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The Second Circuit's Libor decision – a mixed bag

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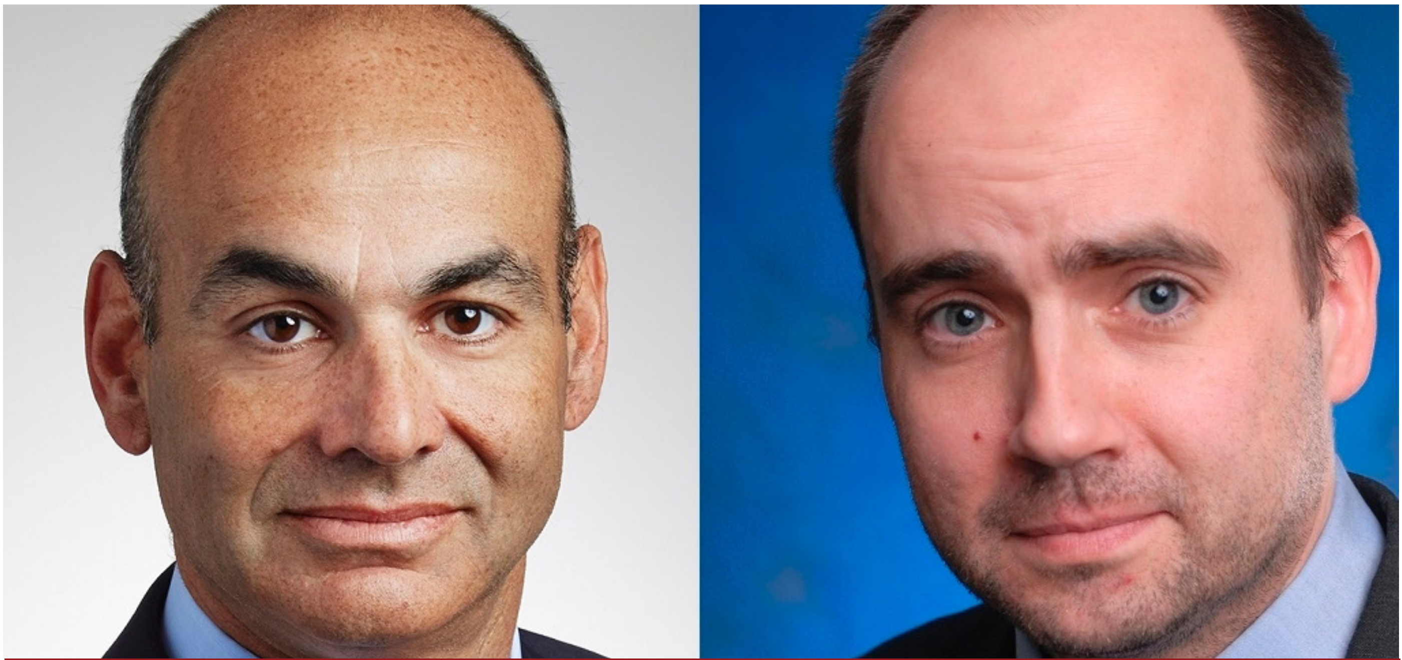

Sheron Korpus and James Cain

While the Second Circuit's ruling in the *Libor* antitrust litigation may have seemed like a clear-cut victory for plaintiffs bringing claims under section 1 of the Sherman Act, Sheron Korpus and James Cain argue that the decision may be more complex than it seems.

Companies sued for violating the Sherman Antitrust Act typically deploy a variety of arguments to defeat the claims against them at the early stages of litigation. They may challenge plaintiffs' definition of the relevant product and geographic markets; or attempt to show that their conduct either did not have any anticompetitive effects in the relevant markets or, if it did, that it promoted a valid procompetitive objective.

However, when the alleged misconduct constitutes a per se violation of the antitrust laws, defendants' options are curtailed. Because certain types of concerted action – such as agreements among horizontal competitors to fix prices or allocate markets – have been held by the courts to be inherently harmful to competition, plaintiffs need not plead or prove that defendants' conduct caused anticompetitive effects in relevant antitrust markets because these elements are conclusively presumed to be satisfied.

Consequently, in per se cases under section 1 of the Sherman Act, challenging plaintiffs' antitrust standing – a threshold requirement for recovering an award of treble damages – is frequently defendants' most promising avenue of attack, especially on a pre-answer motion to dismiss.

But, as the US Court of Appeals for the Second Circuit observed in a recent decision, *Libor-Based Financial Instruments*, the interplay between antitrust standing and the underlying violation in a per se case has been the source of "substantial confusion" to both courts and litigants.

In its opinion, the Second Circuit set out to dispel that confusion. As we discuss below, although the court did not purport to break new ground and despite characterising the scope of its ruling as "narrow," the decision may

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raise as many questions as it answers, foreclosing certain challenges to antitrust standing in a per se case while opening up others.

In *Libor*, the defendant banks were accused of engaging in a horizontal price-fixing conspiracy to artificially depress the London Inter-Bank Offered Rate. Seeking treble damages under section 4 of the Clayton Act, plaintiffs alleged that, as a result of the purported conspiracy, they received lower returns on swaps and bonds, and overpaid for Eurodollar future contracts, because these instruments were pegged to *Libor*.

The district court dismissed plaintiffs' antitrust claim, finding that they had failed to establish "antitrust injury" which is one of two essential components of antitrust standing. Because this element was absent, the district court did not address the second aspect of antitrust standing: the "efficient enforcer" factors.

The district court reasoned that because independent, parallel action by the banks to submit low *Libor* bids would have produced the same harm that plaintiffs claim occurred from the alleged conspiracy, as a matter of law that injury could not be said to be the result of defendants' anticompetitive conduct and therefore did not qualify as an injury of the type the antitrust laws were intended to prevent.

The Second Circuit reversed, holding that plaintiffs' allegations were sufficient at the pleading stage to establish antitrust injury, and directing the district court on remand to consider whether plaintiffs could also satisfy the efficient enforcer requirement. Both the appellate court's holding on the first component of antitrust injury and its dicta regarding the second component raise interesting questions for defendants challenging per se antitrust claims.

Antitrust injury

To recover treble damages, a plaintiff must do more than simply show it suffered a concrete injury causally related to defendants' alleged misconduct, also known as "injury-in-fact", which is required to satisfy constitutional standing. A plaintiff's injury must also reflect the anticompetitive effects of the alleged antitrust violation or of the anticompetitive acts made possible by the violation.

In seeking to clarify the interplay between antitrust injury and the underlying violation, the Second Circuit in *Libor* began its analysis by reaffirming the principle set forth over half a century ago by the Supreme Court in *US v Socony-Vacuum Oil* that horizontal agreements to fix prices – whether by raising, depressing or stabilising them – are per se illegal.

From there, the Second Circuit reasoned that whenever "consumers, because of a conspiracy, must pay prices that no longer reflect ordinary market conditions," the mere fact of paying those tainted prices necessarily constitutes antitrust injury because, under the per se rule, the market effects of price-fixing agreements are conclusively presumed to be anticompetitive.

In effect, therefore, under the rationale of *Libor*, if plaintiffs can plausibly allege the allegedly fixed price caused them an injury-in-fact, then they have automatically pled antitrust injury as well.

But some caveats are in order. First, the Second Circuit was careful to note that a private plaintiff is not "absolved of the obligation of demonstrating antitrust standing" simply because it alleges a per se violation. Thus, to the extent that *Libor* has effectively lightened a plaintiff's burden of pleading antitrust injury in a per se case, the decision should not be read to suggest that the antitrust standing analysis is a mere formality – a point driven home later by the court's subsequent discussion of the efficient enforcer factors.

Second, it is highly questionable whether the court's rationale for treating antitrust injury as presumptively satisfied in price-fixing cases can, or should, be extended to other types of *per se* cases. For example, in a case alleging a horizontal market allocation between two companies, even though the conduct is conclusively presumed to be anticompetitive, it does not necessarily follow that a consumer would suffer antitrust injury simply by virtue of purchasing from one of the colluding companies. If the two companies previously competed in the same area, then the removal of one may indeed have affected prices paid by consumers.

On the other hand, if the companies were not previously competing in the same area but were instead agreeing not to do so in the future, whether the division affected prices in that area and caused a consumer antitrust injury would likely turn on whether the two companies were "actual potential competitors" or "perceived potential competitors," as defined in the case law.

Efficient enforcer factors

As the *Libor* court cautioned, even when antitrust injury is satisfied, it is "not always sufficient" to convey antitrust standing. Rather, to be eligible to recover treble damages, a private plaintiff must further demonstrate that it is an "efficient enforcer" of the antitrust laws with respect to the particular misconduct at issue.

To make this determination, courts typically consider four factors: (1) the "directness or indirectness" of the claimed injury; (2) the existence of "more direct" victims of the alleged misconduct; (3) whether the damages sought by the plaintiff are "highly speculative"; and (4) the risk of "duplicative recoveries" or the "complex apportionment" of damages.

The Second Circuit's discussion of the first factor is of particular interest, because twice the court suggested that how the relevant market is defined – "whether for *Libor*-denominated instruments, for interest-bearing products generally, or simply for money" – may bear on the directness or indirectness of the plaintiff's injury. By logical extension, this suggests that a defendant may be able to introduce antitrust market concepts, even in a per se case, to challenge plaintiff's antitrust standing.

Though mere dicta, the court's recognition of the significance of relevant markets may be a particularly welcome development to defendants in per se cases involving conspiracies of regional or global scope. As the Second Circuit aptly observed, "if [defendants] control only a small percentage of the ultimate identified market, this may raise the … concern of damages disproportionate to [defendants'] wrongdoing." Although the court raised this concern in the context of the product market, it applies with equal if not greater force to the issue of relevant geographic markets.

For example, in a class action where the plaintiff class consists of consumers residing in numerous, geographically dispersed regions, defendants may – following the logic of *Libor* – attempt to challenge class certification on the grounds that not all putative class members have antitrust standing because the alleged conspiracy did not operate in certain geographic markets.

Indeed, on a first principles basis, it is not at all apparent why this argument should be available to litigants defending a case under section 1 of the Sherman Act for an agreement subject to "rule of reason" analysis or under section 2, but not in a per se case.

In short, *Libor* may seem at first blush to be a clear win for the plaintiffs' bar by clarifying the standards for showing antitrust injury, but on a closer reading it may be more of a mixed bag, providing something to litigants on both sides of the "v."

While defendants may find it harder to contest antitrust injury in per se price-fixing cases, they may now find it worthwhile to press the issue of the relevant antitrust market, if not as a substantive element of the underlying per se violation, then as part of the efficient enforcer analysis in a challenge to antitrust standing.

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