

***In re LIBOR: More Light, Please! – Questions and Observations  
As the Decision Dismissing Antitrust Claims for Lack of Antitrust Injury  
Now Faces Appellate Review***<sup>1</sup>

- By Richard Wolfram

**Summary:** A key ruling by a federal district court in New York City 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 court ruled in March 2013 that alleged collusion by 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 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.

This article examines both of these legs of the court’s antitrust ruling with a view to upcoming appeal: it explains the doctrine of antitrust injury, 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 consequences of confusing antitrust injury with either antitrust causation or harm to competition come under the spotlight. Ultimately, the issues under discussion resolve to whether the court correctly invoked an absence of antitrust injury in dismissing the antitrust claims, which thereby precludes plaintiffs even from obtaining discovery on questions of fact going to the very question of antitrust injury itself, let alone other substantive elements of their claims. The analysis, including discussion of related case

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<sup>1</sup> © Richard Wolfram 2015. Mr. Wolfram has not represented and does not represent any of the parties involved in any of the benchmark litigations or matters discussed herein, including the principal case under discussion, *In Re Libor-Based Financial Instruments Antitrust Litigation*. His practice is focused on litigation and counseling on antitrust and related intellectual property law matters. The author thanks Sharon Foster, Mark Patterson, Jeffrey May of Wolters Kluwer and a practitioner and an economist for their insightful, helpful comments.

law on antitrust injury, 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.

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## **I. Introduction**

Antitrust injury is one of the most vexing subjects in antitrust jurisprudence. It has tripped up numerous courts, which not infrequently confuse it with either causation (‘injury-in-fact’) or harm to competition, and it continues to give them and litigants fits. Recently, antitrust injury has come to the fore again, in a case with significant potential implications across a number of financial markets. In a March 2013 decision based on this fundamental gate-keeping principle, Judge Naomi Reice Buchwald of the federal district court for the Southern District of New York dismissed antitrust claims that certain banks colluded in the ‘cooperative’ setting of the daily interbank interest rate benchmark known as the London Interbank Offered Rate, or LIBOR, calculated and managed by the British Banking Association (BBA). *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 935 F.Supp.2d 666 (S.D.N.Y. 2013) (“*LIBOR*”). Judge Buchwald held that the plaintiffs, holders of financial instruments for which the rate of return was pegged to the dollar LIBOR rate, failed to meet their burden of plausibly showing that they suffered antitrust injury, but she also denied defendants’ motions to dismiss fraud and other non-antitrust claims.

*Appeal to the Second Circuit is now imminent; significant financial impact from this and other ‘benchmark’ cases, which may look to LIBOR for guidance on antitrust injury from manipulation of benchmarks.* Now, nearly two years later, the decision once again is front and center, and it could have widespread effects. First, when plaintiffs

allege that a decision “affects the pricing of trillions of dollars’ worth of financial transactions”<sup>2</sup> – an allegation that appears to be generally accepted – and allege billions of dollars in damages, and a highly respected federal court dismisses the case for lack of antitrust injury, it clearly is no small matter, and the legal and financial worlds are paying heed.

Second, after a lengthy delay and complex procedural history, appeal from the district court’s decision to the Second Circuit is now imminent, thanks to a lightning-fast decision by the Supreme Court, less than six weeks after oral argument.<sup>3</sup> In short, of the four types of cases (representing some 60 individual actions) consolidated in the LIBOR multidistrict litigation, only one, brought by bondholders, contained only antitrust claims (a single cause of action under Section 1 of the Sherman Act). That case was immediately appealed to the Second Circuit as a final judgment, although it was part of the consolidated proceeding.<sup>4</sup> The Second Circuit dismissed the appeal for lack of jurisdiction, reasoning that the district court’s dismissal was not a final judgment as to all claims (i.e., including non-antitrust claims) in the consolidated LIBOR proceeding. The Supreme Court granted certiorari on the question of the correct interpretation of the final judgment rule, which prevents appeals until after final judgment, except in certain circumstances where an interlocutory appeal may be taken, and argument was heard in December 2014. On January 21st, the Supreme Court reversed the Second Circuit,

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<sup>2</sup> *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 935 F. Supp.2d 666, 679 (S.D.N.Y. 2013) (J. Buchwald) (“*LIBOR*”) (quoting the amended complaint of certain bondholder plaintiffs).

<sup>3</sup> *Gelboim v. Bank of America Corp.*, No. 13-1174, Slip Op. (Jan. 21, 2015) (Ginsburg, J.).

<sup>4</sup> Plaintiffs in all four types of suit sought leave to amend their complaints (for a second time) after the March 2013 decision in order to address the deficiencies identified by the court regarding antitrust injury. The court denied the motions, ruling that even if it allowed amendment – which it considered improper in any case – “plaintiffs’ new allegations would be futile” because “none of [the] allegations make plausible that there was an arena in which competition occurred, that defendants’ conduct harmed such competition, and that plaintiffs suffered injury as a result.” *In re LIBOR*, 962 F.Supp.2d 606 (S.D.N.Y. 2013).

breaking the log-jam and thereby enabling the bondholder plaintiffs to file an immediate appeal. The focus of the briefings and oral argument had been on the bondholder plaintiffs' right to appeal immediately under Rule 54(b) – which addresses orders finally adjudicating fewer than all claims presented in a civil action complaint – in the context of the ongoing suits by other plaintiffs (over-the-counter and exchange-based plaintiffs) in the consolidated action.<sup>5</sup> Writing for a unanimous Court, Justice Ginsburg made it clear that the Court's decision instead rests on the simple fact that the district court's dismissal was a final decision, subject to immediate appeal under the federal rules. Justice Ginsburg commented that there is nothing about the initial MDL consolidation of all of the suits that renders the dismissal of the bondholder plaintiffs' complaint, which included only a claim for violation of Section 1 of the Sherman Act, tentative or incomplete.

There is a further important procedural aspect to the Supreme Court's decision: Judge Buchwald had previously granted Rule 54(b) certifications to the OTC and Exchange plaintiffs authorizing them to appeal the dismissal of their antitrust claims while their other claims are pending in the district court – essentially, at the same time as the bondholders' appeal. But when the Second Circuit dismissed the bondholders' appeal she withdrew the 54(b) certifications. The Supreme Court's decision may now have cleared the way for a consolidation of appeals by the OTC and exchange-based plaintiffs with the bondholders on the dismissal of the antitrust claims.<sup>6</sup>

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<sup>5</sup> Federal Rule of Civil Procedure 54(b) (“Judgment Upon Multiple Claims or Involving Multiple Parties”) provides in relevant part as follows: “When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment.”

<sup>6</sup> Indeed, on January 23<sup>rd</sup>, several days before the scheduled publication of this article, the OTC and exchange-based trading plaintiffs filed a letter with the district court once again requesting that it issue a

Finally, Judge Buchwald’s dismissal on antitrust injury grounds comes amidst a whirlwind of government enforcement actions, settlements, legislation and private suits on both sides of the Atlantic relating not only to LIBOR but a host of other financial benchmarks as well. These matters concern benchmarks, in addition to LIBOR, for foreign exchange, currency, interest rate derivatives, crude oil futures, gold and silver.<sup>7</sup> What the affected markets and legal actions typically have in common, notwithstanding their differences, is a benchmark-setting mechanism to which banks or other participants contribute in a collaborative fashion, even as they compete downstream on financial instruments, currencies or commodities. Although most if not all of these matters have proceeded on the basis of non-antitrust claims, many also potentially could include antitrust claims, particularly private ‘piggyback’ actions, and a final decision on the issue of antitrust injury in *LIBOR* quite possibly would be cited as a reference, or even precedent, in other benchmark suits, allowing of course for factual distinctions.

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Rule 54(b) certification of final judgment of dismissal of their antitrust claims, as separable from the rest of their ongoing actions, in order to join the appeal.

<sup>7</sup> For instance, reportedly, as of early September 2014, banks, including many of the bank defendants in the private LIBOR actions, had paid out more than \$6 billion in settlements and fines over their alleged participation in a concerted manipulation of LIBOR (Law 360, Portfolio Media, Sept. 25, 2014); in November 2014, five banks agreed to pay \$3.3 billion in fines to the U.S. Commodities and Futures Trading Commission and the U.K.’s Financial Conduct Authority to resolve allegations that they attempted to manipulate foreign exchange rates (CNN, Nov. 12, 2014); in September 2014, the U.K. government, having passed legislation in 2013 to criminalize the manipulation of LIBOR, announced that it would seek to criminalize the manipulation of seven more benchmarks, including currency, foreign exchange, swaps and commodities, such as oil, gold and silver (Law360, Portfolio Media, Sept. 25, 2014); in October 2014, a class action was filed alleging that a number of banks and the interdealer ICAP conspired to manipulate the ISDA (International Swaps and Derivatives Association) fix rate for valuation of interest rate derivatives, on the heels of a suit filed by the U.S. Commodities and Futures Trading Commission making similar allegations (Law360, Portfolio Media, Oct. 1, 2014); in 2012, Barclays paid U.S. and U.K. regulators a total of \$450 million over allegations it rigged LIBOR and the Euro Interbank Offered Rate (Law 360, Portfolio Media, Oct. 8, 2014); in early October 2014, Barclays agreed to pay nearly \$20 million to settle a class action accusing it of manipulating LIBOR with respect to LIBOR-based Eurodollar futures contracts (Law360, Portfolio Media, Oct. 8, 2014); and in early January 2015, JPMorgan Chase agreed to pay \$100 million to settle a class action suit alleging that the bank participated in a conspiracy to rig the approximately \$5 trillion-per-day foreign exchange market (Bloomberg, Jan. 5, 2015).

By way of background, we begin with the concept of antitrust injury, then summarize the facts of *LIBOR* and re-state Judge Buchwald’s rationale. All of this will set the stage for a closer critical look.<sup>8</sup>

## II. Antitrust Injury

In order to sustain a claim for damages under U.S. federal antitrust law, private plaintiffs – as distinguished from federal or state government plaintiffs – must show that they have standing under Section 4 of the Clayton Act, and one element of standing is antitrust injury. Antitrust injury, in the words of the familiar formulation by the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, is “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.”<sup>9</sup> As the Court further explained in *Brunswick*, “[t]he injury should reflect the anticompetitive effect *either of the violation or of anticompetitive acts made possible by the violation.*”<sup>10</sup> And as Judge Buchwald notes, citing *Atlantic Richfield Co. v. USA Petroleum Co.* (“*ARCO*”), “[a]lthough conduct in violation of the Sherman Act might reduce, increase, or be neutral with regard to competition, a private plaintiff can recover for such a violation only where ‘the loss stems from a competition-*reducing* aspect or effect of the defendant’s behavior’.”<sup>11</sup> Essentially, this means that in order to recover under federal antitrust law, a private plaintiff must show not only that it was standing in

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<sup>8</sup> The LIBOR-setting process and the banks’ conduct are typically described herein in the present tense, to refer to the relevant time period at issue in the suit; there is no intent to imply that the conduct at issue is ongoing. On February 1, 2014, in the wake of the alleged widespread rigging of LIBOR, the administration of LIBOR was taken over by the Intercontinental Exchange (ICE), and what was known previously as BBA LIBOR is now known as ICE LIBOR.

<sup>9</sup> 429 U.S. 477, 489 (1977).

<sup>10</sup> *Id.* (emphasis added).

<sup>11</sup> *LIBOR* at 686 (citing *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990) (“*ARCO*”) (emphasis in original)).

the way of the damage resulting from the conduct, but that the conduct violated the antitrust laws and that it was that violation that caused the harm to the plaintiff. Thus, as Judge Buchwald states: “a plaintiff must demonstrate *not only* that it suffered injury and that the injury resulted from defendants’ conduct, *but also* that the injury resulted from the anticompetitive nature of the defendants’ conduct.”<sup>12</sup>

*Distinct from, but sometimes confused with, antitrust causation.* Antitrust injury is distinct from antitrust causation, or ‘injury-in-fact’, which also is a required element of any antitrust claim. The plaintiff must show that the antitrust violation is a material cause of, or contributed significantly (even if not exclusively) to, the claimed injury; that is, the plaintiff must show a causal link between the defendants’ conduct in violation of the antitrust laws and plaintiff’s loss. If the plaintiff would have suffered the same injury even in the absence of the challenged restraint, there is no antitrust causation. The more speculative such independent cause is, however, the less likely it is to be viewed as undercutting the plaintiff’s showing of antitrust causation. And typically causation is not an issue disposed of on a motion to dismiss but instead a question of fact that can be resolved at the earliest only after discovery, on a motion for summary judgment.<sup>13</sup> As discussed in further detail below, antitrust injury and antitrust causation are sometimes confused, and the effect can be consequential, especially, for instance, on a motion to dismiss, if what is in fact a question of causation is instead mistaken for a question of

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<sup>12</sup> *LIBOR* at 686 (citation omitted).

<sup>13</sup> To establish a prima facie case of causation, the plaintiff “need only establish that [the defendant] violated the antitrust laws, that [the defendant’s] alleged violations had a tendency to injure [the plaintiff’s] business, and that [the plaintiff] suffered a decline in its business ‘not shown to be attributable to other causes.’” *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1495 (8<sup>th</sup> Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993). And “to defeat causation, the defendant must then offer evidence that other forces caused the plaintiff’s harm. Once the defendant does so, the burden remains on the plaintiff to persuade the jury that the antitrust violation was a material cause.” Areeda and Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 338a (2014).

antitrust injury and causation, properly identified, would be addressed more properly on a motion for summary judgment.

*Distinct from, but sometimes confused with, harm to competition.* Antitrust injury is also distinct from harm to competition, which is also a necessary element of any antitrust claim. Numerous decisions have found a lack of antitrust injury and dismissed on this ground where the plaintiff failed to show harm to competition itself, rather than only to itself; this is not the absence of antitrust injury, properly speaking, but instead the absence of harm to competition, which means no violation of antitrust law.<sup>14</sup>

In sum, a plaintiff must establish that defendant's conduct harmed competition (states a claim for relief under the antitrust laws), that it caused plaintiff's injury (causation), and that plaintiff's injury is the result of the anticompetitive nature of defendant's conduct (antitrust injury -- the type of injury antitrust laws were meant to prevent).

Correct identification of the grounds for dismissal – that is, for lack of antitrust injury, causation or harm to competition – is not, as we shall see, merely a matter of nomenclature but can instead determine whether a court has properly dismissed antitrust claims or not.

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<sup>14</sup> See, e.g., Areeda and Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 337 (“Antitrust Injury”) (2014) (“While some courts speak of ‘antitrust injury’ comprehensively to include injury-in-fact caused by the defendant or lack of any impact on competition, we use that term in the precisely focused sense of *Brunswick*. To say that the plaintiff has not alleged or shown any injury-in-fact requires dismissal on grounds of causation or lack of injury. To say that the plaintiff has not suffered injury to competition is to conclude that the antitrust laws have not been violated at all. Neither of these is “antitrust injury” in the sense that *Brunswick* used the term, where the Court assumed both injury-in-fact and an antitrust violation.”) (citations omitted, collecting numerous cases and describing *LIBOR* holding as “troublesome,” while noting also that the plaintiffs consulted Professor Hovenkamp, the author of the treatise, following the *LIBOR* decision)).



### III. Facts of *LIBOR*

During the time period relevant to the suit, LIBOR was a daily average of interest rates submitted to and then calculated by the British Bankers' Association (BBA).

LIBOR was intended to reflect the rate-submitting banks' expected costs of borrowing U.S. dollars from other banks; those borrowing costs, put simply, are of course interest rates. The BBA averaged the submitted rates by calculating the arithmetic mean of the middle two quartiles and that mean then became the LIBOR for the given day.

The defendants were members of a panel of banks organized and selected by the BBA for the calculation of the daily US Dollar LIBOR fix. This rate in turn was used as a benchmark for interest rates to be paid to investors by the defendant banks on a variety of financial instruments, including the principal types at issue in the case. LIBOR was calculated for ten currencies and 15 distinct maturities ranging from overnight to 12 months. The Contributor Panel for the US dollar LIBOR, the rate at issue in this case, consisted of 16 banks – the defendants. Each day the banks on a given Contributor Panel answered the following question concerning the currency at issue for that panel: “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 a.m.”<sup>15</sup> As the court notes, the question did not ask banks to report an interest rate, or an average of rates, that they *actually* paid but instead asked banks to predict the rate at which they can borrow unsecured funds from other banks in the London wholesale money market.<sup>16</sup> By 11:10 a.m. each day, they answered this question with respect to all 15 maturity periods. Furthermore, and most importantly for the case, each bank, according to the Department

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<sup>15</sup> Hence the term “interbank offered rate.”

<sup>16</sup> *LIBOR*, 935 F.Supp.2d at 678 (quoting OTC Complaint).

of Justice, was expected to “submit its rate without reference to rate[s] submitted by other Contributor Panel banks.”<sup>17</sup>

The LIBOR case is a multidistrict litigation consolidating some 60 cases in which various private plaintiffs, investors in four different categories of financial instruments, alleged that they suffered harm as a result of a concerted suppression of LIBOR. The four sets of antitrust claims dismissed in the consolidated litigation, corresponding to four categories of financial instruments, were brought, respectively, by investors in hundreds of millions of dollars of interest rate swaps (the “over-the-counter (OTC) plaintiffs”); investors in bonds/debt securities (the ‘bondholder plaintiffs’)<sup>18</sup>; investors in Eurodollar futures contracts,<sup>19</sup> described as the most actively traded futures contracts in the world, traded on such exchanges as the Chicago Mercantile Exchange (the ‘exchange-based plaintiffs’); and investors through Schwab in various floating and fixed-rated instruments (the ‘Schwab plaintiffs’). All of the plaintiffs alleged that the return on the instruments in which they invested was indexed directly to LIBOR. The OTC, bondholder and Schwab plaintiffs alleged that the defendants’ concerted manipulation and suppression of LIBOR resulted in their receiving lower returns (i.e., lower payments on interest rate swaps, lower interest on bonds/debt securities and lower value on various Schwab invested-instruments). The exchange-based plaintiffs alleged that the defendants’ concerted manipulation and suppression of LIBOR caused Eurodollar contracts to trade and settle at

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<sup>17</sup> *Id.* (quoting a settlement agreement between the U.S. Department of Justice, Criminal Division, and Barclays at ¶ 6 (June 26, 2012). The court noted that following the filing of plaintiffs’ amended complaints on April 30, 2012, “several governmental agencies,” including the DOJ, the Commodities Futures Trading Commission and the United Kingdom Financial Services Authority, “disclosed that they had reached settlements with Barclays with regards to its submission of artificial quotes.” 935 F.Supp.2d at 681. Regarding this and other settlements, *see n. 7, supra*.

<sup>18</sup> As noted, the bondholder plaintiffs were the only plaintiffs alleging only antitrust claims.

<sup>19</sup> Eurodollars are U.S. dollars deposited in commercial banks outside the United States.

artificially high prices so that, because these plaintiffs bought such contracts during the class period, they had to pay supracompetitive prices for the contracts.

*Examples of use and alleged suppression of LIBOR.* An example of the benchmark role played by LIBOR is instructive. For instance, as the court explains, market actors “commonly set the interest rate on floating-rate notes [in which the seller of the note pays the buyer a variable rate] as a spread against LIBOR’, such as LIBOR plus 2%, and ‘use LIBOR as a basis to determine the correct rate of return on short-term fixed-rate notes [in which the seller of the note pays the buyer a fixed rate] by comparing the offered rate to LIBOR).”<sup>20</sup>

Another example comes from the settlement with Barclays, mentioned above. The CFTC, in its order settling with Barclays, stated that it engaged in “wrongful conduct span[ning] from at least 2005 through at least 2009” at times “on an almost daily basis.”<sup>21</sup> In particular, “Barclays based its LIBOR submissions . . . on the requests of Barclays’ swaps traders . . . who were attempting to affect the official published LIBOR, in order to benefit Barclays’ derivatives positions [which] included swaps and futures trading positions.”<sup>22</sup> As the court further detailed, the DOJ, FTC and U.K. FSA “documented instances in which Barclays’ LIBOR submitters had accommodated requests from traders for an artificially high LIBOR quote as well as instances where the LIBOR submitters had accommodated requests for an artificially low LIBOR quote. In addition to this manipulation to benefit daily trading positions, leading to either an artificially high or artificially low LIBOR quote, the agencies found that from ‘late August 2007 through early 2009,’ Barclays’ LIBOR submitters, ‘pursuant to a directive by certain members of

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<sup>20</sup> *LIBOR*, 935 F.Supp.2d at 679 (citing OTC Plaintiffs’ Amended Complaint).

<sup>21</sup> *Id.* at 681, quoting CFTC Order.

<sup>22</sup> *Id.*

Barclays' senior management'[, ] consistently submitted artificially low LIBOR quotes 'in order to manage what [Barclays] believed were inaccurate and negative public and media perceptions that Barclays had a liquidity problem'."<sup>23</sup> As explained in further detail below, although this conduct, which at first glance may reflect only independent, unilateral motives on the part of a given bank – here, Barclays – concerning the estimated borrowing costs it submitted to the BBA, it also allegedly gave rise to an incentive to collude with the other defendant banks on the LIBOR panel.

*Defendants' alleged motives.* Plaintiffs offered two main motives for the defendant banks' alleged collusive suppression of LIBOR.<sup>24</sup> First, the plaintiffs explained, the interest rate a bank pays or expects to pay on its debts reflects the market's assessment of risk associated with that bank. Generally, other factors being equal, the lower the rate, the more confidence by the market in that bank's ability to pay. The banks therefore allegedly had an incentive to suppress LIBOR – namely, to portray themselves as economically stronger than they were in fact. Furthermore, "because no one bank would want to stand out as bearing a higher degree of risk than its fellow banks, each Defendant shared a powerful incentive to collude with its co-Defendants to ensure it was not the 'odd man out'."<sup>25</sup> In normal, competitive market conditions, the probability that a bank will default on an obligation correlates positively with its cost of borrowing; the higher the perceived risk, the higher the rate. Consequently, "investors require a higher . . . rate of return as a premium for taking on additional risk exposure."<sup>26</sup>

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<sup>23</sup> *Id.* (quoting CFTC Order).

<sup>24</sup> *Id.* at 679.

<sup>25</sup> *Id.* (quoting Exchange Plaintiffs' Amended Complaint).

<sup>26</sup> *Id.* (quoting OTC Plaintiffs' Amended Complaint).

Second, suppressing LIBOR allowed defendants to pay lower interest rates on the LIBOR-based financial instruments in which the plaintiffs invested and on which they expected a competitive, market-driven rate of return.

We will return to these two alleged incentives in addressing Judge Buchwald's conclusion that the LIBOR-setting process was not competitive and that any collusion among the banks therefore could not displace competition and, so, cause antitrust injury.

#### **IV. LIBOR Rationale**

*First leg: there can be no antitrust injury from collusion in the LIBOR-setting process because such alleged collusion did not displace competition: the rate-setting process is collaborative, not competitive.* Plaintiffs alleged that the defendants conspired to set the LIBOR rate at an artificial level – manipulating it through their submission of interest rate figures that they had agreed upon among themselves, to the BBA, which then set the rate. The plaintiffs alleged, in particular, that “Defendants’ anticompetitive conduct [adversely affected] competition in that [plaintiffs] who trade in LIBOR-Based [financial instruments] . . . were trading at artificially determined prices that were made artificial as a result of Defendants’ unlawful conduct.”<sup>27</sup> The court countered, however, that these allegations “do not suggest that the harm plaintiffs suffered resulted from any anticompetitive aspects of defendants’ conduct” because “[a]lthough [they] might suggest that defendants fixed prices and thereby harmed plaintiffs, they do not suggest that the harm plaintiffs suffered resulted from any *anticompetitive aspect* of defendants’ conduct.”<sup>28</sup>

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<sup>27</sup> OTC Plaintiffs’ Complaint, ¶ 219.

<sup>28</sup> *LIBOR*, 935 F.Supp.2d at 688 (emphasis added).

Here, Judge Buchwald zeroes in on the first of the two main legs of her rationale. The LIBOR-setting process, she said, is not itself competitive but instead “a cooperative endeavor wherein otherwise-competing banks agreed to submit estimates of their borrowing costs to the BBA each day to facilitate the BBA’s calculation of an interest rate index.”<sup>29</sup> Even if the court concurred that defendants “subverted this cooperative process by conspiring to submit artificial estimates instead of estimates made in good faith, it would not follow that plaintiffs have suffered antitrust injury,” according to the court.<sup>30</sup> The reason, Judge Buchwald explains, is that “Plaintiffs’ injury would have resulted from defendants’ misrepresentation, not from harm to competition.”<sup>31</sup>

Based on the predicate that the LIBOR-setting process is cooperative, not competitive, the court then found that plaintiffs did not allege a restraint on competition either in the market for LIBOR-based financial instruments or in the interbank loan market. They did in fact allege that the prices of LIBOR-based financial instruments “were affected by Defendants’ unlawful behavior” such that “Plaintiffs paid more or received less than they would have in a market free from Defendants’ collusion”<sup>32</sup> And they did in fact allege that “defendants agreed to lie about the interest rates they were paying in [the interbank loan market] when they were called upon to truthfully report their expect borrowing cots to the BBA.”<sup>33</sup> But in neither of these markets, the court reasoned, did the plaintiffs allege harm to *competition* – in particular, through a failure to compete where they otherwise would have – and that is because, once again, the LIBOR-setting process is not itself competitive. To be antitrust injury, the injury must result

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<sup>29</sup> *LIBOR*, 935 F.Supp.2d at 688,

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (quoting OTC Plaintiffs’ Complaint).

<sup>33</sup> *Id.* at 689.

from an anticompetitive aspect of defendants' conduct. Even if defendants colluded as to the rates they submitted to the BBA, the collusion cannot be anticompetitive if the rate-setting process itself is not competitive, by the court's rationale. Thus, the court stated, the plaintiffs' allegation that the prices of LIBOR-based financial instruments "were affected by Defendants' unlawful behavior,' such that Plaintiffs paid more or received less than they would have in a market from Defendants' collusion'," might support an allegation of price fixing, but that does not indicate that plaintiffs' *injury* resulted from an anticompetitive aspect of defendants' conduct."<sup>34</sup> "In other words," Judge Buchwald continues, "it is not sufficient that plaintiffs paid higher prices because of defendants' collusion; that collusion must have been anticompetitive, involving a failure of defendants to compete where they otherwise would have. Yet here, undoubtedly as distinguished from most antitrust scenarios, the alleged collusion occurred in an arena in which the defendants never did and never were intended to compete."<sup>35</sup> The court's rationale is in effect that a process said to be cooperative and thus not in itself competitive cannot be turned to anticompetitive purposes; this is not a matter of mere semantics, but a question of substantive law, as we shall discuss.

*Second leg.* For the second leg of its decision dismissing the antitrust claims, the court takes another tack, which it says supports the first: namely, that the plaintiffs could have suffered the same harm under normal circumstances of free competition – that is, where the defendants act independently, rather than collusively, as alleged.<sup>36</sup> The logical consequence, if this is the case, is that plaintiffs' alleged loss "did not occur 'by reason of

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<sup>34</sup> *Id.* at 688 (quoting Plaintiffs' Opposition to Defendants' Motion to Dismiss) (emphasis added).

<sup>35</sup> *Id.* at 689.

<sup>36</sup> *Id.*

that which made the [conduct] unlawful’.”<sup>37</sup> To be clear, this does not mean that plaintiffs necessarily would not, in conditions of normal competition, suffer a loss – but the loss would not be caused by what makes the conduct unlawful under the antitrust laws. According to the court, as examined more thoroughly below, this was the rationale underlying important Supreme Court precedent in *Brunswick* and *ARCO*, in which the Court dismissed antitrust claims for lack of a showing of antitrust injury, and it is no different here. “Specifically,” Judge Buchwald explained, “the 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.”<sup>38</sup> The court continued:

Even if such independent misreporting would have been fraudulent, it would not have been anticompetitive, and indeed would have been consistent with normal commercial incentives facing defendants. Those incentives, of course, are alleged on the face of plaintiffs’ complaints: defendants allegedly had incentive (1) ‘to portray themselves as economically healthier than they actually were’ and (2) ‘to pay lower interest rates on LIBOR-based financial instruments that Defendants sold to investors’.<sup>39</sup>

The court next contrasts the allegations in this case with a typical antitrust conspiracy among sellers to raise prices. Whereas there, “the sellers’ supracompetitive prices could exist only where sellers conspired not to compete, here, each defendant, acting independently, could rationally have submitted false LIBOR quotes to the BBA.”<sup>40</sup> Unlike in a traditional price-fixing conspiracy, according to the court, here a “misreporting bank . . . would not have been concerned about being forced out of business by competition from other banks. In other words, precisely because the process

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<sup>37</sup> *Id.* at 690 (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977)).

<sup>38</sup> *Id.* at 690.

<sup>39</sup> *Id.* (citing OTC Plaintiffs’ Complaint).

<sup>40</sup> *Id.* at 690-91.



of setting LIBOR is not competitive, collusion among defendants would not have allowed them to do anything that they could not have done.”<sup>41</sup> The question, the court added, is not whether the defendants could have independently submitted the exact quotes that they in fact submitted, “but rather whether they could have caused plaintiffs the same injury had they acted independently. [And] the answer is yes: each defendant could have submitted, independently, a LIBOR quote that was artificially low.”<sup>42</sup>

We now examine in turn each of these legs of the rationale.

## V. Analysis of Court’s Rationale

A. *First Leg of Rationale: ‘No antitrust injury because no harm to competition; there may have been distortion of the LIBOR rate-setting process, but that process is not competitive’.*

The crux of the court’s rationale for the first leg of its holding dismissing the antitrust claims for lack of antitrust injury is that notwithstanding any allegations of collusion by the defendants on the rates they submitted to the BBA for determination of the LIBOR rate, and any resulting harm, the plaintiffs failed to allege that the harm resulted from an “antitrust aspect” of the defendants’ conduct. Indeed, Judge Buchwald sounds this refrain throughout the several pages of discussion on antitrust injury in the decision.<sup>43</sup> The LIBOR-setting process itself, starting with each bank’s daily submission of rates, is not itself competitive, the court reasoned. As noted above, implied in this logic is the conclusion, or assumption, that a process said to be cooperative, as a component of a larger whole, cannot be turned to anticompetitive purposes – or that however those purposes may be described (e.g., as self-serving, fraudulent, or an effort to

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<sup>41</sup> *Id.* at 691.

<sup>42</sup> *Id.*

<sup>43</sup> *See id.* at 687-95.

distort the independent rate setting by the BBA), they do not involve a distortion of competition itself. As Judge Buchwald put it, the defendants' conduct "did not displace competition where it normally would have occurred."<sup>44</sup> This conclusion is questionable. The LIBOR-setting process contains elements of both collaboration and competition, as we shall discuss. Also, and in any case, to say that the LIBOR defendants' conduct did not displace competition where it normally would have occurred – i.e., that there was never any competition among the defendant banks in the LIBOR-setting process, specifically in the interbank lending process, so their conduct did not displace competition among them as to *that* – arguably focuses too narrowly on this one component of the competitive dynamic among the defendants, while neglecting the effect of collusion in that process on their interaction as competitors in the downstream markets, and the alleged effect on the plaintiffs. Thus, on both accounts, as to the interbank lending market and downstream markets for financial instruments indexed to LIBOR sold by the banks, Judge Buchwald's conclusion – so clearly essential to her decision – that LIBOR-setting is cooperative, not competitive, requires closer scrutiny.

*LIBOR-setting process was intended to be 'blind'.* The plaintiffs alleged that the defendants conspired to rig the LIBOR rate so that they would all benefit in the end vis à vis their customers. The rate-setting process was intended to be 'blind': the banks submitting their daily inter-bank loan interest rates were expected to do so without consulting with their peer banks, so the information taken in the aggregate then results in an objectively determined average – the benchmark rate – that constitutes the daily LIBOR rate, without the opportunity for steering or distortion of that average other than by each bank acting unilaterally and independently. As the DOJ confirmed, the banks

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<sup>44</sup> *Id.* at 693.

were required to submit their rates without prior consultation, collaboration or agreement on rates with their peer banks.<sup>45</sup> And the reason for such a rule, presumably, was to prevent distortion of the LIBOR rate, so that it accurately reflects an average of each bank's perception of the market and other conditions affecting its own borrowing costs. If this objective, independent process is compromised, the LIBOR rate itself predictably would be affected and, as it happened, according to the allegations, in such a way as to benefit the defendants and prejudice their customers with respect to the financial instruments pegged to the LIBOR rate. And it does not appear that the court would take issue with any of this reasoning so far, on the allegations. Instead, the court returns to its refrain that because the rate setting process is itself not competitive, the distortion of that process, through collusion and even understanding that it was price-fixing, is not anticompetitive, and the resulting harm from the conduct that allegedly distorted LIBOR therefore cannot constitute antitrust injury.

In an effort to 'deconstruct' the rationale for the first leg of the court's decision dismissing the antitrust claims, we examine the relationships and conduct of the banks in both the upstream interbank lending market and the downstream markets for the sale of financial instruments indexed to LIBOR.

***-- The interrelationship of the banks in the interbank lending market:***

Focusing first on the interbank lending market, we now turn to three possible approaches to the question of the cooperative or mixed cooperative-competitive character of the LIBOR-setting process. These approaches (which are not proposed here as exclusive) are, first, the plaintiffs' allegation that the banks competed in their submission of their estimated borrowing costs to present themselves as financially sound; second,

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<sup>45</sup> See n. 17, *supra* (citing settlement agreement between the DOJ and Barclays).

similarities with the ‘messenger model’ in antitrust; and, third, an analogy to cooperative standard setting, which may have antitrust consequences, and prompted by the court’s effort to distinguish this conduct from LIBOR-setting.

*First: The defendants’ alleged incentive to compete in their self-portrayal as financially strong through their estimated borrowing costs warrants credit under Twombly as a question of fact on the competitive component of the LIBOR-setting process, even if it may be more generally characterized as collaborative.* As previously mentioned, the banks were motivated in part in their formulation of the LIBOR rates allegedly by the desire to portray themselves as economically stronger than they were, and thus, typically, to understate their expected borrowing costs. At the same time, no bank wanted to state its costs appreciably below those of any other bank because it would be flooded with requests to draw on pre-existing credit lines. If too low, that bank likely would see an increased demand for credit, perhaps in excess of its ability to provide it. This would cause it to incur increased costs to fund that demand. Alternatively, if the bank were to price its rates higher than the market rate, no client likely would draw on the credit lines and the bank would incur significant deadweight losses from uninvested capital. In short, as the plaintiffs alleged, one of the banks’ principal incentives for colluding in submitting what were supposed to be independently formulated estimated interbank borrowing costs was the desire not to be ‘the odd man out’. That is, as reflected in the information obtained from the Barclays’ settlement, each bank could quite plausibly have had independent, unilateral reasons for understating or overstating its expected interbank offered. But there is a constraint on this quite plausible independent, unilateral incentive on the part of each bank, and the constraint stems from the bank’s

relationship with the other banks: appreciably understating or overstating its estimated borrowing costs would hurt it vis à vis its competitor peers unless they all submitted substantially similar estimates, hence the incentive to ensure that its competitors would join in any understatement (or overstatement, as the case may be).<sup>46</sup> In this respect, the interplay of the independent incentives of each bank to suppress LIBOR and the competitive interrelationship of the banks may be understood as prompting the alleged collusion.

That each bank submitted its rates to the BBA in a process that more generally may be described as cooperative (ostensibly submitting its daily estimated costs independently to the BBA) does not displace its competitive motivation to appear financially healthier than it is, through the rates it submits to the BBA; and at the same time, the bank is constrained by the aforementioned risks of substantial understatement or overstatement of its actual estimated costs and also from deviating from the rates submitted by the other banks. Inasmuch as the banks are thus allegedly competing against each other in the interbank loan market and this competition is reflected in the rates they submit to the BBA, it would appear inaccurate, or at least premature at this stage of the litigation, to conclude that the LIBOR-setting process was entirely collaborative.

Furthermore, it would make no sense in the first place even to describe the banks' alleged concerted manipulation of LIBOR as "collusion," which by definition assumes a

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<sup>46</sup> The decision makes no mention of the antitrust implications of parallel conduct where plaintiffs also can show certain 'plus factors', which may justify an inference of conspiracy from consciously parallel conduct. *See, generally*, ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (7<sup>th</sup> ed., 2012) at 11 (citing cases discussing plus factors) Given the court's rationale, there would be no need to address this possible approach, as the court assumes collusion; if antitrust injury is found on appeal, however, and in the absence of direct evidence of collusion (which may prove substantial in any case), then the circumstances would suggest this as a possible approach.

competitive interrelationship, if the banks did not compete against each other at all. Thus, even in this fundamental sense, acknowledgement by the court of the banks' alleged collusion undermines its characterization of LIBOR-setting as altogether cooperative, with no meaningful element of competition. And, of course, Judge Buchwald's conclusion that it is entirely collaborative is a major predicate for her holding that collusion on LIBOR does not result in antitrust injury to the plaintiffs.<sup>47</sup>

The court's monochromatic characterization of LIBOR-setting appears to ignore the competitive incentives of the banks in the interbank lending market itself, as expressly alleged by the plaintiffs. And the dismissal before discovery for lack of antitrust injury forecloses the opportunity for the plaintiffs to seek factual support for their contention that the banks are driven by competitive incentives in their submission of estimated costs to the BBA. The plaintiffs' contention should be credited under *Twombly*<sup>48</sup> as plausibly showing that LIBOR-setting has sufficient competitive characteristics to warrant discovery on this question of fact; the court's rationale, however, summarily forecloses such inquiry, saying, in effect, 'LIBOR-setting is not competitive, so we're not going to let you show us how it's competitive, or how the collusion could therefore cause antitrust injury'.

*Second: Antitrust rationale for the 'messenger mode'l – recognition of the competitive relationship of the participants – and its similarity to the LIBOR-setting process.* The LIBOR-setting process at issue in *LIBOR* bears a marked resemblance to

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<sup>47</sup> It should also be noted that there is no regulatory or other immunity that removes LIBOR-setting from antitrust scrutiny.

<sup>48</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 556 (2007) (holding that to survive a motion to dismiss, a claim under Section 1 of the Sherman Act "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made;" and explaining that by insisting that a complaint allege "plausible grounds to infer an agreement," the Court was not imposing a probability requirement at the pleading stage, and that the plausibility standard "simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement").

the ‘messenger model’ in antitrust. Under this model, an independent third-party entity collects information about prices and price conditions from providers, as a conduit, in order to negotiate on their behalf with payors. A typical example of a messenger of this kind is an independent practice association (IPA), which gathers information from independent physician providers and then negotiates on their behalf with insurance companies, HMOs or other managed care plan payors. For instance, the 1996 Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Healthcare set forth guidelines for compliance with antitrust law by such information exchange activity in health care. A key safeguard prescribed by the Statements for achieving procompetitive efficiencies in payor-provider contracting is a rigorous adherence to the messenger model, with independent submission of pricing information to the IPA, to prevent providers, as competitors, from conferring and agreeing on price terms or conditions. This, too, may be characterized as a cooperative mechanism, just like LIBOR rate setting, in that it imposes a framework and set of operational rules and requires participation at an individual and collective level in order to function effectively, but it is also structured in recognition of the competitive relationship among the providers. And participating physicians, for instance, compete of course on the services they provide, just as the banks in *LIBOR* compete downstream on the products they sell that are indexed to the rate.

Although the comparison with the messenger model cannot be taken too far, it may help better understand the cooperative nature of LIBOR-setting and the roles played in it by the contributing banks and the BBA as, essentially, an information exchange system with a safeguard erected in recognition of the fact that the banks compete with

each other, both in the interbank lending market and the downstream markets. The banks must cooperate – ‘play by the rules’ – for the system to work efficiently and the BBA must play its role as messenger, in order to achieve the efficiency of a single LIBOR daily rate; but the principal rule itself (of independent submission of estimated borrowing costs), and the similarity of this mechanism to the messenger model, reflect the underlying competitive interrelationship of the banks. In this regard, as well, the court’s characterization of the LIBOR-setting process as entirely cooperative, so as to preclude discovery relevant to the possibility of antitrust injury from the banks’ alleged collusion, seems shortsighted.

*Third: Does judicial treatment of standard setting hold lessons for correctly interpreting the nature of LIBOR-setting and the possibility of antitrust injury from its collusive manipulation? And does the court’s effort to distinguish Allied Tube succeed?*

The question arises whether a useful analogy may be drawn between the collaborative process of setting LIBOR and standard setting, which, when abused, has been the subject of antitrust complaints. The question, which warrants a more thorough treatment in its own right, is also prompted by the court’s discussion of one of the leading antitrust standard setting cases, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*<sup>49</sup>, in response to the plaintiffs’ contention that it concerned arguably similar facts.<sup>50</sup>

Standard setting is a collaborative process, usually among competitors, who cooperate in the development of standards (e.g., wireless communications standards) and in following certain ground rules for standard setting (such as the obligation of any participant in the standard setting process to license on reasonable and non-

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<sup>49</sup> 486 U.S. 492 (1988).

<sup>50</sup> *LIBOR*, 935 F.Supp.2d at 693.



discriminatory (RAND) terms any of that participant's intellectual property determined to be essential to the standard); also they compete to have their intellectual property – or simply their technology alone, as in the case of *Allied Tube* – included in the standard that ultimately emerges from the standard setting process. The competition among the participants for inclusion of their IP (or bare technology) in the standard within the collaborative standard setting process has been one of the key conceptual 'hooks' in stating antitrust claims that a given participant has abused the standard setting process, such as, for instance, by failing to disclose intellectual property that may 'read on' the standard to the other participants in the standard setting organization, and then, after the standard is developed and industry is locked-in to the standardized technology, engaging in patent 'hold-up' by seeking royalties at a level that it would not have been able to obtain had it complied with the disclosure and/or RAND licensing obligations.<sup>51</sup>

It is thus undeniable that standard setting, as described above, involving competition among the participants for inclusion of their technology or intellectual property in the standard, differs from the collaborative LIBOR-setting process by the banks with the BBA; the collaboration in the two activities is of course not identical, nor is the competition. Yet, on the whole, standard setting is viewed as a collaborative process and, provided the standard setting organization imposes certain rules to prevent capture of a standard and subsequent abusive exploitation of the power gained through ownership of intellectual property that is essential to the standard (e.g., patent hold-up), and assuming those rules and due process principles are followed by the participants, antitrust gives a qualified 'pass' to this collaboration among competitors, and it does so

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<sup>51</sup> See generally J. Farrell, J. Hayes, C. Shapiro and T. Sullivan, "Standard Setting, Patents, and Hold-Up," 74 *Antitrust L.J.* 603 (Issue 3, 2007); see also R. Wolfram, "Down the Rabbit Hole with *Rambus*," *Global Competition Review* (Vol. 12, Issue 7, July 2009).

because of the procompetitive, efficiency-enhancing benefits that typically result from standard setting. It is therefore also accurate to characterize this activity as fundamentally collaborative, even if some or all of the participants vie among themselves to have their intellectual property or technology chosen for the standard. The law recognizes that the standard setting process itself is essentially collaborative but also that should any participant abuse this collaboration, there can be harm to competition and antitrust harm to the other participants as competitors. Also, and most importantly with reference to the court’s discussion of *Allied Tube* in *LIBOR*, there can be downstream harm to users of the technology encompassed by the standard, so that they also might have an antitrust claim stemming from the standard setting.

As one commentator has observed, comparing the LIBOR-setting process and standard setting, with reference to Judge Buchwald’s decision: “Standards resemble Libor rates in that they are both forms of collectively created information that define the products offered on the market. And the standard-setting process resembles Libor rate-setting because both are collaborative information-gathering processes. The processes are not themselves competition in the usual sense, as Judge Buchwald points out, but they are part of collective processes that [are] intended to and [do] have competitive effects.”<sup>52</sup>

With this brief background in mind, we turn to the court’s treatment of *Allied Tube*. The district court in *LIBOR* sought to distinguish the case, first, because it addresses only the question of petitioning immunity under the Noerr-Pennington

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<sup>52</sup> M. Patterson, “Who is Responsible for Libor Rate-Fixing,” Blog post, The Harvard Law School Forum on Corporate Governance and Financial Regulation (Dec. 26, 2013), *available at* <http://blogs.law.harvard.edu/corpgov/2013/12/26/who-is-responsible-for-libor-rate-fixing> (further noting that “collectively the defendant banks created and monitored the BBA mechanism through which the rate-fixing took place” and that “the system was created and monitored in a way that made it easy to manipulate” and noting, with reference to the BBA and the banks, that standard setting cases have established that an organization can itself be liable under antitrust for fraud committed by its members.)

doctrine<sup>53</sup>, and, second, on the question of antitrust injury, because unlike in *Allied Tube*, where the plaintiff alleged that collusion distorting a cooperative process<sup>54</sup> “gave the defendants’ an advantage over their competitors,” here the LIBOR plaintiffs did not allege that “defendants’ suppression of LIBOR gave them an advantage over their competitors.”<sup>55</sup>

Two observations are in order: First, although the court was correct in its characterization of the Supreme Court’s *Allied Tube* ruling as limited to the issue of petitioning immunity, the *LIBOR* court inexplicably failed to consider the Second Circuit’s *Allied Tube* decision, which squarely addressed and found antitrust liability for abuse of the standard setting process as an illegal agreement in restraint of trade in violation of Section 1 of the Sherman Act; and the appellate decision has been widely cited as authoritative precedent on antitrust liability from distortion of collaborative standard setting.<sup>56</sup> Second, the only significance that may attach to the fact that the LIBOR plaintiffs did not allege that the collusion gave the defendants a competitive advantage over their competitors is that the plaintiffs in this case, of course, are not competitors of the defendants, but instead purchasers or consumers from the defendants. And it is beyond question that antitrust affords rights of redress from injury to both purchasers and competitors. It is therefore difficult to ascertain what principled distinction the court sought to make here: the fact remains that injury was alleged, and found by the Second Circuit, in *Allied Tube* through distortion of what was intended to be

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<sup>53</sup> *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)

<sup>54</sup> The incumbent steel interests packed a vote of the Fire Protection Association of America for safety standards for insulation of electrical wire in order to prevent certification of plaintiff’s newer, PVC, technology.

<sup>55</sup> *LIBOR*, 935 F.Supp.2d at 693.

<sup>56</sup> *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, 817 F.2d 938 (2d Cir. 1987).

a collaborative process for standard setting. In this respect, the facts and allegations in *Allied Tube* and subsequent cases concerning standard setting, which clearly recognize the possibility of antitrust injury, whether to competitors or downstream users or purchasers of technology based on the standardized technology, would indeed appear to have significant bearing on allegations that distortion through collusion of a collaborative benchmark process can result in antitrust injury to purchasers of financial instruments indexed to that benchmark figure.

**-- *The interrelationship and conduct of the banks in the downstream markets:***

*“The anticompetitive acts made possible by the violation.”* *Brunswick* itself suggests that we examine the nature of the interrelationship of the banks not only in the upstream interbank lending market, but also in the downstream markets where they sell financial instruments indexed to LIBOR, to look for any anticompetitive effects. Thus, as the Supreme Court stated in *Brunswick*, and Judge Buchwald herself notes, to constitute antitrust injury, the “injury should reflect the anticompetitive effect either of the violation *or of the anticompetitive acts made possible by the violation.*”<sup>57</sup> The “violation” and “the anticompetitive acts made possible by the violation” are of course not the same thing.<sup>58</sup> If the “violation” is the alleged collusive price (LIBOR)-fixing, then the anticompetitive acts “*made possible by the violation*” must refer in this case not to the self-same conduct, i.e., the collusion in submitting rates to the BBA, but to the subsequent pricing by the

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<sup>57</sup> *LIBOR*, 935 F.Supp.2d at 686, quoting *Brunswick*, 429 U.S. at 489 (emphasis added).

<sup>58</sup> Ron Davis, in one of the most thorough and influential articles on antitrust injury, offers an example of the distinction drawn by Justice Marshall in *Brunswick* between the “anticompetitive effect of the violation” and the “anticompetitive effect of anticompetitive acts made possible by the violation: “Here the Court evidently had in mind, for example, an illegally predatory practice that at the same time causes antitrust injury to the excluded competitor (‘the anticompetitive effect . . . of the violation,’ i.e. the illegal loss of the opportunity to compete) and antitrust injury to consumers (the monopoly overcharge made possible by the predatory activity). The Court apparently wished to be clear that, in that circumstance, both kinds of injury count as antitrust injury.” R. Davis, “Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury.” 70 Antitrust L.J. 697, 725 (No. 3) (2003).

defendants of their financial instruments pegged to the LIBOR rates, where allegedly plaintiffs paid more or received less than they would have in a market free from the defendants' collusion. These are the acts made possible by the violation. The question then resolves to whether the injury also or alternatively reflects the anticompetitive effects of these acts – that is, the pricing of the instruments, or the interest rates on them, which have allegedly been influenced by the collusive rate setting for LIBOR. Judge Buchwald says 'no', because the rate-setting process is not one in which the banks compete, in submitting their daily interbank borrowing rates – a questionable conclusion, as discussed above. But even assuming this conclusion is correct, if the banks compete among themselves with respect to their marketing of financial instruments pegged to LIBOR, and they have distorted the LIBOR rate in such a way – individually and as a group – as to cause their customers (the plaintiffs) to pay more or receive less than in the absence of the banks' collusion, can it not be reasonably said that these acts made possible by the violation – that is, the pricing of the instruments based on collusive setting of LIBOR – are anticompetitive, and that alleged injury suffered as a result of that pricing constitutes antitrust injury? In other words, the marketing of their financial instruments indexed to LIBOR was itself an arena in which the banks competed among themselves. They allegedly rigged the LIBOR-setting process to suppress this competition by distorting a component, or constituent part, of the aggregate calculus on which they compete, inasmuch as the financial instruments are indexed to the LIBOR rate. By Judge Buchwald's rationale, the loss of such competition, which competition occurs in the 'but for' world (competition that would have occurred but for the banks' collusion), is not itself anticompetitive, because the component rate-setting process that

results in an average on which the financial instruments are based (and as to which the banks compete, as sellers) is not itself competitive.

*Even assuming, arguendo, that the LIBOR-setting process itself is entirely 'cooperative', the banks nonetheless compete with respect to their LIBOR-indexed financial instruments. To conclude, in the face of plaintiffs' allegations, that the distortion of the LIBOR-setting process, as a violation of the Sherman Act, cannot cause antitrust injury also arguably prejudices a material question of fact and does not comport with Twombly. Thus, we may properly turn our attention, for purposes of analyzing antitrust injury, also to "the anticompetitive effect of the anticompetitive acts made possible by the violation." If we are to conclude that a distortion of what the court characterizes as a cooperative component in the calculus resulting in the valuation of the financial instruments, including interest to be paid to the buyers, as to which the banks compete, necessarily cannot constitute antitrust injury (because that component is itself cooperative), how do we posit in the first place that the sale of the instruments by the banks can be characterized as competitive, inasmuch as the instruments are pegged to a rate that issues from a cooperative submission and averaging process by the BBA? What is 'cooperative' in the 'but for' world, as a component in the calculus of the financial instruments, evidently does not obscure or diminish the competitive character of the banks' efforts to outsell each other with respect to the financial instruments they offer. No less then should it be that the distortion of that cooperative process somehow obscures or diminishes the particular character of the interaction of the banks in their sale of these instruments – that is, the competitive character of that interaction – as if to render it not*

competitive *ab initio*. And the distortion of that cooperative component then results in a suppression of that interaction, which in the ‘but for’ world is competitive in nature.

Put another way, why is it that the distortion of a constituent process – even if entirely cooperative in nature, as the court concludes – in the calculus of the financial instruments sold by the defendants could not affect the competitive character of the interaction among the banks in the sale of those instruments? If the banks’ interaction was competitive in the ‘but for’ world – and it was – and yet constructed in part on a figure that issues from a cooperative process (by the BBA), why does the harm resulting from the suppression of that competition suddenly become *not* anticompetitive, such that it does not constitute antitrust injury?

There is a certain symmetry that might help inform the analysis, even accepting Judge Buchwald’s conclusion that LIBOR-setting is not competitive: Competition among the banks in the sale of the LIBOR-indexed financial instruments is constructed in part on a collaborative process. No one suggests that the interaction among the banks in such sale is any the less competitive for being based in part on the LIBOR rate-setting process. What is affected by the alleged collusion is the competition among the banks – it is allegedly suppressed. Their conduct in the ‘but for’ world was not any the less competitive in the sale of the instruments for being based in part on the LIBOR-setting process (even if cooperative in nature, as concluded by the court), and for the same reason, the suppression of that competition allegedly through the collusive distortion of the cooperative LIBOR-setting process cannot logically be said to *promote* competition or otherwise have no effect on it. The defendant bank’s traders did nothing more than find a simple way to upset the nature of that competition, by allegedly rigging the

independent LIBOR-setting process. Even if, by the court’s analysis, they did so by ‘working on’ a constituent ‘cooperative’ process leading to the determination of the return on the instruments as to which the banks compete, rather than some constituent competitive aspect in the formulation of those instruments, this should not alter the nature of the result – suppression of downstream competition – any more than the inclusion of a cooperative process as a constituent in the calculation of the value of instruments as to which the banks compete does not mean that the nature of their interaction was not competitive in the first place.<sup>59</sup>

As with the treatment of the LIBOR-setting process itself by the court, its handling of the alleged effects in the downstream market of collusion in the upstream interbank lending market, begs rather than squarely addresses the question of antitrust injury; given the allegations, the issue is at least a question of fact worthy of discovery, which of course is foreclosed by the court’s conclusion.

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<sup>59</sup> In response to the court’s position that “defendants’ conduct did not displace competition where it normally would have occurred” (935 F.Supp.2d at 693), plaintiffs’ counsel contended that LIBOR is itself a proxy for competition in the underlying market for interbank loans and that the defendants harmed competition by manipulating LIBOR. The court rejected this view and sought to distinguish cases cited by plaintiffs on the grounds that with respect to the conduct at issue in each case, in contrast to LIBOR-setting process, where the court concluded the banks did not compete, the defendants previously competed and then withdrew from such competition – whether on credit terms that beer distributors previously extended but then discontinued, in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980); on the prices of yarn processing machines, where the court held that a scheme among the manufacturers to split the royalty income earned by one manufacturer, which also held a patent on the machines, violated the antitrust laws because it fixed a portion of the prices they received for the machines, in *In Re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5<sup>th</sup> Cir. 1976); or on cooling and palletizing charges agreed upon by cantaloupe sellers which they added to the price of their cantaloupes, as to which they otherwise continued to compete, and where the court found the agreement on such charges, as a component of the price of the cantaloupes, to be illegal price fixing, in *Northwestern Fruit Co. v. A. Levy & J. Zentner Co.*, 665 F.Supp. 869 (E.D.Cal. 1986). Each of the distinctions drawn by the court, however, rests at least in part on the questionable premise that the banks did not compete in the LIBOR-setting process.



*B. Second Leg of Rationale: ‘Plaintiffs could have suffered the same harm under normal circumstances of free competition’.*

As briefly previewed above, for the second leg of her rationale Judge Buchwald explained that the plaintiffs could have suffered the same harm under normal circumstances of free competition.<sup>60</sup> The logical consequence, if this is the case, is that plaintiffs’ alleged loss “did not occur ‘by reason of that which made the [conduct] unlawful’” under the antitrust laws.<sup>61</sup> Instead, here, as in *Brunswick* and *ARCO*, Judge Buchwald found, “the alleged harm here could have resulted from normal competitive conduct. Specifically [Judge Buchwald continued], the 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.”<sup>62</sup> The independent incentives of any given bank to misrepresent its borrowing costs, even assuming that would be fraudulent, would in fact be consistent with the two motives alleged by the plaintiffs – namely, first, to portray itself as financially stronger than it actually is, and second, to pay lower interest rates on LIBOR-based financial instruments that the defendants sold to investors, according to the court. Furthermore, according to the court, “precisely because the process of setting LIBOR is not competitive, collusion among defendants would not have allowed them to do anything that they could not have done otherwise.”<sup>63</sup> This is an interesting line of reasoning and invites closer scrutiny.

*The Trap of the Irrelevant Hypothetical.* The first observation regarding the second leg of Judge Buchwald’s rationale – that there is no antitrust injury because

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<sup>60</sup> *LIBOR*, 935 F.Supp.2d at 689-92.

<sup>61</sup> *Id.* at 690 (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977)).

<sup>62</sup> *Id.* at 690.

<sup>63</sup> *Id.* at 691.

plaintiffs could have suffered the alleged harm under normal competitive circumstances – is that if one applied this as the *ratio decidendi* for antitrust injury to any claim of collusion, whether a concerted refusal to deal, conspiracy to fix prices or reduce output, or the like, then virtually all such claims would collapse on a motion to dismiss for failure to show antitrust injury, because in virtually all such instances, what an individual defendant may not do legally in concert with competitors, it may legally do unilaterally, such as unilaterally setting a given price or refusing to deal. The illegality thus stems from the concerted nature of the conduct; this is what distorts the expected competitive, market-driven motives of firms. If each of several sellers independently and unilaterally decides not to sell to a given prospective buyer, the harm to the buyer is the same as if the sellers decided jointly not to sell to it; the harm would be the same in each case, but only in the latter instance would the injury be the kind the antitrust laws are intended to address, in prohibiting joint refusals to deal as illegal boycotts while respecting firms’ right unilaterally, as a general principle, to decide whom they deal with and on what terms.<sup>64</sup> As a result, there seems on this analysis to be nothing remarkable in Judge Buchwald’s statement that “the 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.”<sup>65</sup> That is true. But just because removing the element of the conduct – collusion – which makes it illegal under antitrust law, turns it into perfectly legal conduct under antitrust law, does not mean that the plaintiffs’ allegations of collusion do not satisfy the burden

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<sup>64</sup> Compare *Federal Trade Commission v. Indiana Fed’n of Dentists*, 476 U.S. 447 (1986) (group boycott violates Sect. 1 of the Sherman Act) with *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (upholding right of manufacturer unilaterally to announce pricing policies and terminate distributors who failed to follow them).

<sup>65</sup> *LIBOR*, 935 F.Supp.2d at 690.

on a motion to dismiss of plausibly showing antitrust injury. If we take away that which makes the conduct illegal under the antitrust laws, then of course there is no antitrust injury, and it is precisely the alleged collusive nature of the conduct which, if proven, would make it illegal.

In short, it would appear that Judge Buchwald’s reasoning proves too much: as explained above, if it is taken to its logical extension, then antitrust injury could never be shown for any alleged collusion, such as agreements to fix prices, reduce output or refuse to deal, because if the alleged collusion is assumed away, then the conduct that is left – unilateral setting of prices, reduction of output and decisions not to deal – does not violate the antitrust laws. It would appear, then, that this logic is flawed, for it were upheld, it would cut the legs out from under a good half, or more, of antitrust law.

In fact, the flaw in the logic adopted by the court in *LIBOR* has been recognized before, and it has a ‘handle’ – the “Trap of the Irrelevant Hypothetical” – a term coined by Ron Davis in his seminal article on antitrust injury, “Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury.”<sup>66</sup> The Trap of the Irrelevant Hypothetical, Davis explains, is 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.”<sup>67</sup> The hypothetical is fallacious, as Davis further explains – discussing the broader case that encompasses Judge’s Buchwald’s hypothetical removal of the collusion in the alleged conduct – because “such a hypothetical can *always* be created[; and, t]herefore,

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<sup>66</sup> 70 Antitrust L.J. 697, No. 3 (2003).

<sup>67</sup> Id. at 725, n.103.

conscientiously applied, the Irrelevant Hypothetical leads ineluctably to the conclusion that no plaintiff ever suffers antitrust injury. It wipes out all private antitrust litigation.”<sup>68</sup> And at the same time that the hypothetical leads to this absurd, clearly untenable result, it also “leads a court away from the whole point of the antitrust injury exercise, as laid out in *Brunswick*, *Cargill*, and *ARCO*, which is to determine the intended purpose of the statute or rule invoked by the plaintiff.”<sup>69</sup>

*The court’s reliance on Brunswick and ARCO is misplaced: the court correctly describes their ‘teaching’ on antitrust injury but fails to apply it.* If indeed Judge Buchwald has erroneously relied on the hypothetical assumption of independent instead of concerted conduct, resulting in the same injury, to show an absence of antitrust injury, then how does this square with her explicit reliance on such authoritative cases as *Brunswick* and *ARCO*? In citing these cases as leading precedent and examples of the absence of antitrust injury, and the need to show it, has the court grasped the barb, the central point, of these cases yet somehow let it slip through its hands with respect to the LIBOR allegations?

*Brunswick:* The court first cites *Brunswick* in support of the proposition that because the plaintiffs here could have suffered the same harm under normal circumstances of free competition, they fail to plausibly show antitrust injury. In *Brunswick*, Pueblo Bowl-O-Mat, a bowling alley operator, alleged that the acquisitions of certain financially distressed bowling alleys by Brunswick, a much larger, ‘deep-pockets’ operator, when those alleys otherwise were likely to go bankrupt, violated Section 7 of the Clayton Act, which prohibits mergers that ‘may substantially lessen competition or

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<sup>68</sup> Id.

<sup>69</sup> Id.

tend to create a monopoly’.<sup>70</sup> Although the plaintiffs, as competitors, might have suffered injury, it clearly was not the kind that Section 7 of the Clayton Act was intended to prevent, namely, supracompetitive prices, a reduction of output or other consequences from the acquisition of power through merger that might substantially lessen competition or tend to create a monopoly. The reason was simple: whereas Section 7 is intended to prevent a substantial loss of competition, the plaintiffs invoked Section 7 in order to obtain damages and enjoin (effectively, undo) acquisitions which injected *more* competition into the market by saving the failing alleys. The plaintiffs thus sought a *reduction* of competition though the distressed alleys going bankrupt and exiting the market, which would have occurred had Brunswick been enjoined from buying them.

The plaintiffs in *Brunswick* thus did not suffer injury of the kind the antitrust laws, in this case Section 7, were meant to prevent – that is, ‘by reason of anything forbidden in the antitrust laws’. As Judge Buchwald points out, the plaintiffs would have suffered the identical loss had the acquired alleys instead obtained refinancing or been purchased by shallow-pocket parents instead of a deep-pockets operator and thus they were not injured by reason of that which (otherwise) made the acquisitions unlawful – i.e., the size of the acquiring company.<sup>71</sup> Even assuming the acquisitions were unlawful given the ‘deep pockets’ of the purchaser (the Supreme Court did not address the merits of the alleged Section 7 violation, although the jury had found that Section 7 was violated, and awarded damages), and that the plaintiffs’ injury occurred by reason of such unlawful acquisitions, the alleged injury still did not occur by reason of that which made

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<sup>70</sup> Even after the acquisitions, however, Brunswick had only two percent of the relevant market. At the time, courts took the view, which has since lost favor, that an acquisition by a conglomerate purchaser, even if it led to only a small market concentration in the hands of that purchaser, could violate Section 7.

<sup>71</sup> See n. 70, *supra*.

the acquisitions unlawful.<sup>72</sup> To put it simply, the plaintiffs would have suffered the same injury anyway – from more, not less, competition. *Brunswick* thus teaches that there is no antitrust injury to plaintiff competitors from an acquisition that results in more, or at least not substantially less, competition than before the acquisition at issue.

The question then arises: has Judge Buchwald placed correct reliance on *Brunswick*, given the plaintiff's allegations in *LIBOR*? To answer this, we must determine the *sine qua non* of the *Brunswick* holding on antitrust injury: is it that there is no antitrust injury if the plaintiffs would suffer the same injury – in this case, lost profits – even in the hypothetical absence of the conduct that allegedly violates the antitrust laws (the acquisition by a deep-pockets operator); or is it that there is no antitrust injury if the object of the plaintiff's complaint would enhance rather than reduce competition? Both characterizations accurately describe *Brunswick*. For the propositions to constitute accurate tests for antitrust injury, however, they should retain their logical consistency and 'sense' in other circumstances as well. But in fact, assuming away alleged collusion on the *LIBOR* facts and conjuring a hypothetical of similar damage from independent conduct by the defendant banks cannot make sense because here, and as a general proposition, it leads necessarily to the conclusion not only that the plaintiffs suffer no antitrust injury but also that no plaintiff ever could suffer antitrust injury – at least not in the collusive conduct scenario, where independent unilateral conduct of the same nature by the same defendants would result in the same injury. A test for antitrust injury that would eviscerate private antitrust litigation cannot be correct. It is thus only the alternative proposition that is meaningfully testable and makes logical sense – namely, that there is no antitrust injury if the harm complained of results from competition-

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<sup>72</sup> *LIBOR*, 935 F.Supp.2d at 689-90 (citing *Brunswick*).

enhancing rather than competition-reducing conduct. *That* is the *sine qua non* of the antitrust injury test of *Brunswick*.

If then we apply the correct antitrust injury test from *Brunswick* to the allegations in *LIBOR*, we must ask: does the conduct of which the plaintiffs complain reduce or enhance competition? Certainly, the force of the allegations is that the suppression of independent submission of LIBOR rates by the defendant banks resulted in the plaintiffs receiving lower payments on (or paying more for) the financial instruments in which the plaintiffs invested. It is difficult to square this allegation, repeated by each of the groups of plaintiffs, with the statement by the court that “the price of LIBOR-based financial instruments can be set at any level above or below LIBOR, and thus defendants’ alleged conspiracy to fix LIBOR did not constrain the free and competitive bargaining of actors in the market for LIBOR-based financial instruments.”<sup>73</sup> Whether LIBOR affects the interest payable on a given financial instrument, as alleged in the OTC and bondholder claims, or the value of the instrument itself, as in the case of the exchange-based and Schwab claims, the statement (above) that “the price of LIBOR-based financial instruments can be set at any level above or below LIBOR,” first of all is irrelevant, because the issue is not what the defendants *could* do, but what they allegedly did and why. Second, the court’s conclusion that the alleged conspiracy did not constrain free competition among the defendants directly contradicts the plaintiffs’ allegations that but for their collusion in fixing LIBOR, the plaintiffs would not have received lower payments on their investments with the defendants. The Supreme Court’s *Twombly* standard for reviewing a motion to dismiss, however, requires denial of the motion if plaintiffs’ allegations of fact “nudge their claims across the line from conceivable to

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<sup>73</sup> *LIBOR*, 935 F.Supp.2d at 694.

plausible.”<sup>74</sup> The above-quoted statement from the court, which ostensibly sums up its reasoning on the effect of the alleged collusion regarding LIBOR on the plaintiffs’ investments, does not so much explain how the plaintiffs’ allegations fail to meet the *Twombly* threshold as simply dismiss them out of hand or, at least, bring us back to the court’s refrain that because the rate-setting process itself is cooperative in nature, there can be no antitrust injury. In any case, *Brunswick* does not provide the support for the rationale that the court claims.

*ARCO: Correct interpretation, similar misapplication by court in LIBOR.* The Supreme Court’s decision in *ARCO*<sup>75</sup> is similarly unavailing as support for the court’s conclusion that the LIBOR plaintiffs did not suffer antitrust injury. In *ARCO*, ARCO, a branded gasoline supplier, allegedly entered into maximum resale price-fixing agreements with its dealers in an effort to increase its retail market share. (At the time of the suit, maximum resale price maintenance (RPM) was per se illegal under *Albrecht v. Herald Co.*<sup>76</sup>) USA Petroleum, an owner of independent discount gas stations, lost sales to ARCO, whose branded gas was now selling at the same price as USA Petroleum’s discount gas as a result of ARCO’s maximum RPM policy. USA Petroleum sued under Section 1 of the Sherman Act alleging that the per se illegal maximum RPM agreements by ARCO with its dealers illegally suppressed the retail price of ARCO gasoline and thereby caused USA Petroleum to lose profits. The Court held that the plaintiff failed to establish antitrust injury from the antitrust violation – and the court in *LIBOR*, in discussing *ARCO*, correctly identified the reason: although the maximum RPM pricing

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<sup>74</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

<sup>75</sup> *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) (“*ARCO*”).

<sup>76</sup> 390 U.S. 145 (1968). *Albrecht* was overruled in 1997 by *State Oil Co. v. Khan*, 322 U.S. 3 (1997), which held that maximum RPM is subject to the rule of reason.



was per se unlawful, it could cause no injury to a *competitor* unless it was also predatory, that is, unless the defendant priced below cost to drive competitors out of business.<sup>77</sup> But the plaintiff had dropped its allegation of predatory pricing and there was no finding of such by the Court. The Court explained that maximum RPM is “unlawful because of its potential effects on dealers and consumers, not because of its effect on *competitors*.”<sup>78</sup> And as the court in *LIBOR* further explained, correctly identifying the locus of antitrust injury from maximum RPM: “When a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an ‘anticompetitive’ consequence of the claimed violation. A firm complaining about the harm it suffers from nonpredatory price competition ‘is really claiming that it [is] unable to raise prices.’ [ . . . ] This is not antitrust injury; indeed, ‘cutting prices in order to increase business often is the very essence of competition’.”<sup>79</sup> The harm sought to be prevented from maximum RPM was instead to a supplier’s own dealers and ultimately to consumers – among other things, to prevent the risk that the maximum resale (retail) price might be fixed too low for a dealer to furnish related services desired by consumers. But that clearly was not the harm that the plaintiff, as a competitor, was alleging; more generally stated, its alleged injury – lost profits from the maximum RPM agreements – did not reflect the anticompetitive effect sought to be prevented by the prohibition. Had ARCO been engaging in predatory pricing as well, USA Petroleum’s injury would have reflected the anticompetitive effect

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<sup>77</sup> *LIBOR*, 935 F.Supp.2d at 690.

<sup>78</sup> 495 U.S. at 336.

<sup>79</sup> *LIBOR*, 935 F.Supp.2d at 690 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 476 U.S. 574, 594 (1986) (other citations omitted)).

of the alleged violation, but there was no predatory pricing, and so no anticompetitive effect of the type sought to be prevented by the prohibition against that conduct.

In sum, the court in *LIBOR* accurately summarized *ARCO*, its holding, and the rationale: just as in *Brunswick*, the Court in *ARCO* in effect held that there can be no antitrust injury from conduct that enhances competition, and as Judge Buchwald noted, in the absence of predatory pricing, “‘cutting prices to increase business often is the very essence of competition’.”<sup>80</sup> And yet, Judge Buchwald’s reliance on *ARCO*, just as with her reliance on *Brunswick*, is misplaced, even though she accurately summarized the case and its rationale. The court appears to have completely grasped the point of *ARCO*: “Because the harm plaintiffs suffered resulted from competitive, healthy conduct,” the court states, “it did not constitute antitrust injury.”<sup>81</sup> But then, in a striking about-face, the court apparently – and mistakenly – conflates the two distinct tests described above for antitrust injury, then reverts to the incorrect lesson it drew from *Brunswick* and continues, with respect to the LIBOR plaintiffs’ allegations: “As with the harm alleged in *Brunswick* and *ARCO*, the harm alleged here *could have* resulted from normal competitive conduct. Specifically, the 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.”<sup>82</sup> But that is not the lesson at all from *ARCO*, or *Brunswick*. As with its treatment of *Brunswick*, the court in *LIBOR* drew the wrong lesson from *ARCO*. Instead of applying the Supreme Court’s test in *ARCO* – does the alleged injury reflect the anticompetitive effect of the alleged violation – which requires an examination of the rationale for the

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<sup>80</sup> 935 F.Supp.2d at 690.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (emphasis added).

prohibition in any given case, the court instead reverts to its previous, more formulaic test, that is, whether the alleged injury *could* have resulted from normal competitive conduct. If the answer to that latter test, according to the court, is ‘yes’, then the injury is not antitrust injury. But the assumption of normal competitive conduct is the “Irrelevant Hypothetical,” which, as shown, leads to a meaningless result.

Addressing *ARCO*, Judge Buchwald clearly explained that a competitor complaining of increased competition from lower prices resulting from nonpredatory maximum resale price maintenance does not suffer antitrust injury. But then the court switches from characterizing the rationale of *ARCO* correctly as ‘an absence of antitrust injury because the conduct promotes competition’ to lumping it together with the lesson it draws from *Brunswick*, that if the injury could occur without the alleged anticompetitive conduct, it is not antitrust injury. But the Court in *ARCO* did not assume away the anticompetitive conduct, find that the plaintiff still suffers injury and therefore conclude that it is not antitrust injury. Instead, it examined the purpose of the prohibition of the alleged conduct as it applies to the alleged injury and asked whether the alleged injury reflects the anticompetitive effect of the alleged violation. In *ARCO*, the answer was clearly ‘no’ – it does not – but again, the Court did not arrive at that conclusion by assuming away the anticompetitive conduct; rather, it asked what the purpose of the prohibition of the violation is, as it applies to the plaintiff’s claim. *ARCO*, properly understood, therefore lends no support for the court’s use of the test that if there is still injury even if the anticompetitive conduct is removed, then it is not antitrust injury. Furthermore, that test, if it even ‘worked’ on the facts of *ARCO* – and it does not, for if the maximum RPM policies had not been imposed, then presumably *ARCO*’s retailers’

gas prices would not have dropped as they did, and so plaintiffs would not have lost sales – suffers from the same infirmity explained above: it proves too much and would eliminate all antitrust claims.

*In good company: the Sixth Circuit fell into the Trap of the Irrelevant Hypothetical with its ‘Necessary Predicate’ test.* The Sixth Circuit Court of Appeals also fell into the Trap of the Irrelevant Hypothetical with its own test for antitrust injury – the ‘necessary predicate’ test – and it has taken some years for that court to acknowledge, if only indirectly, its critical flaw. Over a period of some years, the Sixth Circuit appeared to take the view in several cases that there is no antitrust injury if the alleged injury could have resulted from some cause other than the antitrust violation.<sup>83</sup> The ‘necessary predicate’ test asks whether the illegal antitrust conduct is a necessary predicate to injury. If the answer is ‘no’ – that is, if injury could result even without the antitrust violation – then the injury is not *antitrust* injury. The necessary predicate test, it may be said, initially drew the Sixth Circuit into the Trap of the Irrelevant Hypothetical, and the flaw

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<sup>83</sup> See, e.g., *Hodges v. WSM, Inc.*, 26 F.3d 36 (6<sup>th</sup> Cir. 1994) (finding no antitrust injury because even in the absence of defendant’s alleged conspiracy with other airport shuttle van service operators to deny access to plaintiff operator to the “Grand Old Opry” amusement center, defendant could have denied access to plaintiff, resulting in the same loss of business to the plaintiff); *Watkins & Son Pet Supplies v. Iams Co.*, 254 F.3d 607 (6<sup>th</sup> Cir. 2001) (holding that exclusive dealing arrangement alleged to violate Sect. 3 of the Clayton Act was not a necessary predicate of plaintiff’s alleged injury from its termination as dealer because it could have been terminated even in the absence of the alleged violation); *Valley Products Co. v. Landmark*, 128 F.3d 398 (6<sup>th</sup> Cir. 1997) (dismissing case for failure to satisfy the ‘necessary predicate’ test where plaintiff, supplier of hotel guest amenities (e.g., bar soap, shampoo, conditioner, etc.), claimed that defendant franchisor Hospitality Services (HFS), owner of trademark rights for a number of hotel-motel businesses, reduced its list of guest amenity suppliers to two co-exclusive suppliers to HFS-franchised hotels, not including plaintiff, and that HFS used its market power as a franchisor to subject HFS franchisees to tying arrangements under which franchise rights were conditioned on purchases of logoed amenities manufactured by the two co-exclusive suppliers in violation of Section 1 of the Sherman Act; reasoning that plaintiff’s “sales losses would have been suffered as a result of the cancellation whether or not HFS had entered into the alleged tying agreements with the franchisees. Here, as in *Hodges*, the alleged antitrust violation was simply not a necessary predicate to the plaintiff’s injury.”). See generally J. Jacobson, T. Greer, “Twenty-One Years of Antitrust Injury: Down the Alley with *Brunswick v. Pueblo Bowl-O-Mat*,” 66 *Antitrust L.J.* 273, 300-302 (1998) (discussing Sixth Circuit’s ‘necessary predicate’ test); ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* (7<sup>th</sup> ed., 2012) at 763 (same).

is the same: reasoning that there is no antitrust injury if the injury could have occurred even in the absence of the alleged antitrust conduct assumes away the antitrust violation and, taken to its logical limit, necessarily eliminates all antitrust cases. The correct test is whether the alleged injury accurately reflects the anticompetitive effect of the alleged violation.

It has been observed that more recently, however, in such cases as *In re Cardizem CD Antitrust Litigation*, the Sixth Circuit has “‘significantly limited’ application of that test to circumstances where it is clear that the plaintiff’s injury would have been caused by other actual factors, not hypothetical occurrences.”<sup>84</sup> In *Cardizem*, the Sixth Circuit says a number of things about its application of the necessary predicate test, including that in *Hodges, Valley Products* and similar dismissals on antitrust injury grounds<sup>85</sup>, it dismissed plaintiffs’ claims not because the defendant *could* have caused the same injury without committing the alleged antitrust violation but “because each of the defendants had taken an action that it was lawfully entitled to take, independent of the alleged antitrust violation, which was the actual, indisputable, and sole cause of the plaintiff’s injury.”<sup>86</sup> Here, arguably, the Sixth Circuit may be confusing causation and antitrust injury, for it is often not clear on a motion to dismiss such claims what exactly is the cause of the alleged injury – conduct allowed under the law or conduct that violates antitrust law. And that is a matter for discovery, not for determination as a matter of antitrust injury.

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<sup>84</sup> ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (7<sup>th</sup> ed., 2012) at 763, citing *In re Cardizem CD Antitrust Litig.*, 332 F. 3d 896, 914-15 (6<sup>th</sup> Cir. 2003)

<sup>85</sup> See note 83, *supra*.

<sup>86</sup> *In re Cardizem*, 332 F.3d at 914.

It does not help, in what may perhaps be viewed as the Sixth Circuit's effort to rehabilitate its previous logic on antitrust injury, when it goes on to state that "in reality, we have only dismissed a case for failure to allege that an antitrust violation is the 'necessary predicate' for the plaintiff's injury where it has been apparent from the face of the complaint that actual and unequivocally legal action by the defendant would have caused the plaintiff's injury, even if there had been no antitrust injury."<sup>87</sup> It is thus not at all clear that the Sixth Circuit escapes the Trap of the Irrelevant Hypothetical with this formulation, even though here it emphasizes the word "actual" apparently in order to reject the interpretation of its 'necessary predicate' test as meaning simply that if the defendant hypothetically *could* have caused the same injury without violating the antitrust law, then there is no antitrust injury.

Far more important than what the Sixth Circuit said, though, is what it actually did in the case. In *Cardizem*, HMR, the manufacturer of a branded drug, Cardizem CD, agreed to pay Andrx \$40M per year not to bring its generic product to market and compete with Cardizem CD. The court said that this would be a "naked, horizontal restraint of trade that is *per se* illegal because it is presumed to have the effect of reducing competition in the market for Cardizem CD and its generic equivalents to the detriment of consumers."<sup>88</sup> The court further noted that "the complaint clearly allege[d] that but for the Agreement, specifically the payment of \$40 million per year, the plaintiffs would not have suffered their injury; there is nothing in the complaint that belies this allegation or justifies this Court not accepting it as true."<sup>89</sup> Quite importantly in the context of this discussion of *LIBOR*, the court added, "the defendants' argument to the contrary, that

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 911.

<sup>89</sup> *Id.*

Andrx would not have entered the market even if there had been no Agreement and payment because of its fear of damages in the patent infringement litigation, creates a disputed issue of fact, not appropriately resolved on a motion to dismiss.”<sup>90</sup>

In sum, most instructively for *LIBOR*, what the Sixth Circuit did – regardless of whether it may also have further muddied the waters with its general restatement of the ‘necessary predicate’ test – was reject the defendants’ contention that “the plaintiffs cannot allege an antitrust injury because Andrx *could* have unilaterally (and legally) decided not to market its generic version of Cardizem CD; they contend it is immaterial whether, in fact, it was the Agreement and the payment of \$40 million per year that caused them to do so.”<sup>91</sup> (This does not appear to be any different from what Judge Buchwald concluded the *LIBOR* defendants could do – i.e., each unilaterally, independently deciding to submit the rates so as to cause the alleged injury to the plaintiffs.) Leaving no ambiguity, the Court said, “We disagree.”<sup>92</sup> Thus, even the Sixth Circuit, whose earlier, more ‘aggressive’<sup>93</sup> version of the ‘necessary predicate’ test has not been adopted by other circuits<sup>94</sup>, has effectively rejected any test for antitrust injury that asks whether plaintiff could have suffered the same harm absent the antitrust violation.

*A question of causation, not antitrust injury.* The Sixth Circuit furthermore quite pointedly explained that the ostensible question of causation – here, whether it was the

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 912.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 914 (noting that the Sixth Circuit “has been reasonably aggressive in using the antitrust injury doctrine to bar recovery where the asserted injury, although linked to an alleged violation of the antitrust laws, flows directly from conduct that is not itself an antitrust violation.”) (citing *Valley Products Co. v. Landmark*, 128 F.3d 398, 403 (6<sup>th</sup> Cir. 1997)).

<sup>94</sup> See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (7<sup>th</sup> ed., 2012) at 763, n.80 (citing cases from the Second, Third, Fourth, Fifth and Ninth Circuits).

agreement at issue which kept Andrx out of the market or its fear of damages from patent litigation – is not appropriately decided on a motion to dismiss and indeed is not a question of antitrust injury at all, but instead a question of causation.<sup>95</sup> And just as with antitrust injury, if antitrust causation were assumed away even where the alleged violative conduct reduces rather than promotes competition, antitrust claims would be virtually gutted.

*Second Circuit case, regarding causation, rejects reasoning utilized by Judge Buchwald.* The Second Circuit itself, in fact, has rejected the very line of reasoning employed by Judge Buchwald for her finding of no antitrust injury, but instead framed in terms of causation. In *Irvin Industries, Inc. v. Goodyear Aerospace Corp.*, a Second Circuit panel reversed a summary judgment dismissal of a contractor’s predatory pricing claim under Section 2 of the Sherman Act.<sup>96</sup> The district court held that Irvin failed to show sufficient facts that would enable it to prove causation on its monopolization claims. Irvin and Goodyear were competing to win a government defense contract for a product used to decelerate bombs when dropped from low-flying aircraft. For the relevant time period, the Army’s fiscal year 1986, Irvin bid \$376 per unit; Goodyear, the incumbent provider, reduced its bid price to \$332 per unit from \$608 per unit for 1985. Irvin sued for predatory pricing, alleging on expert testimony that Goodyear’s average

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<sup>95</sup> The Court of Appeals stated that given the allegation of a horizontal market allocation agreement, “dismissal would be appropriate only if the plaintiffs’ allegations, taken as true and construed in their favor, somehow precluded the possibility that their injury flowed from the anticompetitive effects of the Agreement and payment. No such conclusion can be reached in this case. To the contrary, the complaint clearly alleges that but for the Agreement, specifically the payment of \$40 million per year, the plaintiffs would not have suffered their injury . . . . The defendants’ argument to the contrary, that Andrx would not have entered the market even if there had been no Agreement and payment because of its fear of damages in the patent infringement litigation, creates a disputed issue of fact, not appropriately resolved on a motion to dismiss. Indeed, a trier of fact may well find that the \$89 million payment renders incredible the defendants’ claim that Andrx would have refrained from marketing simply because of its fear of infringement damages.” 332 F.3d at 911.

<sup>96</sup> 974 F.2d 241 (2d Cir. 1992).



variable cost, the measure for determining illegal predatory pricing, was between \$367.16 and \$378.82, well above its \$332 bid price. Resolving disputed facts in Irvin's favor, the district court found that Goodyear had monopoly power, as the prior sole source provider of the product, and then, based on Irvin's expert testimony, that Goodyear's bid of \$332 was predatory. The district court ruled, however, that Irvin could not as a matter of law establish that the alleged injury – Irvin's lost profits from not winning the contract – were caused by the predatory bid.

As the appellate panel explained, first, the district court correctly found Goodyear's bid to be presumptively unlawful (because it was below its average variable cost, and assuming monopoly power and the requisite intent to recoup). But the district court further reasoned that Goodyear could have bid above \$367 yet below Irvin's bid of \$376 and thereby underbid Irvin without engaging in predatory pricing; in this way, then, Goodyear lawfully could have won the contract. The district court concluded that because Goodyear thus could have lawfully won the contract, it was not the unlawful nature of Goodyear's bid that caused Irvin to lose the contract but instead Irvin's own bid price; the court then reasoned on this basis that Irvin had not shown causation. But what Goodyear could have done, the Court of Appeals, emphasized, is not what Goodyear in fact did: "Goodyear argues . . . that it would have won the contract anyway with a lawful bid between \$367.16 and \$376. But Goodyear did not submit such a bid. The possibility that it might have submitted a lawful bid, and if so, the same damage might have resulted, cannot in and of itself negate causation as a matter of law."<sup>97</sup> In other words, Goodyear asked the court to assume away the illegal predatory pricing and instead that it could have

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<sup>97</sup> *Id.* at 245 (citing *Lee-Moore Oil Co. v. Union Oil Co. of Calif.*, 599 F.2d 1299, 1302 (4<sup>th</sup> Cir. 1979)).

legally underbid Irvin, yet resulting in the same injury to Irvin, thereby negating causation.

Framed in terms of antitrust injury instead of causation, Goodyear’s argument is exactly equivalent, in logical terms, to contending that hypothetical legal pricing negates antitrust injury. Goodyear contended that Irvin would have lost the contract anyway if Goodyear had submitted a lawful bid. But the Court found that “under the facts of [the] case, the possibility that Irvin would have lost the contract anyway is too speculative to negate, as a matter of law, the causal link shown by Irvin” between the predatory bid and Irvin’s loss of the contract.<sup>98</sup> One could as well state, with respect to *LIBOR*, that the possibility that each of the defendants independently would submit figures equivalent to those they submitted allegedly through collusion, which Judge Buchwald credits as negating antitrust injury, is equally speculative – and of course it is.

The question before the appellate panel in *Goodyear* was whether there was a genuine issue of material fact as to whether there was a causal connection between Irvin’s failure to win the contract and Goodyear’s predatory bid, so as to preclude summary judgment. The court evidently framed the issue in terms of causation because that was the issue on appeal of the summary judgment. But the Second Circuit panel’s reasoning, rejecting the argument that Goodyear might have priced lawfully and yet still won the contract by underbidding Irvin as too speculative to negate the alleged causal link as a matter of law, is exactly the same reasoning that the Sixth Circuit ultimately adopted in *Cardizem*, framed in terms of antitrust injury. As noted, the antitrust injury inquiry – whether the injury reflects the anticompetitive effect or competition-reducing aspects of the violation or challenged conduct – is distinct from the causation inquiry – whether the

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<sup>98</sup> *Id.* at 246.

challenged conduct or violation materially caused the alleged injury. But there is no principled difference in the invalidity of the test proposed by Goodyear as applied to determining causation -- or to antitrust injury in another case: it fails on either inquiry because by assuming that hypothetical legal conduct would result in the same harm as alleged to have resulted from the claimed antitrust violation, it is asking the court to ignore the antitrust violation, which has yet to be proved. If it is ignored, then of course there is no causation – there can be no link between the alleged harm and the antitrust violation, because there is no violation. For the same reason, there can be no antitrust injury on the assumption that the defendants *could* have engaged in legal conduct that would have resulted in the same injury to the plaintiff as if they had engaged in conduct that violates the antitrust laws, because of course the injury then would not reflect the anticompetitive or competition-reducing aspects of the violation or conduct.

In short, in *Goodyear* the Second Circuit has clearly rejected, on a causation analysis, the reasoning employed by Judge Buchwald as to antitrust injury, but there is no effort to address *Goodyear*, let alone any mention of it, in *LIBOR*. Furthermore, the fact that Judge Buchwald employed this rationale to find an absence of antitrust injury, and the Second Circuit rejected it on a summary judgment causation determination, is of no moment: it is Judge Buchwald who frames the question in terms of antitrust injury, and if, as contended herein, she has done so incorrectly, and it is not a matter of antitrust injury at all, then it must be something else. If it were a question of causation, along the lines of the analysis by the appellate panel in *Goodyear*, then the conclusion there, too, must be that the possibility that the banks independently submitted rates similar to those they allegedly did through collusion, with the same injury to plaintiffs, would be too

speculative to negate the causation alleged by plaintiffs between their harm and the alleged violation. In either case, logic and Second Circuit precedent itself strongly suggest that the rationale employed by Judge Buchwald, elsewhere discredited, cannot negate antitrust injury in *LIBOR* – or causation – on a motion to dismiss, before discovery.

*Second Circuit in Goodyear draws support for its rationale regarding causation from Fourth Circuit case regarding antitrust injury.* It is noteworthy that the Second Circuit in its *Goodyear* decision, in support of its rationale explained above with respect to causation, cited with approval a Fourth Circuit case, *Lee-Moore Oil Co. v. Union Oil Co. of California*, which concerned antitrust injury.<sup>99</sup> *Lee-Moore* further illustrates the invalidity of the rationale employed by Judge Buchwald – whether applied to the question of causation or antitrust injury. Johnson Oil Company, as predecessor to Lee-Moore, was a petroleum products ‘jobber’ (distributor) which purchased gasoline and other petroleum products from oil suppliers, such as Union, and sold them to retail gas stations. When Union terminated Johnson’s supply contract in 1972, Johnson could no longer sell Union-branded products to its customers operating retail stations under the Union brand and it was forced to turn to unbranded products of independent suppliers. Lee-Moore, as successor to Johnson, sued under Sections 1 and 2 of the Sherman Act, alleging that the major oil companies conspired to create an artificial oil shortage and that one of the goals of the conspiracy was to drive from the market ‘maverick jobbers’ such as Lee-Moore, who tended to depress the price of major brand products through their

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<sup>99</sup> *Goodyear*, 974 F.2d at 245-46, citing *Lee-Moore*, 599 F.2d 1299 (4<sup>th</sup> Cir. 1979) and noting that “[i]n *Lee-Moore*, the court held that if the plaintiff could show damages from the defendant’s unlawful refusal to deal, ‘the fact that [the defendant] might have caused the same damages by a lawful cancellation of the contract is irrelevant’”), *id.*, 974 F.2d at 246, n.3.

promotion of highly competitive self-service retail stations. It was not the bare termination of the supply contract itself, without more, that might violate antitrust law, the court noted, but a cancellation of the contract in the context of an alleged anticompetitive conspiracy, which would constitute a per se violation of the Sherman Act.<sup>100</sup>

The district court granted summary judgment in favor of Union on two principal grounds: first, it ruled that any injury suffered by Lee-Moore was not “competitive injury” because at all relevant times it had alternative sources of supply for the products; second, it reasoned that “Lee-Moore would have sustained the same damages if Union had lawfully cancelled its supply contract, and . . . therefore . . . Lee-Moore could not recover these damages even if it showed that the cancellation was in furtherance of an illegal conspiracy”<sup>101</sup> – or, in the district court’s own words, “[i]n short, these damages could result from even the lawful termination of a supply agreement.”<sup>102</sup> Although the Court of Appeals did not specifically describe the second ground as also concerning “competitive injury,” it quite arguably goes to the same issue as that attributed to the first ground, that is, antitrust injury. Reversing the district court, the Court of Appeals rejected both arguments and, with particular application to Judge Buchwald’s reasoning, stated as follows regarding the second ground:

This reasoning is based on what we think is an erroneous view of private damage actions under § 4. If Lee-Moore can show damages caused by Union’s antitrust violation, *the fact that Union might have caused the same damages by a lawful cancellation of the contract is irrelevant*. It is, of course, an established principle that a supplier may

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<sup>100</sup> *Lee-Moore*, 599 F.2d at 1301.

<sup>101</sup> *Id.* (restating district court’s rationale)

<sup>102</sup> *Lee-Moore Oil Co. v. Union Oil Co. of California*, 441 F.Supp. 730, 739 (M.D.N.C., Durham Div. 1977).

lawfully refuse to deal with a customer, so long as the refusal does not involve an illegal combination or agreement. [ . . . ] But we fail to understand how this principle can limit a plaintiff's right of recovery under s 4 once a Sherman Act violation is established. The reports contain a multitude of cases in which private recovery for an unlawful refusal to deal has been or will be allowed with regard to elements of damage, which, had the refusal to deal been lawful, would not have been recoverable.<sup>103</sup>

It seems clear that the Court of Appeals here is addressing antitrust injury, no less than for the first ('competitive injury') ground, and thus rejects this reasoning as one basis for concluding that the plaintiff could show no right to recovery.<sup>104</sup>

*Recent decision illustrates the confusion – and highlights the difference – between antitrust injury and causation.* As previously mentioned, antitrust injury and antitrust causation are sometimes confused, and the effect can be consequential, especially, for instance, on a motion to dismiss, if what is in fact a matter of causation is instead mistaken for antitrust injury and the question of causation, properly identified, would be addressed more properly on a motion for summary judgment. A January 2015 decision by a federal district court in California, *Galope v. Deutsche Bank National Trust Co.*,<sup>105</sup> illustrates the point and, fortuitously, addresses antitrust injury, causation and LIBOR – all in one decision. In 2006 the plaintiff homeowner took out a mortgage loan that ultimately was sold into a trust for which one of the defendants, Deutsche Bank National Trust, served as the trustee and defendant Barclays Bank served as the administrator of

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<sup>103</sup> 599 F.2d 1299 at 1302 (citations omitted) (emphasis added).

<sup>104</sup> See also J. Jacobson and T. Greer, "Twenty-One Years of Antitrust Injury: Down the Alley with *Brunswick v. Pueblo Bowl-O-Mat*," *supra*, 66 Antitrust L.J. at 301-02 (discussing *Lee-Moore* and commenting that the Fourth Circuit's rejection of the district court's reasoning based on its finding that the same damages "could result from even the lawful termination of a supply agreement" conflicts squarely with the Sixth Circuit's 'necessary predicate' test for antitrust injury).

<sup>105</sup> Case No. SACV 12-00323-CJC(RNBx), Order Granting the Barclays' Defendants' Motion for Summary Judgment (C.D. Cal., S. Div., Jan. 12, 2015).

the trust sponsor. Plaintiff defaulted on the loan. As to Barclays (and an affiliate – the “Barclays Defendants”), plaintiff alleged that the bank violated the Sherman Act and other law by its LIBOR submissions to the BBA between 2005 and 2009 and that she would not have purchased her loan had she known that Barclays was participating in a concerted manipulation of the LIBOR rate. The court granted summary judgment in favor of Barclays.

The court appeared to base its dismissal on antitrust injury grounds, stating that the plaintiff had “not satisfied the standard for antitrust standing;”<sup>106</sup> a closer review of its reasoning, however, shows that instead it based the dismissal on causation. First, it found that the plaintiff never made any payment on the loan that was linked to LIBOR. Then, referring to antitrust injury and plaintiff’s assertion that she would not have entered into the 2006 loan in the first place if she had known that Barclays was manipulating LIBOR, it stated that plaintiff’s asserted damages – late fees and credit damage – did not stem from any competition-reducing aspect of Barclays’ conduct but instead from Barclays’ purported misrepresentations and omissions (in not disclosing its conduct to plaintiff). Thus, the court stated, “Plaintiff’s injury is not ‘of the type the antitrust laws were intended to prevent.’”<sup>107</sup> (The court, however, made no finding that Barclays’ conduct with respect to LIBOR was not competition-reducing; rather, it was simply stressing that plaintiff’s injury would have stemmed from Barclays’ statements or omissions about its LIBOR-related conduct to the plaintiff, if it made any at all.)

The court continued that “Plaintiff has not shown that her default was in any way caused by Barclays’ conduct regarding its LIBOR submissions. Rather, it is undisputed

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<sup>106</sup> Order at 8.

<sup>107</sup> Order at 8 (quoting *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1057 (9<sup>th</sup> Cir. 1999)).

that Plaintiff defaulted when her interest payment was based on a fixed rate established by the loan originating documents, *not linked in any way to LIBOR*. Thus, even assuming an antitrust violation by the Barclays Defendants, Plaintiff has not shown an injury ‘that flows from that which makes defendants’ acts unlawful’.”<sup>108</sup> In short, according to the court, the plaintiff failed to show antitrust injury, and therefore has no standing.

But despite the court’s reference to antitrust injury and its citation to the leading Supreme Court cases, this is not a matter of antitrust injury at all; it is a matter of antitrust causation, and the rationale, notwithstanding the court’s apparent analytical confusion, makes this clear. Thus, the fact that Plaintiff defaulted when her interest payment was based on a fixed rate established by the loan originating documents, *not linked in any way to LIBOR*, means quite simply that whatever Barclays did, and even assuming Barclays committed an antitrust violation by a concerted manipulation of LIBOR, that conduct could not have had anything to do with the Plaintiff’s loan. Even assuming the plaintiff had known of Barclays’ alleged conduct, therefore, that conduct could have had nothing to do with her asserted damages. Thus, there was no causal link between Barclays’ LIBOR conduct – even assuming it was competition-reducing – and the asserted damages. This is not a failure to show an injury flowing from that which makes defendants’ acts unlawful, contrary to the court’s assertion – not because the conduct itself arguably did not reduce competition but because that conduct had no effect whatsoever on the plaintiff’s loan and she would have sustained the same injury even in the absence of the alleged antitrust violation by Barclays. As the court further explained,

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<sup>108</sup> Id. at 9 (emphasis added) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977))).



emphasizing in substance that it based its dismissal on the absence of antitrust causation, not antitrust injury:

Even assuming Plaintiff would have been aware of her prospective lender's LIBOR submissions and would have considered them in entering into a home loan, Plaintiff took the loan from New Century, not from either of the Barclays Defendants. Thus, this information could not have a causal connection with Plaintiff's decision to enter into the loan. Nor is there a direct connection between Barclays' submission of favorable LIBOR quotes and Plaintiff's injury. The direct victim of Barclays' LIBOR submissions would presumably be the party on the other side of the particular interest rate swaps transaction the traders sought to influence. Plaintiff does not claim to be such a party.<sup>109</sup>

Interestingly, the court next addressed the hypothetical context in which Barclays' alleged LIBOR manipulation somehow could relate causally to the plaintiff's loan, and explains that even then there could be no injury, because the published LIBOR concededly "decreased during the period of Barclays' alleged anti-competitive conduct. [And u]nlike plaintiffs in other LIBOR-related litigation, who consist of holders of financial instruments that *earned* a rate of return based on LIBOR, and whose injury is based on the lower payments they received allegedly because of Barclays' conduct, *see In re LIBOR-Based Fin. Instruments Antitrust Litig.* [ . . . ], Plaintiff entered a debt obligation in which she would have to *pay* interest based on LIBOR. Plaintiff therefore would have presumably benefited from a suppressed LIBOR."<sup>110</sup> In other words, even assuming a hypothetical causal connection (which the court nevertheless concluded did not exist), here the court effectively is stating that there also would not be antitrust injury (but without identifying it as such) because the Plaintiff's paying *lower* interest on its loan due to the suppression of LIBOR resulting from its alleged manipulation by Barclays is not an injury that flows from that which makes defendants' act unlawful. The causal connection

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<sup>109</sup> Id. at 9.

<sup>110</sup> Id. at 10.

is hypothetically present, in the court’s formulation, but here the supposed injury (which as the court explains is no injury at all) is certainly not the kind intended to be prevented by Section 1 of the Sherman Act, from concerted manipulation of LIBOR with anticompetitive effects and resulting harm to plaintiffs: if anyone suffered antitrust injury, it would be those persons receiving lower interest on the financial instruments in which they have invested and which are indexed to LIBOR, not the plaintiff mortgagor. Thus, even on this hypothetical, assuming causation, the plaintiff – as in *ARCO* – would not suffer antitrust injury because she is not the type of person who could suffer injury resulting from the anticompetitive nature of the defendants’ conduct.

The court continued, reverting to its causation explanation: “In any event, Plaintiff’s loan never entered a LIBOR-based repayment stage and Plaintiff never in fact made any payment linked to LIBOR. Investors like those in *In re LIBOR-Based Financial Instruments Antitrust Litigation*, or even conceivably a class of mortgagor plaintiffs who paid interest based on LIBOR, would potentially be the direct victims of Barclays’ purported anti-competitive conduct”<sup>111</sup> – but not the plaintiff.

## **VI. Conclusion**

Now that the Supreme Court has ruled in favor of the bondholder plaintiffs on the procedural timing question in *LIBOR*, their appeal, perhaps consolidated with appeals by the OTC and exchange plaintiffs of their antitrust claims, will likely reach the Second Circuit in the coming months. Appellate review should afford an excellent opportunity to clarify several key points about antitrust injury, consistent with the views of a number of

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<sup>111</sup> Id.

other circuits and as articulated by the Second Circuit itself, albeit with respect to causation (in *Irvin v. Goodyear*).

Given the importance of the LIBOR decision itself, and the role of benchmarks in various financial markets, the consequences of ‘getting it right’ on antitrust injury, both in antitrust jurisprudence and in concrete, monetary terms, cannot be overstated. The doctrine of antitrust injury must be applied rigorously and correctly, lest it improperly foreclose plaintiffs’ right to discovery. On the basis of the foregoing, it would appear that the district court in *LIBOR* misapplied, if not misconstrued, antitrust injury. The Second Circuit should breathe new life into the antitrust claims in *LIBOR*.