CPI's Cartel Column Presents:

ISDAfix Decision

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Welcome back to the cartel column "From Collusion to Competition." Much has happened since the last column, almost a year ago. We are now back on after this long break, and have much ground to cover.

I dedicate this column to a very significant decision recently issued in the ISDAfix antitrust class action, titled *Alaska Electrical Pension Fund v. Bank of America, N.A*., 2016 WL 1241533 (S.D.N.Y. Mar. 28, 2016). Class lead counsel are Quinn Emanuel Urquhart & Sullivan LLP, Robbins Geller Rudman & Dowd LLP, and Scott+Scott, Attorneys at Law LLP.

Among several important aspects of this decision, the use of screens for conspiracies and manipulations (and in this case, my own screens) played an important role in addressing plausibility of such conduct at the complaint stage.

I hope you enjoy the reading!

Feel free to send me your comments and suggestions for future columns to rabrantes-metz@globaleconomicsgroup.com

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ISDAfix Decision

ISDAfix is an interest rate benchmark used to determine the settlement value of cash-settled swaptions (options on interest rate swaps) and other financial derivatives. Plaintiffs' basic allegation was that the fourteen major Wall Street banks who set the ISDAfix rate each day conspired to rig ISDAfix in order to extract higher profits on financial instruments that are linked to ISDAfix.

On March 28, 2016, Judge Jesse Furman issued an in-depth, 36-page opinion largely upholding the complaint. Judge Furman sustained the antitrust, breach of contract, and unjust enrichment claims, while dismissing the tortious interference and breach of implied duty of good faith and fair dealing claims. The court's decision has important implications for financial benchmark litigation in particular, and antitrust litigation in general. The case is one of a number of large financial misconduct cases being put together through quantitative analysis of public and quasi-public data. The use of "screens" to detect subtle but consistent pricing and other anomalies was also used, for example, in LIBOR. In *Alaska Electrical*, the "screens" revealed that: (1) the banks repeatedly claimed to have had identical offer/bid rates; (2) the level of uniformity of the banks' submissions was undermined by concurrent market rates; (3) the level of uniformity in the banks' submissions abated once regulatory scrutiny increased; and (4) the change in the banks' behavior cannot be explained by an increase in volatility, or other market forces. The analyses also show that (5) the banks "banged the close" in the market for ISDAfix-related instruments to manipulate the reference rate; (6) the banks conspired with the ISDAfix rate administrator, ICAP, to delay the publication of transactional information; and (7) these behaviors also began to dissipate when the banks came under increased scrutiny from regulators in late 2013.

The *Alaska Electrical* court's upholding of the complaint is another judicial stamp of approval on this approach to "plausibly" pleading a claim based primarily on analyses of pricing data. This approach allows plaintiffs to take the initiative to immediately pursue their claims, rather than wait for news stories or government investigations to fully develop. The court rejected many common defense arguments, such as that their non-nefarious alternative explanations for the data should hold sway at the pleading stage, and that the court had to blind itself to the banks' wrongdoing in other areas. 2016 WL 1241533, at *4-5. To the contrary, Judge Furman recognized that the fact the banks had held together a conspiracy in other financial areas, provided additional support for the allegation they conspired here as well. This is because it took the air out of the defense argument that the alleged conspiracy was simply too complex, across a too-diverse set of banks, to make economic sense.

The case is also important because it highlighted a split amongst the district courts with regard to the issue of "antitrust standing." The court rejected the banks' argument that plaintiffs cannot establish antitrust injury because the setting of ISDAfix was "based on a cooperative process." *Id*. at *6. The banks relied on *In re LIBOR-Based Financial Instruments Antitrust Litigation*, 935 F. Supp. 2d 666 (S.D.N.Y. 2013) ("*LIBOR I*"), where Judge Naomi Buchwald held that "the process of setting LIBOR . . . was a cooperative endeavor wherein otherwise-competing banks agreed to submit estimates of their borrowing costs . . . to facilitate calculation of an interest rate index." *Id*. at 688. Judge Buchwald concluded that if the banks "subverted this process by conspiring to submit artificial estimates . . . it would not follow that plaintiffs have suffered antitrust injury. Plaintiffs' injury would have resulted from defendants' misrepresentation, not from harm to competition." *Id.* Judge Furman disagreed for two reasons. First, he found that a benchmarking conspiracy that was carried out not only through the reference-rate process, but also through "banging the close" market activities, distinguished the ISDAfix case from the LIBOR cases. 2016 WL 1241533, at *6. More "broadly," Judge Furman "disagree[d] with the *LIBOR I* Court's legal conclusion" that engaging in a purportedly "cooperative" process to manipulate prices insulates the participants from antitrust liability. *Id.* at *6-7. He began his analysis with Supreme Court precedent, which says that the specific "machinery employed by a combination for price-fixing is immaterial" to the antitrust laws. He also disagreed with Judge Buchwald's conclusion that the LIBOR claims are essentially fraud allegations, writing that "[i]t would be perverse to grant such wrongdoers immunity from liability under the antitrust laws." Notably, Judge Lorna Schofield of the S.D.N.Y., who is overseeing litigation involving alleged manipulation of foreign currency exchange, similarly concluded that collusion in the setting of a benchmark rate results in antitrust injury and disagreed with Judge Buchwald, a decision which has recently been overturned by the Second Circuit.

Another common area of dispute in these large financial cases, which the *Alaska Electrical* court had chance to weigh in on, is whether the parties bringing the claims are the "right" plaintiffs. Defendants have argued that particular plaintiffs cannot show "standing" without pleading "injury-in-fact" with great specificity—*i.e.*, tying their investment to a specific day, time of day, and type of demonstrated misconduct. The *Alaska Electrical* court held that the basic "standing" requirement is a "low threshold" for plaintiffs. 2016 WL 1241533, at *4. The court found that the ISDAfix plaintiffs easily met the standard by alleging that they "transacted in interest rate derivatives . . . directly impacted" by the manipulation of ISDAfix, recognizing that a "paid too much" or "received too little" harm is a "classic" economic injury-in-fact. The court

thus rejected the argument that the plaintiffs had to detail their investments, and the wrongdoing, down to the exact minute.

The banks also regularly argue that their misconduct may have benefitted the plaintiffs. A movement in one way that harmed those who bought, simultaneously helped those who sold. The court held that these "netting" issues are simply not a pleading question. *Id*. The plaintiffs' only burden is to plausibly plead some harm, which the *Alaska Electrical* plaintiffs did. As the court observed, the fact "that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing." Finally, on the statute of limitations, Judge Furman found allegations that the conspiracy to manipulate ISDAfix was secretive by nature, and thus fraudulently concealed, well-pled. *Id*. at *12-13. The court rejected the banks' argument that plaintiffs should have known of their allegations earlier because the underlying economic data was publicly available. The court noted that "the trends identified in the Amended Complaint are subtle and required the aggregation of massive quantities of data." This aspect of the decision is thus another significant victory for the data-driven approach to pleading benchmarking conspiracies, as pleading a case based on publicly available data is always potentially a dual-edged sword with respect to the statute of limitations.

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