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Not All Conspiracies Are Anticompetitive, Or Are They?

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Not All Conspiracies Are Anticompetitive, Or Are They?

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In this article, we analyze recent attempts to apply Section 1 of the Sherman Act to conduct that is best described as manipulating market information, rather than agreeing not to compete on price. The issue raises a fundamental question about the scope of antitrust regulation: are all conspiracies among competitors anticompetitive? We argue that expanding the antitrust laws to regulate conduct that does not reduce competition, even where there may be widespread fraud among competitors, misapplies antitrust laws to conduct that does not reduce competition and dilutes the proof required to show that the conduct was actually illegal under laws other than antitrust. Further, doing so further risks transforming Section 1 of the Sherman Act into a sweeping mechanism for imposing liability across any industry in which a government or plaintiff decides there is widespread bad behavior.

We begin by summarizing the recent civil antitrust conspiracy case involving the LIBOR interest rate benchmark in which the defendants, who are horizontal competitors in certain markets, allegedly agreed to manipulate certain market-related information. In this paper, we briefly summarize the traditional mix of legal and economic analyses that have guided antitrust regulation for decades as well as fraud-based theories of liability including Section 10(b) of the 1934 Securities Act. In the last Section, we conclude that antitrust analyses are not well-suited to conduct such as that found in the LIBOR allegations but is better analyzed (and in some instances, punished) under the various market manipulation regulations, the origins of which derive from familiar securities fraud and fraud-based theories of liability, not antitrust. The alleged conspiracy in the LIBOR litigation is more akin to behavior that has been subject to the market manipulation regulatory regime, which instead of a foundation in traditional antitrust theories of liability, is instead grounded in fraud and securities regulation such as Rule 10b-5. We conclude that regulation of market manipulation—by both civil and criminal laws—is an awkward task for antitrust law, for a variety of both economic and legal reasons.

Libor And Market Manipulation

Beginning in 2012, numerous banks were being investigated and would ultimately be charged by U.S. and other foreign regulatory bodies for manipulating the London Interbank offered rate ("LIBOR"), the average interest rate at which banks borrow from one another and a rate that is used to set other rates or affects other rates related to certain

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loans and financial products.[2] As is now probably widely understood, the LIBOR rate, at the time, was set by large banks reporting their purported borrowing costs to an independent data collection service, which then performed a calculation with the banks' reported data and published a set of daily LIBOR rates. This process was allegedly manipulated by the banks for several possible reasons: to portray their financial health to be better than their actual financial health, especially during the years of the financial crisis; to lower interest rates on LIBOR-based financial products that the banks sold to investors; and to profit from declines in the LIBOR when the banks had large portfolio exposures to the LIBOR. As the government investigations became public, civil plaintiffs brought class action lawsuits against the banks and claimed that they had been harmed from the manipulation. The civil suits included antitrust claims as well as claims that the banks had violated the Commodity Exchange Act and state fraud, unjust enrichment, and contract laws.[3] The banks, in arguing that the civil plaintiffs' antitrust claims should be dismissed, pointed out that the LIBOR rate-setting process was collaborative, not the outcome of a competitive process and therefore could not be an antitrust conspiracy and could not have caused competitive harm.[4] While the district court accepted the banks' argument and dismissed the plaintiffs' antitrust claims, the Second Circuit disagreed and reversed.

The district court's decision to dismiss the antitrust claims in the LIBOR case focused on the issue of antitrust injury. According to the court, a private plaintiff must demonstrate not only that it was injured due to defendants' conduct, but that the injury was due to the *anticompetitive nature* of that conduct. The court found that defendants did not compete with one another in a LIBOR market or in the LIBOR-setting process. That process was collaborative, and to the extent plaintiffs were injured by defendants' efforts to subvert the process, the injury was due to Defendants' misrepresentations not because competition had been harmed.[5,6] In a traditional price fixing case, the court noted, a supra-competitive price, could exist only if the sellers conspired not to compete. In that situation, if one of the firms independently decided to raise its price to such a supra-competitive level, competition would force it from the market. Therefore, the supra-competitive prices, competitive injury, would result only through conspiracy. In LIBOR, however, the court found that any individual firm independently could decide to report a false, lower borrowing cost. There was no competition within the LIBOR-setting process that would force that firm out of a market or out of the LIBOR

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[2] In re: LIBOR-Based Financial Instruments Antitrust Litigation, 935 F. Supp. 2d 666 (S.D.N.Y.) 2013 ("LIBOR I") at p. 4.

[3] The District Court found that the plaintiffs' claims of manipulation of futures contracts traded on domestic exchanges was "precisely the conduct that the CEA was designed to regulate." LIBOR I at p. 54.

[4] LIBOR I at p. 25. The defendants moved to dismiss the antitrust claims on four grounds: (1) plaintiffs do not adequately plead a contract, combination, or conspiracy, (2) plaintiffs fail to allege a restraint of trade, (3) plaintiffs lack antitrust standing, and (4) indirect purchasers lack standing under Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). The district court found that the third ground, that plaintiffs lack antitrust standing, was a sufficient reason to dismiss plaintiffs' antitrust claims, and did not reach the remaining grounds.

[5] LIBOR I at p. 26, 27, 31. Moreover, the court found that plaintiffs had not alleged that competition had been harmed in a market for LIBOR-based financial instrument market or in a market for interbank loans. See LIBOR I at p. 32.

[6] Plaintiffs later attempted to amend the complaint and to allege that defendants did compete with one another in various marketing, including for example, over creditworthiness and over offering customers the best interest rate benchmark on financial instruments. The court rejected the plaintiffs' attempt to identify a market in which defendants competed and in which the defendants' conduct harmed competition and caused injury to plaintiffs. See LIBOR II at p. 44.

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