DePaul Business and Commercial Law Journal

Volume 11
Issue 3 *Spring 2013*

Article 2

LIBOR Manipulation and Antitrust Allegations

Sharon E. Foster

LIBOR Manipulation and Antitrust Allegations

*Sharon E. Foster**

CONTENTS

* Associate Professor, University of Arkansas School of Law. The Author would like to thank her research assistant, Nick Irmen, and the University of Arkansas School of Law for its grant support.

I. INTRODUCTION

> *"[H]onesty has no fence against superior cunning; and since it is necessary that there should be a perpetual intercourse of buying and selling, and dealing upon credit, where fraud is permitted and connived at, or has no law to punish it, the honest dealer is always undone, and the knave gets the advantage."*[1]

The recent London Interbank Offered Rate (LIBOR) scandal of manipulating interest rates on a global basis has, yet again, called into question issues of stability and moral integrity of the global financial services sector and, in particular, systemic banks,[2] which form the panels that submit the data LIBOR rates are based upon. LIBOR manipulation is being described as nothing less than a *cartel* of banks[3] manipulating interest rates that affect hundreds of trillions of dollars in financial products, including adjustable rate mortgages, credit cards, interest rate swaps, and interest rates on government bailout funds.[4] Perhaps most troubling is something rarely, if ever, mentioned; that the LIBOR manipulation also undermines the reliability of the United States Treasury stress tests and Dodd–Frank reporting requirements, which require LIBOR data and other data provided by some of the same banks that manipulated LIBOR data.[5] This perverse situation

---

1. JONATHAN SWIFT, THE WORKS OF JONATHAN SWIFT: GULLIVER'S TRAVELS 44–45 (Black's Readers Serv. Co. 1932) (1726) (emphasis added).

2. A systemic financial-service institution is defined as a commercial and/or investment bank that poses a risk to the domestic economy if it fails due to the sum of its assets, leverage, and counterparty risk exceeding about 15.2% of the GDP plus banking assets. Sharon E. Foster, *Systemic Financial-Service Institutions and Monopoly Power*, 60 CATH. U. L. REV. 357, 374 (2011).

3. Rosa M. Abrantes-Metz & D. Daniel Sokol, *The Lessons from LIBOR for Detection and Deterrence of Cartel Wrongdoing*, 3 HARV. BUS. L. REV. 10 (2012); Ellen Brown, *Titanic Banks Hit Libor'berg*, ASIA TIMES (July 24, 2012), www.atimes.com/atimes/Global-Economy/NG24Dj01.html; *Hammer Time: How Auction Theory Can Help Improve the System for Setting LIBOR*, THE ECONOMIST (July 14, 2012), www.economist.com/node/21558573; Alan Kohler, *Banking Is a Cartel Where Prices Are Fixed Twice*, ABC (July 5, 2012, 12:38 PM), www.abc.net.au/news/2012-07-05/kohler-banking-is-a-cartel/4111782. *But see* Andreas Stephan, *Should LIBOR-Rigging Be Treated Like Price Fixing?*, COMPETITION POLICY BLOG (July 11, 2012), www.competitionpolicy.wordpress.com/2012/07/11/should-libor-rigging-be-treated-like-price-fixing.

4. Alexandra Alper & Kirstin Ridley, *Barclays Paying $453 Million to Settle LIBOR Probe*, REUTERS (June 27, 2012, 6:13 PM), http://www.reuters.com/article/2012/06/27/us-barclays-libor-idUSBRE85Q0J720120627; David M. Ellis, *LIBOR Manipulation: A Brief Overview of the Debate*, FTI CONSULTING (Apr. 20, 2011), http://www.fticonsulting.com/global2/media/collateral/united-states/libor-manipulation.pdf; Pam Martens, *LIBOR Scandal Made Simple: It's About Illegal Proprietary Trading*, WALL ST. ON PARADE (July 18, 2012), http://wallstreetonparade.com/2012/07/libor-scandal-made-sim.

5. BD. OF GOVERNORS OF THE FED. RESERVE SYS., COMPREHENSIVE CAPITAL ANALYSIS AND REVIEW 2012: METHODOLOGY AND RESULTS FOR STRESS SCENARIO PROJECTIONS 8 (Mar. 13, 2012), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20120313a1.pdf. Income projection and losses are based on the same interest-rate-sensitive financial products as

places the public in the unacceptable position of having to rely on the unreliable.

This is not the first scandal to raise issues about the stability and integrity of the financial services sector nor will it be the last. Since the financial crisis started in 2007, we have learned that systemic banks have participated in bid rigging on public works of improvements,[6] money laundering violating United States sanctions on Iran,[7] mortgage fraud,[8] and various other fraudulent endeavors.[9] And, as before, there are cries for investigations and regulatory reform.[10] Certainly, United States antitrust law already addresses the alleged cartel conduct on both civil and criminal grounds. While civil antitrust actions based upon section 1 of the Sherman Act (Section 1) have already been filed,[11] historical patterns seem to suggest that no significant criminal cases will be brought against the systemic banks nor their upper management.[12] This Article addresses the applicability of Section 1 to the LIBOR manipulation facts as set forth in the Barclays Settlement documents.[13]

---

those that are affected by LIBOR such as credit cards, mortgages, municipal bonds, and derivatives. *Id.* at 13–16, 18, 32–36, 40, 44–54. Additionally, as with LIBOR data, the input data for the stress test projections is provided by the banks being tested. *Id.* at 17.

6. Hinds Cnty. v. Wachovia Bank, N.A. (*In re* Mun. Derivatives Antitrust Litig.), 620 F. Supp. 2d 499, 507 (S.D.N.Y. 2009).

7. Liz Rappaport, *Banks Settle Iran Money Case*, WALL ST. J. (Aug. 15, 2012, 10:28 AM), http://online.wsj.com/article/SB10000872396390444777589380427559426.html.

8. *See* FED. BUREAU OF INVESTIGATION, 2010 MORTGAGE FRAUD REPORT: YEAR IN REVIEW (2011), *available at* http://www.fbi.gov/stats-services/publications/mortgage-fraud-2010.

9. *See* House of Commons Treasury Committee, Uncorrected Transcript of Oral Evidence, at 42 (U.K. July 4, 2012) (to be published as HC 481-i) [hereinafter HC 481-i], *available at* http://www.parliament.uk/documents/commons-committees/treasury/treasury_committee_04_july_12_bob_diamond.pdf; *see also* 158 CONG. REC. S5921–22 (daily ed. Aug. 2, 2012) (statement of Sen. Sherrod Brown).

10. 158 CONG. REC. E1362 (daily ed. July 31, 2012) (statement of Rep. Earl Blumenauer); 158 CONG. REC. E1333 (daily ed. July 24, 2012) (statement of Sen. Mazie K. Hirono); MARTIN WHEATLEY, THE WHEATLEY REVIEW OF LIBOR: FINAL REPORT 35 (HM Treasury, U.K., Sept. 28, 2012), *available at* http://cdn.hm-treasury.gov.uk/wheatley_review_libor_finalreport_280912.pdf; *Final Communiqué: Meeting of Finance Ministers and Central Bank Governors*, G2012 MEXICO (Nov. 4–5, 2012), http://www.g20mexico.org/index.php/en/press-releases/537-final-communique.

11. *See* Amended Complaint at 13, *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 2012 WL 1522305 (S.D.N.Y. 2012) (No. 2262, 11 Civ. 2613); *see also* Complaint, Adams v. Bank of Am. Corp., No. 12-cv-07461-UA (S.D.N.Y. Oct. 4, 2012).

12. None to date. Indeed, it seems none are likely not due to a lack of evidence but rather due to a concern of the economic fallout if such prosecutions went forward. Lanny A. Breuer, Assistant Attorney Gen., U.S. Dep't of Justice, Speech at the New York City Bar Association (Sept. 13, 2012), *available at* www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html.

13. *See In re* Barclays PLC, Comm. Fut. L. Rep. (CCH) ¶ 32,234, 2012 CFTC LEXIS 39 (June 27, 2012); Letter from U.K. Fin. Servs. Auth., Final Notice to Barclays Bank PLC (June 27, 2012)

Part II of this Article explains the LIBOR interest rate benchmarks, how they are calculated, and how banks are selected to be on a LIBOR panel, thus placing a bank in the position to manipulate interest rates. Additionally, this part explains the history of the adoption of LIBOR rates as benchmarks and why properly functioning interest rate benchmarks are critical to a properly functioning market. Finally, this part examines what happened with the LIBOR manipulation primarily based on the Barclays Settlement during the summer of 2012 with the Financial Services Authority (FSA) in the United Kingdom, the United States Department of Justice (DOJ), and the United States Commodity Futures Trading Commission (CFTC). The Barclays Settlement documents regarding LIBOR manipulation and EURIBOR manipulation (another interest rate benchmark) are nothing less than shocking.[14] Adjustable interest rates were raised and lowered by these banks for personal gain and public deception.

In Part III, Section 1 is examined in relation to the LIBOR manipulation. Generally, Section 1 deals with cartels and requires an agreement between two or more persons in unreasonable restraint of trade. The Barclays Settlement documents reference numerous emails indicating agreements to manipulate LIBOR rates, which would amount to price fixing—an unreasonable restraint of trade. The main problem under Section 1 is that many, though not all, of these emails were intra-firm—between Barclays Capital Traders and LIBOR submitters at Barclays Bank, a sister corporation, and Barclays PLC, the parent corporation which wholly owns Barclays Capital and Barclays Bank.[15] In order to have two persons for an agreement under Section 1, two separate economic actors are required. Generally, a parent corporation and its wholly owned subsidiary are considered one economic ac-

---

[hereinafter Final Notice to Barclays], *available at* http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf; Statement of Facts, Non-Prosecution Agreement Between U.S. Dep't of Justice and Barclays Bank PLC (June 26, 2012) [hereinafter Statement of Facts], *available at* http://www.justice.gov/iso/opa/resources/9312012710173426365941.pdf.

14. UBS has recently entered into similar settlements regarding its participation in LIBOR manipulation. *See In re* UBS AG, Comm. Fut. L. Rep. (CCH) ¶ 32,481, 2012 CFTC LEXIS 80 (Dec. 19, 2012); Letter from U.K. Fin. Servs. Auth., Final Notice to UBS AG (Dec. 19, 2012) [hereinafter Final Notice to UBS], *available at* http://www.fsa.gov.uk/static/pubs/final/ubs.pdf; Statement of Facts, Non-Prosecution Agreement Between U.S. Dep't of Justice and UBS AG (Dec. 19, 2012), *available at* http://www.justice.gov/iso/opa/resources/6942012121911725320624.pdf. The total UBS settlement with these three regulators for its part in the LIBOR manipulation, and manipulation of other interest rate benchmarks such as EURIBOR, is reported at $1.5 billion. David Enrich & Jean Eaglesham, *UBS Admits Rigging Rates in 'Epic' Plot*, WALL ST. J. (Dec. 20, 2012, 7:17 PM), http://online.wsj.com/article/SB10001424127887324407504578188342618724274.html.

15. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *11–12.

tor as are sister subsidiaries.[16] However, as discussed in Part III, the Barclays Settlement evidences a lack of unity of economic interests as well as a lack of control of the parent corporation over the subsidiaries. Accordingly, it is possible under these circumstances that we are dealing with more than one economic actor.

After the LIBOR manipulation and Barclays Settlement became public in the summer of 2012, some regulatory officials and commentators suggested that no one was damaged as a result of the LIBOR manipulation.[17] Conversely, some expect that the civil damages could run into the billions of dollars.[18] Part IV discusses the damage requirement for Section 1 civil claims and the intent requirement for Section 1 criminal actions. Again, the Barclays Settlement documents are analyzed together with civil and criminal Section 1 cases to establish damages or intent.

Perhaps in an attempt to down play the significance of the LIBOR manipulation, it has been claimed that governmental regulators were complicit in the manipulation at least from the start of the financial crisis in 2008.[19] Allegedly, regulators wanted systemic banks like Barclays to artificially report low LIBOR rates to deceive the public into thinking certain systemic banks were financially stable. Low LIBOR rates mean a bank can borrow at a low rate because it is a low credit risk, indicating that the bank is stable. Part V explains why it is irrelevant under a Section 1 claim that regulators may have advocated, encouraged or suggested such conduct.

Finally, Part VI looks at the extraterritorial application of Section 1 in this global cartel context. The Barclays group is a United Kingdom

---

16. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984); Hood v. Tenneco Tex. Life Ins. Co., 739 F.2d 1012 (5th Cir. 1984) (applying *Copperweld* to sister subsidiaries of the same parent).

17. Jim Puzzanghera, *Geithner Doubts Libor Manipulation Cost Taxpayers Bailout Money*, L.A. TIMES (July 27, 2012), http://articles.latimes.com/2012/jul/27/business/la-fi-geithner-hearing-20120727 (describing Treasury Secretary Timothy F. Geithner's testimony before a Senate panel, defending his handling of concerns in 2008 that large banks were manipulating Libor); *see* Daniel J. Macy, *Funds Suits over Alleged LIBOR Manipulation Garner More Attention as Scandal Grows*, THOMPSON INFO. SERVICES (July 27, 2012), http://www.thompson.com/public/newsbrief.jsp?cat=FINANCE&id=3906. For the difficulty in establishing LIBOR manipulation damages, see James Kavanagh & Reinder Van Dijk, *LIBOR Damages: Key Emerging Issues* (Oct. 17, 2012), http://www.cdr-news.com/categories/expert-views/libor-damages:-key-emerging-issues.

18. *See* Satyajit Das, *The Libor Fix—Part 2*, ECONOMONITOR (July 24, 2012) [hereinafter Das, *Part 2*], http://www.economonitor.com/blog/2012/07/the-libor-fix-part-2/; Satyajit Das, *The LIBOR Fix—Part 1*, ECONOMONITOR (July 23, 2012) [hereinafter Das, *Part 1*], http://www.economonitor.com/blog/2012/07/the-libor-fix-part-1/; Maureen Kraten & Michael Kraten, *Libor Manipulation: Calculating Damages*, AQPQ (July 16, 2012), http://aqpq.org/2012/07/16/libor-manipulation-calculating-damages/.

19. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *22–64; Final Notice to Barclays, *supra* note 13, ¶¶ 12–14, 102–45; Statement of Facts, *supra* note 13, at 15–22.

banking group, and much of the antitrust activity took place in London, England. But that activity caused an effect in the United States justifying the extraterritorial application of United States antitrust laws. However, United States banks are also implicated in the LIBOR manipulation and may be subject to competition laws of other countries on similar, extraterritorial grounds.

II. WHAT IS LIBOR?

LIBOR is an *estimate* of interest rates one bank would pay to borrow unsecured funding from another bank.[20] In essence, it reflects the estimated cost of money. Specifically, the British Bankers Association, which administered LIBOR from its inception and through the relevant time period,[21] would have participating banks submit data in response to this question, "*At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 am?*"[22] The rates are calculated by participating banks submitting data on a daily basis reflecting their estimated cost of money for fifteen different time periods; overnight loans up to twelve month loans.[23] Participating banks are on panels consisting of six to eighteen banks with some banks on more than one panel.[24] There are a total of ten panels; one for each of the ten major currencies[25] included in the LIBOR calculations.[26]

Banks are selected as participating banks on the panels based upon reputation, credit quality, and activity in London, as London is a major international financial market.[27] The data provided by participat-

20. Alvin L. Arnold, *Financing: Understanding Libor*, 44 No. 6 MORTGAGE & REAL EST. EXECUTIVES REP. 6 (2011); Final Notice to Barclays, *supra* note 13, ¶¶ 30–32; BANK OF ENG., TRENDS IN LENDING 14 (2012), *available at* http://www.bankofengland.co.uk/publications/Documents/other/monetary/trendsJuly12.pdf; *The Basics*, BBALIBOR, http://www.bbalibor.com/bbalibor-explained/the-basics (last visited May 16, 2013).

21. WHEATLEY, *supra* note 10, at 5.

22. *The Basics*, *supra* note 20.

23. *Id.*; *see also* Arnold, *supra* note 20, at 6; Final Notice to Barclays, *supra* note 13, ¶¶ 30–32.

24. Final Notice to Barclays, *supra* note 13, ¶ 34; *The Basics*, *supra* note 20.

25. These currencies include the Australian Dollar, the Canadian Dollar, the Swiss Franc, the Danish Krone, the Euro, the British Pound Sterling, the Japanese Yen, the New Zealand Dollar, the Swedish Krona, and the U.S. Dollar. *See The Basics*, *supra* note 20.

26. *Id.* With ten panels providing data for fifteen time periods, a total of 150 interest rates are calculated under LIBOR. Final Notice to Barclays, *supra* note 13, ¶ 34.

27. *The Basics*, *supra* note 20. Participating banks are selected twice yearly by the Foreign Exchange and Money Markets Committee—a committee comprised of anonymous market participants, meeting in undisclosed locations to discuss LIBOR panel participation in strictly confidential terms. *Id.*; Liam Vaughan, *Secret Libor Committee Clings to Anonymity Following Scandal*, BLOOMBERG (Aug. 21, 2012, 7:53 AM), http://www.bloomberg.com/news/2012-08-20/secret-libor-committee-clings-to-anonymity-after-rigging-scandal.html. Banks currently on LIBOR panels include: Abbey National plc; Bank of America; Bank of Tokyo-Mitsubishi UFJ

ing banks on a specific panel is then "trimmed" with the highest and lowest 25% rates eliminated and the median rates used.[28] For example, the U.S. Dollar LIBOR panel is comprised of eighteen participating banks which would submit data each day on each of the fifteen time periods. Looking at just one of those time periods for purposes of this example, say the overnight rate, of the eighteen data submissions, the high four and the low four would be eliminated with the middle remaining ten used to calculate the overnight interest rate for the U.S. Dollar LIBOR.[29]

A. *Why LIBOR Matters*

Prior to the ubiquitous use of LIBOR as an interest rate benchmark, other benchmarks were used more frequently like the Prime Rate based upon the Federal Reserve's Discount Rate in the United States, which is the rate of interest the Federal Reserve charges banks to borrow funds.[30] However, during the economic instability of the 1970s, inflation caused unacceptable fluctuations in interest rates creating concern about the stability and predictability of a central bank benchmark for interest rates, such as the Federal Reserve's rate in the United States.[31] Additionally, questions were raised about the use of a regulator's (again like the Federal Reserve, which is a banking regulator in the United States) interest rates for benchmarks with respect to whether it truly reflected market conditions or, rather, reflected political policy.[32] Further, this economic instability caused concern about long-term debt being set at a fixed rate resulting in market mismatch; basically the cost of money to a bank as a debtor being higher than the interest rates charged by a bank, as a creditor, to its custom-

Ltd.; Bank of Nova Scotia; Barclays Bank plc; BNP Paribas; Canadian Imperial Bank of Commerce; Citibank N.A.; Commonwealth Bank of Australia; Credit Agricole CIB; Credit Suisse; Deutsche Bank AG; HSBC; JP Morgan Chase; Lloyds Banking Group; Mizuho Corporate Bank; Rabobank; Royal Bank of Canada; Société Générale; Sumitomo Mitsui Banking Corp.; Norinchukin Bank; Royal Bank of Scotland Group; and UBS AG. Many of these banks are on more than one panel. *In re* Barclays PLC, Comm. Fut. L. Rep. (CCH) ¶ 32,234, 2012 CFTC LEXIS 39, at *13-15 (June 27, 2012); *The Basics*, *supra* note 20.

28. Final Notice to Barclays, *supra* note 13, ¶ 36; *The Basics*, *supra* note 20; *see* Arnold, *supra* note 20, at 6.

29. *The Basics*, *supra* note 20.

30. FEDPRIMERATE.COM, http://www.fedprimerate.com/ (last visited May 16, 2013); *The Discount Rate*, BD. OF GOVERNORS OF THE FED. RES. SYS., http://www.federalreserve.gov/monetary policy/discountrate.htm (last visited May 16, 2013).

31. Jacob Gyntelberg & Philip Wooldridge, *Interbank Rate Fixings During the Recent Turmoil*, BIS Q. REV., March 2008, at 59, 59-60.

32. *Id.* at 60-63.

ers.[33] These concerns fueled the desire for a more predictable, stable interest rate benchmark as well as a change from fixed rates of interest to variable rates tied to an interest rate benchmark.[34] Finally, the 1980s saw an increase in "creative" financial products, such as interest rate sensitive derivatives like interest rate swaps, many of which are tied directly or indirectly to an interest rate benchmark. In part, as a response to many of these events, LIBOR was created in 1986.[35]

LIBOR rates are a benchmark for interest rates on a global scale.[36] A benchmark for interest rates needs to be predictable, stable, and reflect market fundamentals[37] because a properly functioning benchmark in financial markets is critical to a properly functioning market.[38] As a benchmark for interest rates, LIBOR provides data which is then used to calculate interest rates for a wide variety of financial products.[39] Globally, there are approximately $750 trillion in financial products.[40] Of that $750 trillion, approximately $560 trillion directly reference LIBOR rates,[41] which is about a 75% market share. These financial products include things such as adjustable-rate mortgages, auto loans, credit cards, and interest rate derivative contracts.[42] Additionally, LIBOR is an indicator of the financial stability of the major banks in the world;[43] the higher interest rate a bank has to pay indi-

33. *See generally LIBOR (Barclays Interest Rate Manipulation Case)*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/l/london_interbank_offered_rate_libor/index.html (last visited May 16, 2013).

34. *The Basics*, *supra* note 20.

35. *Id.*; *LIBOR: Where Do We Go from Here?*, BLACKROCK (July 2012), https://www2.blackrock.com/webcore/litService/search/getDocument.seam?venue=PUB_IND&source=GLOBAL&contentId=1111170360.

36. Gyntelberg & Wooldridge, *supra* note 31, at 59; Final Notice to Barclays, *supra* note 13, ¶¶ 3, 13; *The Basics*, *supra* note 20.

37. Gyntelberg & Wooldridge, *supra* note 31, at 60; *The Basics*, *supra* note 20.

38. Final Notice to Barclays, *supra* note 13, ¶ 6.

39. *The Basics*, *supra* note 20.

40. *LIBOR (Barclays Interest Rate Manipulation Case)*, *supra* note 33. This amount has been calculated as high as $800 trillion, 158 CONG. REC. S5959 (daily ed. Aug. 2, 2012) (Statement of Sen. Dick Durbin), and as low as about $360 trillion, *Barclays Paying $453 Million to Settle LIBOR Probe; CEO Quits*, 18 No. 17 WESTLAW J. DERIVATIVES 2 (2012). Part of the discrepancy is a result of what is included in the figure—the broad "financial products" or specific instruments such as loans.

41. Lauren Oppenheimer et al., *Understanding LIBOR*, THIRD WAY (Aug. 16, 2012), http://content.thirdway.org/publications/570/Third_Way_Memo_-_Understanding_Libor.pdf.

42. Final Notice to Barclays, *supra* note 13, ¶¶ 3, 5; *The Basics*, *supra* note 20. Interest rate derivative contracts are basically a hedge or insurance to reduce the risk of wide interest rate swings and would include financial products such as interest rate swaps and exchange-traded interest rate futures. *See* Final Notice to Barclays, *supra* note 13, ¶¶ 38, 41–45; *see also In re* Barclays PLC, Comm. Fut. L. Rep. (CCH) ¶ 32,234, 2012 CFTC LEXIS 39, at *12–15 (June 27, 2012).

43. *The Basics*, *supra* note 20.

cates a perception that bank is at risk while a lower interest rate indicates that a bank is less risky.[44]

Finally, interest rate sensitive financial products are part of the calculation in the periodic stress test analysis to determine the financial stability of systemic banks.[45] To the extent these financial products are tied to LIBOR, which is highly likely considering LIBOR's 75% market share as a benchmark, the stress test results are compromised by inaccurate LIBOR data. This result is an excellent example of the classic statistical theory—garbage-in-garbage-out.[46]

B. *What Happened*

Most of what we know comes from the first LIBOR Settlement between Barclays and the FSA in the United Kingdom, and the DOJ and CFTC in the United States.[47] Additional facts regarding LIBOR manipulation are constantly coming to light as it appears that Barclays is just the first of many banks involved in the LIBOR manipulation which will be settled to avoid, or at least limit the impact of, criminal charges.[48]

Starting in or about 2005, some if not all of the participating banks on various LIBOR panels manipulated the data submitted for the LIBOR rates.[49] Generally speaking, this manipulation was both internal and external. For example, the internal manipulation would occur when a trader within a LIBOR panel bank or a wholly owned subsidiary would request that the LIBOR data submitters for that bank submit data that would make the LIBOR rates go up or down depending

44. Arnold, *supra* note 20, at 6.

45. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 5, at 15–18, 36–37, 40, 47, 57.

46. Evidently a common practice of methodology among our financial services regulators. *See* NEIL BAROFSKY, BAILOUT: AN INSIDE ACCOUNT OF HOW WASHINGTON ABANDONED MAIN STREET WHILE RESCUING WALL STREET 88–94, 196–98 (2012).

47. *In re Barclays PLC*, 2012 CFTC LEXIS 39; Final Notice to Barclays, *supra* note 13; Statement of Facts, *supra* note 13.

48. To date, UBS has also settled. *In re* UBS AG, Comm. Fut. L. Rep. (CCH) ¶ 32,481, 2012 CFTC LEXIS 80 (Dec. 19, 2012); Final Notice to UBS, *supra* note 14; Statement of Facts, Non-Prosecution Agreement Between U.S. Dep't of Justice and UBS AG (Dec. 19, 2012), *available at* http://www.justice.gov/iso/opa/resources/6942012121911725320624.pdf. Other banks that appear to be under scrutiny include JP Morgan, Citigroup, HSBC Holdings, Royal Bank of Scotland, Deutsche Bank, and Bank of America. Lindsay Fortado et al., *UBS Turning Whistleblower in LIBOR Probe Pressures Rivals*, BLOOMBERG (Feb. 21, 2012, 4:43 AM), http://www.bloomberg.com/news/2012-02-21/ubs-turning-whistleblower-in-libor-probe-pressures-rivals.html; Hugh Son, *BofA Says LIBOR Probe Draws U.S. Subpoenas on Submissions*, BLOOMBERG (Aug. 2, 2012, 11:00 PM), http://www.bloomberg.com/news/2012-08-02/bofa-says-libor-probe-draws-u-s-subpoenas-on-submissions.html.

49. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *3–11, *18–23; Final Notice to Barclays, *supra* note 13, ¶¶ 8–14, 52–98; Statement of Facts, *supra* note 13, at 5–13, 15–22.

on what benefitted their trading position.[50] The external manipulation would occur when such requests were made on behalf of traders from another bank.[51] These LIBOR manipulation requests were made verbally and in writing, often by email, and appear to be quite numerous.[52] The email communications reveal a global financial system exploited by insiders for personal gain and devoid of free-market fundamentals. For example, a trader from a LIBOR panel bank complained to a trader from another LIBOR panel bank regarding a low LIBOR submission: "*duuuude. . . whats up with ur guys 34.5 3m fix . . . tell him to get it up!!*"[53] To date, the evidence indicates that a majority of the time the LIBOR data submitter complied with the requests.[54]

LIBOR manipulation to gain an unfair advantage in a trading position was only one motive for participating banks. The second motive for LIBOR manipulation was to avoid the public perception that the participating banks were at risk of failing during the financial crisis.[55] In this regard, LIBOR manipulation starting around September 2007 was geared toward making it appear that the participating banks were stable by submitting artificially low rates.[56] As with the manipulation for profit on a trading position, investigations are ongoing, but there is already a significant amount of evidence documenting the manipulation.[57]

Because of the length of time involved—from 2005, if not earlier, until at least 2009, if not later[58]—and the magnitude of the assets involved, around $560 trillion, the ill-gotten gains skimmed by the LIBOR manipulators are difficult to calculate at this time but estimates

---

50. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *3–11, *18–23; Final Notice to Barclays, *supra* note 13, ¶¶ 8–14, 52–98; Statement of Facts, *supra* note 13, at 5–13, 15–22.

51. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *3–11, *18–23; Final Notice to Barclays, *supra* note 13, ¶¶ 8–14, 52–98; Statement of Facts, *supra* note 13, at 5–13, 15–22.

52. Investigations are ongoing, but it appears that just one panel bank, Barclays, had at least 257 such manipulation requests from 2005 to 2009 for various LIBOR rates. Final Notice to Barclays, *supra* note 13, ¶ 56.

53. Final Notice to Barclays, *supra* note 13, ¶ 91; *see In re Barclays PLC*, 2012 CFTC LEXIS 39, at *3–11, *18–23; Statement of Facts, *supra* note 13, at 5–13, 15–22.

54. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *25–28, *62; Final Notice to Barclays, *supra* note 13, ¶¶ 63–80; Statement of Facts, *supra* note 13, at 5–13, 15–22.

55. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *44–64; Final Notice to Barclays, *supra* note 13, ¶¶ 102–45; Statement of Facts, *supra* note 13, at 15–22.

56. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *44–64; Final Notice to Barclays, *supra* note 13, ¶¶ 102–45; Statement of Facts, *supra* note 13, at 15–22.

57. *In re Barclays PLC*, 2012 CFTC LEXIS 39; Final Notice to Barclays, *supra* note 13; Statement of Facts, *supra* note 13.

58. Final Notice to Barclays, *supra* note 13, ¶¶ 53–145; *Timeline: Libor-Fixing Scandal*, BBC, www.bbc.co.uk/news/business-18671255 (last updated Feb. 6, 2013).

have them in the multi-million to multi-billions of dollars.[59] Given the large volume, in terms of assets involved, it is helpful to have some perspective: "*A 1 basis point change on US$ 1 billion is equivalent to US$100,000 per annum.*"[60] A basis point is one one-hundredth of a percent.[61] We are dealing with about $560 trillion in assets or about 560,000 times the one billion/one basis point hypothetical, meaning, hypothetically, about $56 billion per annum. Considering the amount of damages potentially involved, it is not surprising that civil actions alleging antitrust violations, among other things, have already been filed.[62]

III. LIBOR MANIPULATION AND SECTION 1 OF THE SHERMAN ACT

The civil LIBOR litigation commenced in the United States alleges, among other things, a violation of Section 1 of the Sherman Act.[63] This is the anti-cartel provision of United States antitrust law, and based upon the information provided to date in the Barclays Settlement, it would appear to have a fair chance of success. That said, as a practical matter antitrust litigation is quite expensive, thus increasing the economic justification for an early settlement—most likely just after the case is at issue. Accordingly, it is unlikely we will see a published opinion on the antitrust issue in these civil actions. Still, it is useful to analyze the application of antitrust law here because even with the settlement of these civil actions and the regulatory settlements the disgorgement of illegal profits will create some disincentive to continue such conduct. Section 1 states, in pertinent part, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[64]

This statutory language has been interpreted as a two-prong test for a Section 1 violation: (1) every contract, combination or conspiracy (the agreement prong) and (2) the unreasonable restraint-of-trade

59. Das, *Part 2*, *supra* note 18; Das, *Part 1*, *supra* note 18; Kraten & Kraten, *supra* note 18.

60. Das, *Part 1*, *supra* note 18.

61. Bradley Scott Ritter & William R. Dauber, *The Present and Future Role of the Electronic Trading Linkage in the Developing International Securities Markets*, 22 GEO. WASH. J. INT'L L. & ECON. 639, 660 n.148 (1989).

62. Adams v. Bank of Am. Corp., No. 12-cv-07461 (S.D.N.Y. Oct. 4, 2012); *In re* LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MD 2262(NRB), 2011 WL 5007957 (S.D.N.Y. 2011).

63. *See Adams*, No. 12-cv-07461; *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2011 WL 5007957.

64. 15 U.S.C. § 1 (2006).

prong.[65] Additionally, as discussed below, the civil antitrust plaintiff must sustain an antitrust injury and establish damages.

A. *Agreement Prong*

The extensive documentary evidence, particularly e-mails, provided by the Barclays Settlement with the FSA, the CFTC and the DOJ indicates four potential types of agreements:

1. Internal agreements between Barclays traders and the Barclays submitters;[66]
2. Internal agreements between Barclays management and Barclays submitters;[67]
3. External agreements between Barclays submitters and traders from other banks;[68] and
4. External agreements between Barclays submitters and submitters from other banks.[69]

Barclays PLC is a British public limited company formed and headquartered in the United Kingdom.[70] Barclays Bank is also a British public limited company and was the submitter bank during the time period in question.[71] Barclays Bank is a wholly owned subsidiary of Barclays PLC.[72] Barclays Capital, Inc. is also a wholly owned subsidiary of Barclays PLC and a sister subsidiary of Barclays Bank.[73] The evidence to date indicates that the internal agreements between Barclays traders and Barclays submitters relating to trading positions may have occurred between Barclays Bank as submitter and Barclays Bank traders and Barclays Bank as submitter and Barclays Capital traders.[74] The second type of internal agreement appears to have been between the management of Barclays Bank and its submitters and possibly the management of Barclays PLC and Barclays Bank submitters relating to manipulating LIBOR due to concern about

65. PHILLIP E. AREEDA ET AL., ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES 113 (6th ed. 2004).

66. *In re* Barclays PLC, Comm. Fut. L. Rep. (CCH) ¶ 32,234, 2012 CFTC LEXIS 39, at *18–23 (June 27, 2012); Final Notice to Barclays, *supra* note 13, ¶¶ 53–80; Statement of Facts, *supra* note 13, at 5–9.

67. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *44–64; Final Notice to Barclays, *supra* note 13, ¶¶ 112–24; Statement of Facts, *supra* note 13, at 15–22.

68. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *22–28; Final Notice to Barclays, *supra* note 13, ¶¶ 81–87; Statement of Facts, *supra* note 13, at 10–15.

69. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *22–28; Final Notice to Barclays, *supra* note 13, ¶¶ 81–87; Statement of Facts, *supra* note 13, at 10–15.

70. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *11.

71. *Id.* at *12–15.

72. *Id.* at *11.

73. *Id.*

74. *Id.* at *19–28; Final Notice to Barclays, *supra* note 13, ¶¶ 8–11, 53–80; Statement of Facts, *supra* note 13, at 5–10.

public perception during the financial crisis.[75] The third type of agreement is external between Barclays Bank submitters and traders from other banks regarding LIBOR manipulation for trading position purposes.[76] The final type of agreement is also external involving Barclays Bank submitters and submitters from other banks relating to manipulating LIBOR due to concern about public perception during the financial crisis.[77] The nature of each agreement (internal/external) is important for antitrust purposes as current antitrust law holds that agreements between a parent corporation and its wholly owned subsidiary and agreements between sister subsidiaries do not usually constitute two economic actors necessary for an agreement under Section 1.

1. Agreement in General

Usually, there is no direct evidence of an agreement to unreasonably restrain trade, such as a written agreement, documentation or testimony.[78] However, such explicit agreements are not necessary to maintain an action under Section 1.[79] Inferences drawn from conduct[80] and surrounding circumstances[81] may be relied upon to establish the agreement. For example, verbal or written indirect communications to a competitor through a press release or trade journal as well as more direct communications in a meeting may evidence an agreement.[82] Additionally, inferential evidence may include the nature of proposals made,[83] the manner in which proposals are made,[84] substantial unanimity of action,[85] actions taken in concert,[86] and familiarity with the purpose and scope of an arrangement.[87] Accordingly, no formal agreement is necessary for the agreement prong of Section 1.

---

75. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *44–64; Final Notice to Barclays, *supra* note 13, ¶¶ 12–14, 102–45; Statement of Facts, *supra* note 13, at 15–22.

76. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *22–28; Final Notice to Barclays, *supra* note 13, ¶¶ 8–11, 88–93; Statement of Facts, *supra* note 13, at 10–12.

77. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *44–64; Final Notice to Barclays, *supra* note 13, ¶¶ 12–14, 102–45; Statement of Facts, *supra* note 13, at 15–22.

78. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939).

79. United States v. Gen. Motors Corp., 384 U.S. 127, 144 (1966); United States v. Paramount Pictures, 334 U.S. 131, 142 (1948).

80. *Interstate Circuit*, 306 U.S. at 221.

81. United States v. Masonite Corp., 316 U.S. 265, 274–76 (1942).

82. E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612 (1914).

83. *Interstate Circuit*, 306 U.S. at 221.

84. *Id.*

85. *Id.*

86. Am. Tobacco Co. v. United States, 328 U.S. 781, 809–10 (1946).

87. United States v. Masonite Corp., 316 U.S. 265, 274–76 (1942).

That said, there is a critical distinction between circumstantial evidence of an improper interdependent agreement which violates Section 1 and circumstantial evidence which merely establishes independent action. Unfortunately, the circumstantial evidence does not always provide a clear guide for this distinction.[88] Accordingly, evidence to establish the inference of an illegal agreement must also exclude the possibility of independent action based upon legitimate business judgment.[89] Parallel conduct even to the point of substantial unanimity of action, without more, will be insufficient to establish an inferential, interdependent agreement as business strategy, and shared market perceptions may also explain such conduct.[90] What must be established is parallel conduct and "plus factors," which tend to exclude the possibility of independent business judgment while tending to increase the likelihood of interdependent behavior. Plus factors may include evidence of an improbable coincidence such as "(1) evidence of conduct that is contrary to the defendants' independent self-interest; (2) the presence or absence of a strong motive to enter into the alleged conspiracy; (3) the artificial standardization of products; and (4) a high level of inter[-]firm communications."[91]

Facilitating practices, or actions that may have the effect of facilitating oligopolistic collaboration, may evidence the plus factors necessary to establish the inference of an agreement. For example, plans to provide pricing and practices information to achieve stability and uniformity, especially when natural competitors do not behave in such a fashion, may evidence an interdependent agreement under Section 1.[92] Thus, parallel pricing together with facilitating practices, such as information exchanges between competitors, may be sufficient to establish the inference of an interdependent agreement for purposes of Section 1.

Conversely, divergent interests may indicate a lack of an agreement. For example, a firm with high costs may have to keep prices higher than a firm with low costs in order to obtain the same profit levels or reflect other economic realities.[93] Thus, conduct which may equally

88. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984).

89. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986); *Monsanto*, 465 U.S. at 763–64.

90. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553–54 (2007).

91. *In re* Currency Conversion Fee Antitrust Litig., 773 F. Supp. 2d 351, 365–66 (S.D.N.Y. 2011); *see also In re* NASDAQ Market-Makers Antitrust Litig., 894 F. Supp. 703, 713 (S.D.N.Y. 1995).

92. Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

93. United States v. Gen. Motors Corp., No. 38219, 1974 WL 926 (E.D. Mich. 1974); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 187–89 (4th ed. 2011).

be explained as independent business judgment will not establish an agreement under Section 1, but conduct which makes no economic sense other than anticompetitive purposes is what is required.[94] In the financial services sector, evidence based on statistical analysis to establish an anomaly may be sufficient when augmented with evidence from a governmental investigation.[95]

2. Analysis of an Agreement as Applied in the Barclays Settlement

The Barclays Settlement indicates that this is one of those rare occasions where there is direct evidence of an external agreement, such as emails, between Barclays Bank submitters and traders from other banks. For example:

> [O]n 26 October 2006, an external trader made a request for a lower three month US dollar LIBOR submission. The external trader stated in an email to Trader G at Barclays "If it comes in unchanged I'm a dead man". Trader G responded that he would "have a chat". Barclays' submission on that day for three month US dollar LIBOR was half a basis point lower than the day before, rather than being unchanged. The external trader thanked Trader G for Barclays' LIBOR submission later that day: "Dude. I owe you big time! Come over one day after work and I'm opening a bottle of Bollinger."[96]

There is also such evidence relating to internal agreements between Barclays Bank submitters and Barclays Bank traders; Barclays Bank submitters and Barclays Capital traders; Barclays Bank submitters and Barclays Bank managers and possibly management from Barclays PLC.[97] However, as discussed in more detail below, the internal agreements may not meet the more than one economic actor requirement for Section 1 agreement.

Even if direct evidence were missing, the circumstantial evidence indicated by the statistical analysis of the LIBOR rate during the time

---

94. Hinds Cnty. v. Wachovia Bank N.A. (*Hinds Cnty. II*), 708 F. Supp. 2d 348, 358–63 (S.D.N.Y. 2010); *see* E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961).

95. Hinds Cnty. v. Wachovia Bank N.A. (*Hinds Cnty. I*), 700 F. Supp. 2d 378, 394–95 (S.D.N.Y. 2010) (holding that municipal derivatives transactions, where the bidding spread was more than 100 basis points, were a sufficient anomaly to plausibly infer an agreement of bid rigging in violation of Section 1, which was augmented with evidence derived from a government investigation of the bid-rigging conduct).

96. Final Notice to Barclays, *supra* note 13, ¶ 83; *see In re* Barclays PLC, Comm. Fut. L. Rep. (CCH) ¶ 32,234, 2012 CFTC LEXIS 39, at *23–26 (June 27, 2012); Statement of Facts, *supra* note 13, at 11.

97. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *19–28; Final Notice to Barclays, *supra* note 13, ¶ 53–80; Statement of Facts, *supra* note 13, at 11–22.

in question, governmental investigations,[98] parallel conduct together with a uniformity of products, motive, inter-firm communications, and the fact that such rate manipulation would make little economic sense unless this was coordinated would indicate an interdependent agreement in violation of Section 1.[99]

3. Intra-Enterprise Agreements

Because Section 1 requires an agreement, unilateral conduct is excluded.[100] But this seemingly simple point belies more complex situations. For example, What if two persons within one corporation form an agreement to unreasonably restrain trade? A literal interpretation of Section 1 would lead to the conclusion that in such a case, say an agreement between officers of one corporation, Section 1 would be applicable as we literally have "two persons." However, the courts have ruled out such possibilities by interpreting the agreement prong to require two separate economic actors using a functional analysis that takes into consideration a "complete unity of interest," as evidenced by common objectives: a single "corporate consciousnesses" and no "sudden joining of economic resources that had previously served different interests."[101] This is important in the LIBOR case because, as the Barclays example shows, we may have communications between a parent corporation and its wholly owned subsidiary as well as between sister subsidiaries. If these various Barclays entities are considered one economic actor, then the communications between these entities would not establish two or more economic actors necessary for an agreement under Section 1. But if we have, as an economic reality, two economic actors, these communications may indeed be evidence of an agreement.

a. A History of the Intra-Enterprise Problem

The language of Section 1 is broad and general, in part, to address "the many new forms of contracts and combinations, . . . which were

98. *Hinds Cnty. II*, 708 F. Supp. 2d at 358–63; *Hinds Cnty. I*, 700 F. Supp. 2d at 394–95.

99. *In re* Currency Conversion Fee Antitrust Litig., 773 F. Supp. 2d 351, 365–66 (S.D.N.Y. 2011); *see also In re* NASDAQ Market-Makers Antitrust Litig., 894 F. Supp. 703, 713 (S.D.N.Y. 1995).

100. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768–72 (1984) (stating that "Section 1 of the Sherman Act . . . reaches unreasonable restraints of trade effected by a contract, combination . . . or conspiracy between separate entities. It does not reach conduct that is 'wholly unilateral'. . . . In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction").

101. *Id.*

being evolved from existing economic conditions."[102] During the early days of the Sherman Act, the law against cartels was thought to still allow combinations through mergers and the formation of holding companies.[103] Merger issues were addressed through the implementation of new laws in the Clayton Act[104] but holding companies went through an evolutionary process through the Sherman Act. At first, under the intra-enterprise doctrine, the United States Supreme Court held that two legally separate but related corporations would count as the "two persons" required to form an agreement under Section 1.[105] However, with the passage of time and lapses in memories of the past, this intra-enterprise doctrine began to erode and was replaced with the two "economic actors" and functionality test. The current law on this issue has, at times, been misunderstood as a complete ban on the possibility that a parent and its wholly owned subsidiary could constitute two economic actors for purposes of Section 1.[106] This is an inaccurate statement of the law. The Barclays Settlement, indeed, presents an interesting opportunity to apply the separate economic actors test in a parent/wholly owned subsidiary situation as the settlement documents do evidence divergent economic interests and functionally separate actors.

Northern Securities is the first case to address the intra-enterprise doctrine. There, the circuit court's decision, affirmed by the United States Supreme Court by a narrow 5–4 decision, found two persons for purposes of Section 1 when two competing railroad companies:

> Great Northern Railway Company, and . . . Northern Pacific Railway Company, entered into a combination to form . . . *a holding* corporation, to be called the Northern Securities Company . . . and to which company . . . was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof . . . .[107]

At the time of the circuit court's opinion, C. C. Langdell of Harvard Law School criticized the decision in part because, "[i]n the Northern Securities Case . . . there is only one person concerned, namely, the

102. United States v. Union Pac. R.R. Co., 226 U.S. 61, 85–86 (1912).

103. *See Union Pac.*, 226 U.S. 61; N. Sec. Co. v. United States, 193 U.S. 197 (1904); C. C. Langdell, *The Northern Securities Case and the Sherman Anti-Trust Act*, 16 HARV. L. REV. 539 (1903).

104. 12 U.S.C. § 18 (2006).

105. United States v. Yellow Cab Co., 332 U.S. 218 (1947); *N. Sec. Co.*, 193 U.S. 197.

106. Satellite Fin. Planning Corp. v. First Nat'l Bank of Wilmington, 633 F. Supp. 386, 395 (D. Del. 1986).

107. *N. Sec. Co.*, 193 U.S. at 320–22.

Northern Securities Company."[108] In essence, Langdell and other critics of *Northern Securities* were holding to a formalistic legal fiction, form over substance, that ignored economic reality, namely an attempt to end-run the Sherman Act.

The approach of substance over form articulated in *Northern Securities* continued in *Union Pacific Railroad Co.* where Union Pacific purchased up to forty-six per cent of the outstanding stock of its competitor, Southern Pacific Company. The stock was held for Union Pacific by one of its proprietary companies, the Oregon Short Line Railroad Company. The government claimed that this "domination over and control of the Southern Pacific Company" was a violation of antitrust laws.[109] The Supreme Court agreed and held:

> Nor do we think it can make any difference that instead of resorting to a holding company, as was done in the Northern Securities Case, the controlling interest in the stock of one corporation is transferred to the other. The domination and control, and the power to suppress competition, are acquired in the one case no less than in the other, and the resulting mischief, at which the statute was aimed, is equally effective whichever form is adopted. The statute in its terms embraces every contract or combination, in form of trust or otherwise, or conspiracy in restraint of trade or commerce.[110]

A similar approach was applied in a vertically integrated enterprise in *Yellow Cab* where there was common ownership between a manufacturer of taxicabs, the sellers of the taxicabs, and the taxicab service providers. Acknowledging the creativity of the human mind when it comes to subverting the law for profit, the Court held:

> The fact that these restraints occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the ap-

108. Langdell, *supra* note 103, at 546.
109. United States v. Union Pac. R.R. Co., 226 U.S. 61, 79 (1912).
110. *Id.* at 85-86.

> plicability of the Sherman Act. That statute is aimed at substance rather than form.[111]

However, in *Copperweld*, the Supreme Court reversed, in part, and distinguished the holding of *Yellow Cab*:

> It has long been clear that a pattern of acquisitions may itself create a combination illegal under § 1, especially when an original anticompetitive purpose is evident from the affiliated corporations' subsequent conduct.[4] The Yellow Cab passage is most fairly read in light of this settled rule. In Yellow Cab, the affiliation of the defendants was irrelevant because the original acquisitions were themselves illegal. An affiliation "flowing from an illegal conspiracy" would not avert sanctions. Common ownership and control were irrelevant because restraint of trade was "the primary object of the combination," which was created in a "'deliberate, calculated'" manner.
>
> [4] Under the arrangements condemned in Northern Securities Co. v. United States, "all the stock [a railroad holding company] held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose." In Standard Oil Co. v. United States and United States v. American Tobacco Co., the trust or holding company device brought together previously independent firms to lessen competition and achieve monopoly power.[112]

Thus, the Court is distinguishing the intra-enterprise cases on the grounds that the combinations at issue in those cases, by trusts or holding companies, were created by the joining of former competitors into a new corporate organization for the express purpose of suppressing competition.

The Court in *Copperweld* further articulated a substance over form rule in terms of two separate economic actors:

> The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms "contract, combination . . . or conspiracy" in § 1. Nothing in the literal meaning of those terms excludes coordinated conduct among officers or employees of the same company. But it is perfectly plain that an internal "agreement" *to implement a single, unitary firm's policies* does not raise the antitrust dangers that § 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing

111. United States v. Yellow Cab Co., 332 U.S. 218, 227–28 (1947); *see also* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 215 (1951) (holding that common ownership and control does not liberate corporations from the impact of the antitrust laws).

112. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 760–62 & n.4 (1984) (footnote omitted) (citations omitted).

> divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.
>
> There is also general agreement that § 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions. . . . *A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself*; a business enterprise establishes divisions to further its own interests in the most efficient manner. Because coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants § 1 scrutiny.[113]

The major, though unsubstantiated, assumption in the above reasoning of the Court is that the officers and directors of one corporation and unincorporated divisions of a corporation are all simply pursuing the common interests of the corporation, not their own personal economic interests to the detriment of the corporation.

The Supreme Court in *Copperweld* then went on to hold:

> For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary *have a complete unity of interest.* Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. . . . With or without a formal "agreement," *the subsidiary acts for the benefit of the parent*, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.
>
> Indeed, the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning. A § 1 agreement may be found when "the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." American Tobacco Co. v. United States. But in reality a parent and a wholly owned subsidiary always have a "unity of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; *the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.*[114]

113. *Id.* at 768–72 (emphasis added) (footnotes omitted).

114. *Id.* (emphasis added) (citation omitted).

By synthesizing *Copperweld*, what we are allegedly looking at with the parent/wholly owned subsidiary situation is one entity because, while legally two (for purposes of liability and perhaps tax reasons), they are economically one. This is so due to the "complete unity of interest,"[115] as evidenced by common objectives, single "corporate consciousnesses,"[116] the subsidiary always acting for the benefit of the parent, and "no sudden joining of economic resources that had previously served different interests."[117] They are but one because the "parent may assert full control at any moment"[118]—theoretically. Of course, if there are separate profit-making interests and the parent has little control over the subsidiary, then it makes no sense to treat the parent and subsidiary as one for antitrust purposes.[119] Thus, *Copperweld* does not exclude the possibility that a parent and its wholly owned subsidiary may be two independent economic actors for purposes of Section 1; it merely eliminates the presumption that two legally separate entities can form an agreement under Section 1 in the parent/wholly owned subsidiary context.[120] A similar analysis has been applied in the situation of sister subsidiaries.[121]

The Court's holding in the *Copperweld* case was subsequently interpreted by some courts to mean that "[a] parent corporation and its wholly owned subsidiaries share a common purpose and cannot, as a matter of law, conspire with each other in violation of Section 1."[122]

However, such an approach is too formalistic and does not take into account the functional considerations required by *Copperweld*. This was clarified by the Supreme Court in *American Needle* where the Court indicates a more flexible rule regarding intra-enterprises. In addressing whether the NFL, a single entity comprised of thirty-two separate entities, must be considered a single entity under the *Copperweld* analysis, the Court held:

> We have long held that concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed such formalistic distinctions in favor of a

115. *Id.*
116. *Id.*
117. *Copperweld*, 467 U.S. at 768–72.
118. *Id.*
119. HOVENKAMP, *supra* note 93, at 203–04.
120. Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2210 (2010).
121. Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125 (3d Cir. 1995) (holding that sister corporations and parent count as one economic actor); Hood v. Tenneco Tex. Life Ins. Co., 739 F.2d 1012 (5th Cir. 1984) (applying *Copperweld* to sister subsidiaries of the same parent).
122. Satellite Fin. Planning Corp. v. First Nat'l Bank of Wilmington, 633 F. Supp. 386, 395 (D. Del. 1986).

> functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.[123]
>
> . . . .
>
> . . . Although, under a now-defunct doctrine known as the "intraenterprise conspiracy doctrine," we once treated cooperation between legally separate entities as necessarily covered by § 1, we now embark on a more functional analysis.[124]
>
> . . . .
>
> We generally treat agreements within a single firm as independent action on the presumption that the components of the firm will act to maximize the firm's profits. But in rare cases, that presumption does not hold. *Agreements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action.*[125]

Accordingly, when parties to the agreement are acting on interests separate from the firm's, we have two economic actors for purposes of a Section 1 agreement. Continuing with that logic, if a wholly owned subsidiary is acting on interests separate from the parent's, we have two economic actors. While theoretically a parent can always fully assert control over its wholly owned subsidiary, the reality of the situation may establish that corporations, which are too big to manage, negate the parent's ability to control the subsidiary.

b. As Applied in the Barclays Settlement

In his testimony before the Treasury Committee for the United Kingdom regarding the LIBOR manipulation, the CEO of Barclays PLC, Bob Diamond, stated:

> When I knew of [LIBOR manipulation] was during the investigation, if that was your question. But I want to correct one thing you said, George. You said that the traders were acting on behalf of Barclays. They were acting on behalf of themselves. It is unclear whether it benefited Barclays but I don't think they had any interest in benefiting Barclays, they were benefiting themselves.[126]

This statement indicates a lack of unity of economic interests between Barclays PLC, Barclays Bank, Barclays Capital, and the functional equivalent of separate economic actors pursuing their own interests. Further, it also evidences a *formalistic shell for ongoing concerted ac-*

123. *Am. Needle*, 130 S. Ct. at 2209.
124. *Id.* at 2210.
125. *Id.* at 2215 (emphasis added) (footnote omitted).
126. HC 481-i, *supra* note 9, at 21.

tion,[127] which would support a finding of two economic actors for the agreement prong under Section 1. However, it appears that Mr. Diamond was referring to the pre-crisis period when LIBOR was manipulated to benefit individual traders. What about the post-2008 period when LIBOR was manipulated to avoid the public perception that the participating banks were at risk of failing during the financial crisis? A more difficult matter to prove, but should it ever be in the economic interest of a corporation to break the law? Certainly, the answer would be yes in a country not governed by the rule of law as the economic reality would indicate, at least in the short term, that crime does pay.

As for the parental control requirement articulated by the Court in *Copperweld*, as a functional matter, it is rather difficult for a parent to "assert full control at any moment if the subsidiary fails to act in the parent's best interests"[128] when the parent has no idea what the subsidiary is doing. For example, Mr. Diamond, the CEO of Barclays as of 2010 prior to which he was the CEO of Barclays Capital, did not learn about the manipulation of LIBOR rates until July 2012.[129] Further, Barclays has been fined by regulatory authorities over the past few years for things such as violating international sanctions against Cuba, Iran, Libya, Sudan, and Burma, client money breaches, and selling risky investment products to older people. In response to these facts, Mr. Diamond stated that, while this was no excuse, Barclays *is a large organization*.[130] Additionally, the investigation of Barclays relating to the LIBOR manipulation has found that Barclays failed to have adequate control systems in place to ensure such conduct could not happen.[131] Finally, the financial crisis in general has led many experts to the conclusion that systemic banks are too big to manage.[132] Ac-

127. *Am. Needle*, 130 S. Ct. at 2208–17.

128. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768–72 (1984).

129. HC 481-i, *supra* note 9, at 19.

130. *Id.* at 42.

131. Press Release, Fin. Servs. Auth., Barclays Fined £59.5 Million for Significant Failings in Relation to LIBOR and EURIBOR (June 27, 2012), *available at* http://www.fsa.gov.uk/library/communication/pr/2012/070.shtml.

132. *Too Big to Fail or Too Big to Save?: Examining the Systemic Threats of Large Financial Institutions*, 111th Cong. 25–26 (2009) (statement of Dr. Joseph E. Stiglitz, Professor, Columbia University); Brooksley Born, *Financial Reform and the Causes of the Financial Crisis*, 1 AM. U. BUS. L. REV. 1, 5 (2011); Andrea M. Corcoran, *Globalization Report Cards for Securities Regulators: National Enforcement of International Capital Market Standards for Information Sharing and Cooperation and the Prevention of Financial Crises*, 79 U. CIN. L. REV. 651, 675 (2010); Joseph Karl Grant, *What the Financial Services Industry Puts Together Let No Person Put Asunder: How the Gramm-Leach-Bliley Act Contributed to the 2008–2009 American Capital Markets Crisis*, 73 ALB. L. REV. 371, 400, 405–10 (2010); Roberta S. Karmel, *Is the Public Utility Holding Company Act a Model for Breaking Up the Banks that Are Too-Big-to-Fail?*, 62 HASTINGS L.J.

cordingly, the notion of parental control in the corporate setting seems to suffer the same attenuated connection to reality as it does in the human setting.

B. *Unreasonable Restraint-of-Trade Prong*

The second prong of a Section 1 violation is the unreasonable restraint-of-trade prong. Although the statute forbids agreements "in restraint-of-trade or commerce," that statutory language has been interpreted by the Supreme Court to prohibit unreasonable restraints of trade or commerce as the statutory language, taken quite literally, could forbid every kind of contract because every contract does, to some extent, restrain trade.[133] Here, the courts will examine the nature of the agreement or alleged unreasonable conduct. Certain agreements, such as horizontal price fixing, are deemed illegal per se as they lack any redeeming competitive virtue.[134] Other agreements, even vertical price-fixing agreements, may have certain competitive virtues. Accordingly, such agreements are tested under the rule of reason where evidence can be presented to establish the market effects and competitive reasonableness of the conduct.[135]

1. Unreasonable Restraint of Trade in General

In determining the extent of evidence regarding market effects necessary to determine if the restraint is indeed unreasonable, the nature of the conduct[136] together with whether the agreement was horizontal or vertical[137] will be determinative. For example, a horizontal price-

821, 842 (2011); FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES *passim* (2011); Simon Johnson, *JP Morgan Debacle Reveals Fatal Flaw in Federal Reserve Thinking*, THE BASELINE SCENARIO (May 11, 2012), http://baselinescenario.com/2012/05/11/jp-morgan-debacle-reveals-fatal-flaw-in-federal-reserve-thinking/ ("The lessons from JP Morgan's losses are simple. Such banks have become too large and complex for management to control what is going on. . . . And the regulators also have no idea about what is going on. Attempts to oversee these banks in a sophisticated and nuanced way are not working.").

133. Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 342 n.12 (1982); *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687 n.9 (1978); United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003).

134. Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8 (1979); *Leegin*, 551 U.S. at 886–87.

135. *Leegin*, 551 U.S. at 885–86.

136. For example, price fixing or market allocation. *Id.* at 886 (involving horizontal agreements among competitors to fix price or allocate markets).

137. DeLong Equip. Co. v. Wash. Mills Abrasive Co., 887 F.2d 1499 (1989) ("Restraints on competition . . . fall into two broad categories, horizontal and vertical. Vertical restraints occur between entities at different levels of distribution in order to control the price or path of a

fixing agreement, as appears to be the case with LIBOR manipulation, is still thought to be the type of conduct that is per se an antitrust violation. What this means as a practical matter is that the amount of evidence necessary to succeed in establishing the unreasonable restraint-of-trade prong is minimal. Prove that the conduct occurred, and it will be presumed that there was an unreasonable restraint.[138] However, most conduct is reviewed under the rule of reason analysis, which requires more information (evidence) in order to determine if the conduct unreasonably restrains trade or commerce.[139] As the LIBOR manipulation appears, at present, to be limited to horizontal price-fixing agreements, the analysis in this Article is limited to such conduct which is, at least as of the date of this Article, still a per se analysis.

2. Price Fixing

From early on, the Court has been concerned about an overzealous application of antitrust laws resulting in too many "false positives" with an effect of harming commerce and undermining the free market.[140] That said, the horizontal price-fixing agreement has a particularly special place in American antitrust history stemming from the Robber Baron period when the Sherman Act was first passed. It was *the accumulation of wealth in the hands of the few*[141] by horizontal agreements, perceived to have been accomplished by dint of bribery and corruption rather than the sweat of the brow, that was the focus of the Sherman Act.[142] Due to this historical perspective, together with conduct deemed anticompetitive and exclusionary, horizontal price fixing is still considered to lack any redeeming economic virtue and a per se violation.[143] Additionally, horizontal price fixing has

product after the product leaves the manufacturer, while restraints between competitors at the same level of distribution are characterized as horizontal.").

138. *See Maricopa*, 457 U.S. at 343–44.

139. *Id.* at 343.

140. United States v. Reading Co., 226 U.S. 324, 369 (1912) ("[T]he words 'restraint of trade' should be given a meaning which would not destroy the individual right of contract, and render difficult, if not impossible, any movement of trade in the character of interstate commerce, the free movement of which it was the purpose of the statute to protect."); *see also* United States v. Am. Tobacco Co., 221 U.S. 106 (1911).

141. City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 430 (1978) (Stewart, J., dissenting); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 50 (1911); McGahee v. N. Propane Gas Co., 858 F.2d 1487, 1497 n.27 (11th Cir. 1988).

142. 21 CONG. REC. 4102–03 (1890).

143. Texaco Inc. v. Dagher, 547 U.S. 1 (2006); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980); Citizen Publ'g Co. v. United States, 394 U.S. 131 (1969); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. New Wrinkle, Inc., 342

been deemed to interfere "with the setting of price by *free market* forces" further justifying a per se rule.[144]

Basically, price fixing does not mean inflexible or uniform price[145] just agreed upon within a range.[146] The effect of the price-fixing agreement needs to only curtail competition, and evidence that a "reasonable price" was charged is irrelevant.[147] So, in addition to an agreement, a Section 1 claim for horizontal price fixing must show that the agreement is among competitors on the same plane of distribution (thus horizontal) "with the purpose or effect of raising, depressing, fixing, pegging, or stabilizing price of a commodity . . . in interstate or foreign commerce."[148] The DOJ has defined price fixing as follows:

> Price fixing is an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold. It is not necessary that the competitors agree to charge exactly the same price, or that every competitor in a given industry join the conspiracy. Price fixing can take many forms, and any agreement that restricts price competition violates the law. Other examples of price-fixing agreements include those to:
>
> . . . .
>
> • Hold prices firm.
>
> . . . .
>
> • Adopt a standard formula for computing prices.
>
> . . . .

U.S. 371 (1952); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); United States v. Masonite Corp., 316 U.S. 265, 274 (1942); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940). As applied in financial services cases, see Hinds Cnty. v. Wachovia Bank N.A. (*Hinds Cnty. II*), 708 F. Supp. 2d 348 (S.D.N.Y. 2010); Brennan v. Concord EFS, Inc., 369 F. Supp. 2d 1127 (N.D. Cal. 2005); Vandervelde v. Put & Call Brokers & Dealers Ass'n, 344 F. Supp. 118 (S.D.N.Y. 1972); Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780 (S.D. Tex. 1971).

144. United States v. Container Corp. of Am., 393 U.S. 333, 337 (1969) (emphasis added). Vertical price fixing is not per se illegal. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007); State Oil Co. v. Khan, 522 U.S. 3 (1997); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988).

145. *Socony-Vacuum*, 310 U.S. at 222–23; *see also* United States v. N. Sec. Co., 120 F. 721 (D. Minn. 1903), *aff'd*, 193 U.S. 197 (1904).

146. *Masonite Corp.*, 316 U.S. at 276; Am. Tobacco Co. v. United States, 147 F.2d 93 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1946); *see also* United States v. Food & Grocery Bureau of S. Cal., 43 F. Supp. 974 (S.D. Cal. 1942), *aff'd*, 139 F.2d 973 (9th Cir. 1943).

147. *Socony-Vacuum*, 310 U.S. at 220–21.

148. Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1361 (10th Cir. 1989).

- Fix credit terms.[149]

3. Unreasonable Restraint of Trade as Applied in the Barclays Settlement

While the Barclays Settlement strongly indicates a horizontal price-fixing agreement, I suppose one could look at the Barclays submitters as the "manufacturers" of the LIBOR rates, which would certainly be correct in a rather ironic sense, and the traders at Barclays Capital as the "wholesalers" of such rates, thus giving us a vertical relationship and no per se rule at least regarding the intra-firm agreements. The inter-firm agreements with other banks could still be horizontal as there appears to be agreements on the same level of distribution, i.e. between submitters and between traders.[150] But it appears from the Barclays Settlements that everyone and his brother at Barclays were involved in the "manufacturing" of the interest rate which would put them all at the same level of distribution.[151] Further, Barclays PLC, Barclays Bank, and Barclays Capital were all "wholesalers" of the LIBOR interest rates in that each would use the rates for pricing of interest sensitive financial products[152] as well as for submission to regulators for purposes of establishing financial stability.[153]

As to the price fixing aspects, the emails referenced above indicate agreements between traders, submitters, and management to raise or depress[154] the various LIBOR rates. For example:

[*Price Raised*]

> On 6 August 2007, a Submitter even offered to submit a US dollar rate higher than that requested:
>
> Trader F: "*Pls set 3m libor as high as possible today*"
>
> Submitter: "*Sure 5.37 okay?*"
>
> Trader F: "*5.36 is fine*"[155]

149. U.S. DEP'T OF JUSTICE, PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR (2001).

150. *In re* Barclays PLC, Comm. Fut. L. Rep. (CCH) ¶ 32,234, 2012 CFTC LEXIS 39, at *22–28 (June 27, 2012); Final Notice to Barclays, *supra* note 13, ¶¶ 81–87; Statement of Facts, *supra* note 13, at 10–15.

151. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *5–10, *18–28; Final Notice to Barclays, *supra* note 13, ¶¶ 53–87; Statement of Facts, *supra* note 13, at 5–15.

152. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *5–10, *18–28; Final Notice to Barclays, *supra* note 13, ¶¶ 8–11, 52–101; Statement of Facts, *supra* note 13, at 5–15.

153. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *8–10, *44–64; Final Notice to Barclays, *supra* note 13, ¶¶ 12–14, 102–45; Statement of Facts, *supra* note 13, at 15–22.

154. Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1361 (10th Cir. 1989).

155. Final Notice to Barclays, *supra* note 13, ¶ 67.

> . . . .
>
> [*Price Depressed*]
>
> Trader C requested low one month and three month US dollar LIBOR submissions at 10:52 am on 7 April 2006 (shortly before the submissions were due to be made); "*If it's not too late low 1m and 3m would be nice, but please feel free to say "no"* . . . *Coffees will be coming your way either way, just to say thank you for your help in the past few weeks*". A Submitter responded "*Done . . . for you big boy*".[156]

Accordingly, while there may be some issues regarding the horizontal or vertical nature of the agreements, the conduct involved fits the definition of price fixing.

IV. NO ONE WAS DAMAGED

It has been suggested that establishing damages, if any, resulting from LIBOR manipulation will be difficult if not impossible.[157] That said, establishing damages is only relevant relating to civil antitrust actions not criminal.[158] For criminal antitrust violations, an intent element must be proved.[159] With regard to the civil antitrust damages, we already have several class actions pending and alleging that the LIBOR manipulation violates Section 1 and that plaintiffs have been damaged as a result.[160] In at least one case, the trial court has held that no damage resulting from antitrust violations (antitrust injury) has been alleged.[161]

The argument that no one was damaged seems to be premised on the assumption that all LIBOR manipulation victims were mortgagors or other debtors with debt instruments that were adjustable based upon a LIBOR rate. If LIBOR has been manipulated down, at least since 2008, the theory goes that these debtors would benefit by the lower interest rates. Such a premise is off the mark for at least two reasons. First, it ignores the victims of interest rate swaps who are harmed by a reduced interest rate, and second, it has been alleged that

---

156. *Id.* ¶ 65.

157. Das, *Part 2*, *supra* note 18; Kraten & Kraten, *supra* note 18.

158. Atl. Richfield Co. v. USA Petrol. Co., 495 U.S. 328, 334 (1990); HOVENKAMP, *supra* note 93, at 659.

159. City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 388 (1991); United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972); ALBERT H. WALKER, HISTORY OF THE SHERMAN LAW OF THE UNITED STATES OF AMERICA 3 (1910).

160. *In re* LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MD 2262(NRB), 2011 WL 5007957 (S.D.N.Y. Oct. 18, 2011); Adams v. Bank of Am. Corp., No. 12-cv-07461 (S.D.N.Y. Oct. 4, 2012).

161. *In re* LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MD 2262(NRB), 2013 WL 1285338, at *15–24 (S.D.N.Y. Mar. 29, 2013).

the LIBOR rates relevant to mortgages were adjusted up during this period on the readjustment date and back down again the next day.[162] If these allegations are established, then the assumption that holders of mortgages with variable interest rates always benefitted from LIBOR manipulation down would be incorrect.

Further, although LIBOR manipulation down may theoretically benefit some people, it harms those investors who benefit from increases in interest rates by virtue of investments in interest rate swaps. Some of these interest rate swap investors included state and local governments where the ultimate harm would be to the taxpayers.[163] Basically, local governments used to issue fixed rate bonds in order to have certainty regarding payment costs. Variable rate bonds typically carried a lower interest rate, but there was the risk of an interest rate increase which could result in a surprise increase in taxes for taxpayers. Bankers advised local governments that they could get the lower variable rate at, in essence, a fixed rate if they would enter into an interest rate swap. If the interest rates went up, they were protected. The catch—the local governments had to agree to waive their call options, i.e. the rights to redeem their bonds before maturity and issue new ones at the lower rate if interest rates went down. When interest rates did go down, in part by LIBOR manipulation, local governments lost billions of taxpayer dollars due to these interest rate swaps and the banks involved gained billions of taxpayer dollars.[164]

As for mortgages, a recent class action complaint filed in the United States District Court for the Southern District of New York alleges that the variable interest rates on mortgages tied to LIBOR rates were manipulated to the harm of the mortgagors. In this case, it is alleged that the banks manipulated the LIBOR rates up on the first of each month when the mortgage rates readjusted, then manipulated them back down the next day so the banks would still look financially stable.[165] Provided that the plaintiffs can establish that they suffered these damages due to the LIBOR manipulation and that these damages are an "antitrust injury," damages should be recoverable. In this regard, the plaintiffs must be direct, not indirect, victims of defendants LIBOR manipulation, meaning that they may have to prove that they purchased their financial products from a LIBOR panel bank.[166]

162. *Adams*, No. 12-cv-07461.

163. Randall Dodd, *Municipal Bombs*, 47 FIN. & DEV. 33 (2010).

164. William J. Quirk, *Too Big to Fail and Too Risky to Exist*, THE AM. SCHOLAR, Autumn 2012, at 5.

165. *Adams*, No. 12-cv-07461.

166. Ill. Brick Co. v. Illinois, 431 U.S. 720, 730–31 (1977).

A. *Damages in Private Civil Actions*

In a civil antitrust action, including Section 1 actions, a plaintiff must establish (1) that it suffered an injury, (2) that the injury was caused by the antitrust violation, and (3) that the injury is an "antitrust injury"—an injury of the type that antitrust laws were intended to prevent.[167] An antitrust injury must be attributable to the anticompetitive conduct.[168] Even in a per se case, a private antitrust plaintiff will be required to establish an antitrust injury.[169] For example, if plaintiff is a competitor of defendant and its alleged losses are due to increased competition this would not be an antitrust injury as the alleged injury of increased competition for plaintiff/competitor is not the type of injury antitrust laws are intended to prevent.[170] In a horizontal price-fixing case, antitrust injuries include lost profits due to the improper price fixing and lost opportunity to compete.[171]

B. *Damage Analysis as Applied in the Barclays Settlement*

First, the plaintiff must establish that it suffered an injury. We are dealing here with two distinct periods of conduct: the first period from about 2005 to 2008 where the manipulation of LIBOR appeared to be primarily to benefit a trader's position. While LIBOR is based upon *estimates*, these estimates are supposed to be based on interbank borrowing, not trading positions.[172] The Barclays Settlement provides evidence and data to calculate manipulation based upon trading positions. For example:

Trader C: "*The big day* [has] *arrived. . . My NYK are screaming at me about an unchanged 3m libor. As always, any help wd be greatly appreciated. What do you think you'll go for 3m?*"

Submitter: "*I am going 90 altho 91 is what I should be posting.*"[173]

During this period the LIBOR rates went up at times and they went down at times as traders could also profit in a reduced LIBOR rate

167. Atl. Richfield Co. v. USA Petrol. Co., 495 U.S. 328, 334 (1990); HOVENKAMP, *supra* note 93, at 659.

168. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986).

169. *Atl. Richfield Co.*, 495 U.S. at 339–40; DeLong Equip. Co. v. Wash. Mills Electro Minerals Corp., 990 F.2d 1186, 1198 (11th Cir. 1993).

170. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487–88 (1977).

171. *DeLong Equip. Co.*, 990 F.2d at 1198–99.

172. *The Basics*, *supra* note 20.

173. Final Notice to Barclays, *supra* note 13, ¶¶ 11–13.

similar to going short in the market.[174] To the extent a trader and his client benefitted, some counterparty lost. This is not a win-win sport. The counterparty should be able to claim an injury due to the lost profits.[175]

However, the counterparty would have to establish the causal connection between the injury (lost profits) and the antitrust conduct (LIBOR manipulation or price fixing). While the Supreme Court has held that it is enough to show that the antitrust conduct was a "material cause" of the injury,[176] some subsequent decisions have applied a "substantial factor" test.[177] As a practical matter, this may be a distinction without a difference.[178] In any event, the civil counterparty plaintiff will have to separate the damages caused by the antitrust conduct from damages caused by other factors.[179] Given that these damages arise from interest rate sensitive financial products and that the damages are directly related to the manipulation of interest rates, causation should not be a problem although the amount at issue may be in dispute. Here the Barclays Settlement documents provide some evidence as to the amount due to the LIBOR manipulation. Use the same quotation above from the Barclays Settlement as our example:

Trader C: "*The big day* [has] *arrived. . . My NYK are screaming at me about an unchanged 3m libor. As always, any help wd be greatly appreciated. What do you think you'll go for 3m?*"

Submitter: "*I am going 90 altho 91 is what I should be posting.*"[180]

We are dealing here with one basis point for the three-month LIBOR rate. As previously discussed in Part II(B) above, a one basis point change in one billion U.S. dollars is the equivalent of $100,000 per annum.[181] No doubt the damage calculation will be complex due to daily submissions, the *estimate* nature of even non-manipulated LIBOR submissions, the amount involved, and the length of time but that does not undermine the causation element.

Is this an antitrust injury? Counterparties under this scenario are not alleging an injury due to increased competition, as in *Brunswick.*

174. *In re* Barclays PLC, Comm. Fut. L. Rep. (CCH) ¶ 32,234, 2012 CFTC LEXIS 39, at *5–10, *18–28 (June 27, 2012); Final Notice to Barclays, *supra* note 13, ¶¶ 8–11, 52–101; Statement of Facts, *supra* note 13, at 5–15.

175. *DeLong Equip. Co.*, 990 F.2d at 1198–99.

176. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969); Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 143–44 (1968).

177. *See, e.g.*, Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469 (7th Cir. 2002).

178. HOVENKAMP, *supra* note 93, at 660.

179. *Id.*

180. Final Notice to Barclays, *supra* note 13, ¶ 12.

181. Das, *Part 1*, *supra* note 18.

They are alleging an injury (lost profits) due to market manipulation in violation of free market principles. As antitrust laws are designed to protect free markets,[182] the injuries caused by LIBOR manipulation would indeed be the type of injuries antitrust laws are intended to prevent.

Similarly, the second period of LIBOR manipulation (around 2008 to at least 2010), where rates were manipulated down to give the appearance of a bank's financial stability during the peak of the economic crisis, would cause recoverable damages to counterparties. The misimpression given here, that everyone benefits from reduced interest rates, is far from the truth. In fact, some of the hardest hit counterparties during this period were state and local governments investing in interest rate swaps.[183]

As to mortgagors who were the victims of LIBOR rates being manipulated higher on the first of each month when the mortgage rates readjusted, there is some evidence that LIBOR was manipulated for this purpose in the Barclays Settlement documents[184] which, again, would not be an injury due to increased competition as in *Brunswick* but would be damages due to market manipulation and price fixing.

Finally, the court's decision in the *In re LIBOR-Based Financial Instruments Antitrust Litigation* case is primarily based on insufficient pleadings[185] and the court's holding that the LIBOR submission process is not competitive.[186] The insufficient pleading problem may be overcome by pending amendments, but the holding that the LIBOR submission process is not competitive, hence no antitrust injury can be alleged, eviscerates any possible civil antitrust action if the holding withstands an appeal. The trial court's antitrust injury analysis in *In re LIBOR-Based Financial Instruments Antitrust Litigation* is deserving of a separate article particularly if it is upheld on appeal. Such analysis is beyond the scope of this Article. However, suffice it to say that, even if it is required that the LIBOR submission process itself must be competitive to allege an antitrust injury, one could make such an allegation. Specifically, banks are selected as participating banks on the panels based upon reputation, credit quality, and activity in

182. City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 388 (1991); United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972); WALKER, *supra* note 159, at 3.

183. *See, e.g.*, *In re* LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MD 2262(NRB), 2011 WL 5007957 (S.D.N.Y. Oct. 18, 2011).

184. *In re* Barclays PLC, Comm. Fut. L. Rep. (CCH) ¶ 32,234, 2012 CFTC LEXIS 39, at *22–24 (June 27, 2012).

185. *In re* LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MD 2262(NRB), 2013 WL 1285338, at *16–17 (S.D.N.Y. Mar. 29, 2013).

186. *Id.* at *16, *19, *21.

London.[187] All of these are competitive factors to get on LIBOR panels for prestige, market input and, evidently, the ability to manipulate the market for profit.

C. *Intent Requirement in Criminal Actions*

A criminal antitrust violation does not require damages but does require the establishment of intent.[188] The intent which must be established in a criminal prosecution of Section 1 is that either the conduct had an anticompetitive effect and that defendants knew of these probable effects or the conduct was intended to produce the anticompetitive effect and that the defendants knew of the probable effect.[189] If the antitrust conduct is per se an unreasonable restraint of trade, as is horizontal price fixing, then the only intent which must be established is the intent to enter into the agreement as intent to produce the anticompetitive effect and knowledge of the probable effect will be presumed.[190]

D. *Intent Analysis as Applied in the Barclays Settlement*

Given the broad language in the Sherman Act and the complexity of business practices, prosecutors and the courts have resorted to the criminal sanctions in the Sherman Act only in cases where the conduct was egregious. Horizontal price fixing is one of those cases.[191] What we have in the Barclays Settlement is a horizontal price-fixing case, so the only intent that would be required would be the intent to enter into the agreement to fix prices.[192]

For example, an exchange of pricing information among competitors may evidence an improper Section 1 agreement but, without more, lacks the requisite intent and purpose of criminal sanctions to punish conscious and calculated wrongdoing.[193] But in a price-fixing

---

187. *See supra* note 27.

188. United States v. U.S. Gypsum Co., 438 U.S. 422, 445 (1978).

189. *U.S. Gypsum Co.*, 438 U.S. at 445–46; United States v. Cinemette Corp. of Am., 687 F. Supp. 976, 983 (W.D. Pa. 1988); HOVENKAMP, *supra* note 93, at 643.

190. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224–25 & n.59 (1940); United States v. Gravely, 840 F.2d 1156, 1161 (4th Cir. 1988); United States v. Cargo Serv. Stations, Inc., 657 F.2d 676, 683 (5th Cir. Unit B Sept. 28, 1981) ("Unlike the situation in Gypsum, in the present case the district court did not require the jury to infer the requisite intent from a finding that the exchange of price information had an impact on prices. Rather, the district court equated the intent to fix prices with the requisite intent to unreasonably restrain commerce."); HOVENKAMP, *supra* note 93, at 643–44.

191. *U.S. Gypsum Co.*, 438 U.S. at 439–40.

192. *Socony-Vacuum*, 310 U.S. at 224–25 & n.59; *Gravely*, 840 F.2d at 1161; HOVENKAMP, *supra* note 93, at 634–44.

193. *U.S. Gypsum Co.*, 438 U.S. at 441–42.

case, if it is established that defendants intended to raise, depress, fix, peg, or stabilize a price,[194] it is not necessary to prove defendants intended to violate antitrust laws.[195] Do the emails referenced in the Barclays Settlement documents evidence such intent to raise, depress, fix, peg, or stabilize a price? The e-mails are, again, enlightening:

> i. [O]n 22 March 2006, Trader A (a US dollar Derivatives Trader) stated in an email to Manager A that Barclays' Submitter *"submits our settings each day, we influence our settings based on the fixings we all have"*.
>
> ii. [O]n 5 February 2008, Trader B (a US dollar Derivatives Trader) stated in a telephone conversation with Manager B that Barclays' Submitter was submitting *"the highest LIBOR of anybody [. . .] He's like, I think this is where it should be. I'm like, dude, you're killing us"*. Manager B instructed Trader B to: *"just tell him to keep it, to put it low"*. Trader B said that he had *"begged"* the Submitter to put in a low LIBOR submission and the Submitter had said he would *"see what I can do"* . . . .
>
> . . . .
>
> 58. Barclays' Derivative Traders would request high or low submissions regularly in emails, for example on 7 February 2006, Trader C (a US dollar Derivatives Trader) requested a *"High 1m and high 3m if poss please. Have v. large 3m coming up for the next 10 days or so"*. Trader C also expressed his preference that Barclays would be *"kicked out"* of the average calculation. Trader C's aim was therefore that Barclays' submissions would be high enough to be excluded from the final average calculation, which could have affected the final benchmark rate.
>
> . . . .
>
> i. Trader C stated *"We have an unbelievably large set on Monday (the IMM). We need a really low 3m fix, it could potentially cost a fortune. Would really appreciate any help"*;
>
> ii. Trader B explained *"I really need a very very low 3m fixing on Monday – preferably we get kicked out. We have about 80 yards* [billion] *fixing for the desk and each 0.1* [one basis point] *lower in the fix is a huge help for us. So 4.90 or lower would be fantastic"*. Trader B also indicated his preference that Barclays would be kicked out of the average calculation; and
>
> iii. On Monday, 13 March 2006, the following email exchange took place:

194. *Socony-Vacuum*, 310 U.S. at 223.

195. United States v. Nippon Paper Indus. Co., 109 F.3d 1, 6–7 (1st Cir. 1997); United States v. Brown, 936 F.2d 1042, 1046 (9th Cir. 1991); United States v. Soc'y of Indep. Gasoline Marketers, 624 F.2d 461, 465 (4th Cir. 1979); United States v. Gillen, 599 F.2d 541, 544–45 (3d Cir. 1979).

Trader C: "*The big day* [has] *arrived. . . My NYK are screaming at me about an unchanged 3m libor. As always, any help wd be greatly appreciated. What do you think you'll go for 3m?*"

Submitter: "*I am going 90 altho 91 is what I should be posting*".

Trader C: "[. . .] *when I retire and write a book about this business your name will be written in golden letters* [. . .]".

Submitter: "*I would prefer this* [to] *not be in any book!*"

. . . .

Submitter: "*Hi All, Just as an FYI, I will be in noon'ish on Monday* [. . .]".

Trader B: "*Noonish? Whos going to put my low fixings in? hehehe*"

Submitter: "[. . .] [X or Y] *will be here if you have any requests for the fixings*".

61. Trader D set calendar entries on at least 4 occasions in 2006 to remind him to make requests for EURIBOR submissions: "*Ask for Low Reset Rate*" and "*Ask for High 6M Fix*".

. . . .

64. In response to a request from Trader C for a high one month and low three month US dollar LIBOR submission on 16 March 2006, a Submitter responded: "*For you . . . anything. I am going to go 78 and 92.5. It is difficult to go lower than that in threes, looking at where cash is trading. In fact, if you did not want a low one I would have gone 93 at least*".

65. Trader C requested low one month and three month US dollar LIBOR submissions at 10:52 am on 7 April 2006 (shortly before the submissions were due to be made); "*If it's not too late low 1m and 3m would be nice, but please feel free to say "no" . . . Coffees will be coming your way either way, just to say thank you for your help in the past few weeks*". A Submitter responded "*Done . . . for you big boy*".

66. On 29 June 2006, a Submitter responded to Trader E's request for EURIBOR submissions "*with the offer side at 2.90 and 3.05 I will input mine at 2.89 and 3.04 with you guys wanting lower fixings (normally I would be a tick above the offer side)*".

67. On 6 August 2007, a Submitter even offered to submit a US dollar rate higher than that requested:

Trader F: "*Pls set 3m libor as high as possible today*"

Submitter: "*Sure 5.37 okay?*"

Trader F: *"5.36 is fine"*[196]

It is difficult to anticipate what a court or jury would think of this evidence. The DOJ tends to settle most of its criminal cases prior to the litigation getting to the point of a publishable opinion.[197] Accordingly, there is a dearth of clear examples of the nature and extent of the intent requirement under Section 1. That said, neither fraud nor corrupt scienter are required for a criminal conviction under Section 1[198] but such evidence certainly would provide a stronger case. The above referenced emails, which are only a portion of the emails in the Barclays Settlement relevant to this issue, do evidence an intent to raise, depress, fix, peg, or stabilize the LIBOR rates. Further, the facts and evidence in the Barclays Settlement documents indicate fraud and a corrupt scienter. This should be sufficient for the intent requirement

V. THE GOVERNMENT MADE ME DO IT

One of the distractions raised by Barclays in the recent LIBOR manipulation scandal is that regulators (the government) encouraged manipulation of the LIBOR rates starting in 2008 when the financial crisis commenced.[199] The reasons given for this manipulation during the financial crisis are that the LIBOR rates are an indicator of bank stability; an increase in a bank's interbank loan interest rate is an indication that that bank is not stable.[200] Accordingly, regulators allegedly suggested to banks, such as Barclays, that they report artificially low LIBOR rates to prevent a run on a systemic bank.[201] While such a public deception, if true, is very troubling, it is not a defense to a civil nor a criminal antitrust action.

Defendants, in *United States v. Socony-Vacuum Oil Co.*, unsuccessfully made a similar argument.[202] *Socony-Vacuum* involved a problem in the petroleum market in the mid-1920s and into the 1930s. Overproduction caused prices to go down dramatically, and the deflation of

196. Final Notice to Barclays, *supra* note 13, ¶¶ 57–61, 64–67.

197. *See, e.g.*, *Workload Statistics: FY 2002–2011*, U.S. DEP'T OF JUST., http://www.justice.gov/atr/public/workload-statistics.html (last visited May 17, 2013).

198. Eric Grannon & Nicolle Kownacki, *Are Antitrust Violations Crimes Involving Moral Turpitude?*, THE CHAMPION, Apr. 2012, at 44–45.

199. *In re* Barclays PLC, Comm. Fut. L. Rep. (CCH) ¶ 32,234, 2012 CFTC LEXIS 39, at *23–64 (June 27, 2012); Final Notice to Barclays, *supra* note 13, ¶¶ 12–14, 102–45; Statement of Facts, *supra* note 13, at 5–22; *see also* Das, *Part 2*, *supra* note 18.

200. *In re Barclays PLC*, 2012 CFTC LEXIS 39, at *23–64; Final Notice to Barclays, *supra* note 13, ¶¶ 12–14, 102–45; Statement of Facts, *supra* note 13, at 15–22.

201. HC 481-i, *supra* note 9, at 17–21; *see In re Barclays PLC*, 2012 CFTC LEXIS 39, at *54–62; Statement of Facts, *supra* note 13, at 20–22.

202. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

prices together with the economic troubles caused by the Great Depression gave both state and federal government concern.[203] At first several states with a large petroleum industry attempted to pass laws to limit production to stabilize prices.[204] When this did not work, the federal government started to look into the problem. As part of the National Industrial Recovery Act of 1933 (NIRA),[205] a "code of fair competition for the petroleum industry" was established with the Secretary of the Interior appointed as the Administrator.[206] The Secretary of the Interior created a Petroleum Administrative Board to advise him and a Planning and Coordination Committee was appointed, with members from the petroleum industry. The Secretary of the Interior approved plans that attempted to limit production, limit supply, and bring prices up, but in 1935, the Supreme Court ruled that the code of fair competition for the petroleum industry was unconstitutional.[207] After that, the government, through the Petroleum Administrative Board, attempted to address the problem through negotiating voluntary cooperative agreements between members in the industry to limit production and stabilize prices.[208] Members of the industry continued to meet even after the Supreme Court ruled that the fair competition code making authority conferred in the NIRA was unconstitutional.[209] Although there was some dispute regarding the outright approval of the government, the government did seem to have knowledge of the ongoing industry attempts to stabilize prices, and there is some evidence of government approval of such conduct.[210] In holding that the government's knowledge or acquiescence did not provide antitrust immunity, the Court stated:

> As to knowledge or acquiescence of officers of the Federal government little need be said. The fact that Congress through utilization of the precise methods here employed could seek to reach the same objective sought by respondents does not mean that respondents or any other group may do so without specific Congressional authority. Admittedly no approval of the buying programs was obtained under the National Industrial Recovery Act prior to its termination on June 16, 1935, (§ 2(c)) which would give immunity to respondents from prosecution under the Sherman Act. Though employees of the government may have known of those programs and winked at

203. *Id.* at 170–71.
204. *Id.*
205. National Industrial Recovery Act of 1933, ch. 90, § 9(c), 48 Stat. 195, 200.
206. *Socony-Vacuum*, 310 U.S. at 171–72.
207. Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935).
208. *Socony-Vacuum*, 310 U.S. at 174–75.
209. *Id.* at 175–90.
210. *Id.* at 201–08.

> them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity. None other would suffice.[211]

In the case of LIBOR manipulation, there is no indication that the United States Congress provided immunity, so even if there was tacit approval from some regulators that would not provide immunity from United States antitrust laws.

VI. EXTRATERRITORIAL APPLICATION

Barclays and the other LIBOR panel banks which may be involved in the LIBOR manipulation have an international presence both in terms of causing an effect in many different countries and physical presence. There is little doubt that these banks will face many civil suits, if not criminal actions, around the globe.[212] Accordingly, the issue of the extraterritorial application of United States antitrust law may become an issue.[213]

Domestic (United States) victims of price fixing may bring a Section 1 claim based upon foreign anticompetitive conduct causing domestic harm, but foreign victims may not for harm caused in foreign nations.[214] Thus, the LIBOR manipulation that occurred outside of the United States will be subject to the extraterritorial application of Section 1 only for the harm caused in the United States.[215] Harm caused in other nations will be subject to the competition laws of those nations. To do otherwise would amount to unacceptable interference with the commercial interests of other nations.[216]

To the extent LIBOR manipulation was a compelled act for which the banks had no choice but to obey, there may be a valid defense to a Section 1 action as the acts of the banks effectively become sovereign acts.[217] But what we have to date is, at best, LIBOR manipulation

---

211. *Id.* at 222–27.

212. *See* Matt Scuffham, *Barclays Faces Libor Claim in Landmark UK Court Case*, REUTERS (Oct. 24, 2012, 6:08 PM), http://uk.reuters.com/article/2012/10/24/uk-barclays-libor-idUKBRE89N14L20121024.

213. Certainly, the international aspect of this mess and the trillions of dollars involved guarantee political ramifications and possible conflicts between competition authorities around the globe.

214. 15 U.S.C. § 6(a) (2006); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004).

215. 15 U.S.C. § 6(a); *Hoffmann-La Roche*, 542 U.S. at 155; Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).

216. *Hoffmann-La Roche*, 542 U.S. at 164–65.

217. Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 606 (1976), *superseded by statute*, 15 U.S.C. § 6(a). For the acts-of-state doctrine, see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 400–01 (1964).

during the financial crisis based upon foreign governmental approval and/or involvement which does not provide a defense.[218] Further, principles of comity would not require deference to foreign government approval and/or involvement for the LIBOR manipulation conduct particularly when such an outcome would, in effect, cede domestic market control to a foreign state.[219]

Additionally, United States banks, which were members of a LIBOR panel and are involved in LIBOR manipulation, may be subject to extraterritorial application of other states competition laws.[220] To date it appears as though the regulatory authorities of the United Kingdom and the United States are continuing to practice cooperation and coordination regarding the LIBOR manipulation scandal—at least on the banking regulations arena. But, European Union law will also be applicable for the competition law violations[221] that are currently under investigation.[222] While it is too early to predict what will happen, it is quite possible we will have conflicting outcomes based more on economic and political considerations rather than the rule of law.[223]

VII. CONCLUSION

The LIBOR manipulation scandal is but the latest of many banking scandals that have come to the public light in the aftermath of the financial crisis of 2008, but it is likely to be recorded in history as the most consequential. Antitrust laws in the United States, as well as anti-cartel laws in the rest of the world, are intended to prevent and redress this type of conduct by powerful cartels. This anticompetitive conduct undermines the free market and harms individuals, corporations, governments, and institutions. Further, the credibility of the

218. *Timberlane Lumber*, 549 F.2d at 606.

219. Hilton v. Guyot, 159 U.S. 113, 123–24 (1895).

220. *See, e.g.*, Case 89/85, *In re* Wood Pulp Cartel, 1988 E.C.R. 5193. Currently, the following United States banks are being investigated for LIBOR manipulation: Bank of America, Citigroup, and JP Morgan Chase. David McLaughlin, *JPMorgan, UBS Said Among Banks Queried in Libor Probe*, BLOOMBERG (Aug. 15, 2012, 11:00 PM), http://www.bloomberg.com/news/2012-08-15/jpmorgan-barclays-said-among-banks-to-get-libor-subpoenas.html; Son, *supra* note 48.

221. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 85, 298 U.N.T.S. 11.

222. Joaquín Almunia, Vice President, European Comm'n Responsible for Competition Policy, Competition Enforcement in the Knowledge Economy (Sept. 20, 2012), *available at* http://europa.eu/rapid/press-release_SPEECH-12-629_en.htm; Sophie Mosca, *Euribor and Libor Probes a Priority for EU*, EUROPOLITICS (July 2, 2012), http://www.europolitics.info/business-competitiveness/euribor-and-libor-probes-a-priority-for-eu-art338710-8.html.

223. For example, see the Boeing/McDonnell Douglas merger.

markets and financial institutions is at an all-time low and continues to sink with each new scandal.

To the historian, the financial crisis of 2008 and the Great Recession aftermath give a strong sensation of déjà vu. Financial crises in the past have often been attributed to over speculation energized, in part, by fraud, market manipulation and governmental assistance in creating a corrupt system.[224] In commenting on the 1907 financial crisis, Justice Brandeis observed:

> The development of our financial oligarchy followed, in this respect, lines with which the history of political despotism has familiarized us:—usurpation, proceeding by gradual encroachment rather than by violent acts; subtle and often long-concealed concentration of distinct functions, which are beneficent when separately administered, and dangerous only when combined in the same persons.[225]

These are not qualities of a free market. Yet, despite these and similar observations over the years, antitrust laws, which are intended to protect free markets,[226] are enforced less, not more, by the government in times of economic turmoil.[227] Perhaps this is because the government has had little success in prosecuting such actions in the financial services sector even after a crisis.[228] In any event, based upon historical patterns, there is little reason to expect a criminal action brought by the United States against a systemic bank or a member of its upper management. Redress will have to come from the civil actions. And after governmental officials deliver their panegyric on the state response to the LIBOR manipulation, the majority of people can find comfort in the knowledge that "[l]aws are best explained, interpreted and applied by those whose interest and abilities lie in perverting, confounding and eluding them."[229]

---

224. *See* Stock Exchange Practices, S. Rep. No. 1455, 73d Cong. (2d Sess. 1934); Concentration of Control of Money and Credit, H.R. Rep. No. 1593, 62d Cong. (3d Sess. 1913); Fin. Crisis Inquiry Comm'n, *supra* note 132.

225. Louis D. Brandeis, Other People's Money 7 (Read a Classic 2011) (1932).

226. FTC v. Ticor Title Ins. Co., 504 U.S. 621, 642 n.1 (1992); City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 388 (1991); City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 408 (1978).

227. Daniel A. Crane, *Did We Avoid Historical Failures of Antitrust Enforcement During the 2008–2009 Financial Crisis?*, 77 Antitrust L.J. 219, 220–21 (2010).

228. See, for example, United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953), where the government lost a case based upon Section 1 and numerous other causes of action. The action arose from the stock market crash of 1929 and the Great Depression resulting thereafter. Defendants were seventeen Wall Street investment banks. *Id.* at 624. Unlike the LIBOR manipulation cases, the government's case involved a wide variety of conduct and was based entirely upon circumstantial evidence.

229. Swift, *supra* note 1, at 129.