to

---

[47] *Id.* at ¶¶ 167-96.

[48] *Gusinsky v. Barclays PLC*, --- F. Supp. 2d ---, 2013 WL 1955881 (S.D.N.Y. May 13, 2013).

[49] *Id.* at *3.

[50] *Id.* at *4 (citing *Ashland Inc. v. Morgan Stanley & Co.*, 652 F.3d 333, 337 (2d Cir. 2011)).

[51] *Id.* at *6 (citing *Boca Raton Firefighters & Police Pension Fund v. Bahash*, No. 12 Civ. 1776, 2012 WL 6621391, at *4 (2d Cir. Dec. 20, 2012)).

[52] *Id.*

[53] *Id.* at *7.

[54] *Id.*

[55] *Id.*

2012 were artificially inflated.[56] The court dismissed plaintiffs' complaint in its entirety, and plaintiffs' appeal is currently pending.

IV. CONCLUSION

LIBOR's pervasive effect throughout the financial market opened the floodgates for litigation. However, recent opinions have drastically limited claims plaintiffs will be able to pursue. While common law fraud claims and breach of contract claims will likely have the most traction going forward, plaintiffs will also have to overcome statute of limitations issues and may face challenges demonstrating damages. In light of Judge Buchwald and Judge Scheindlin's opinions, plaintiffs face significant hurdles to succeed on LIBOR-related claims, but the landscape will continue to change as courts across the country continue to weigh in.

FOR MORE INFORMATION, CONTACT:

David A. Elliott in Birmingham at (205) 458-5324 or delliott@burr.com

S. Kristen Peters in Birmingham at or (205) 458-5169 or kpeters@burr.com

or the Burr & Forman attorney with whom you regularly work.

[56] *Id.* at *7-8.