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CONFLICT MINERALS

SEC defeats challenge to 'conflict minerals' rule

A federal judge has upheld the "conflict minerals" rule implemented by the Securities and Exchange Commission requiring public companies to disclose whether they use certain minerals from the Democratic Republic of the Congo or adjoining countries.

National Association of Manufacturers v. Securities and Exchange Commission et al., No. 13-635, 2013 WL 3803918 (D.D.C. July 23, 2013).

The rules challenge was filed by the National Association of Manufacturers, the U.S. Chamber of Commerce and the Business Roundtable. The decision is a major defeat for business groups that oppose the conflict minerals rule.

"In a thorough and well-reasoned opinion, the United States District Court for the District of Columbia rejected a long list of industry challenges to the SEC's rule requiring greater transparency in the use of 'conflict minerals,'" Dennis Kelleher, president and CEO of Better Markets, a nonprofit organization, said in an email.

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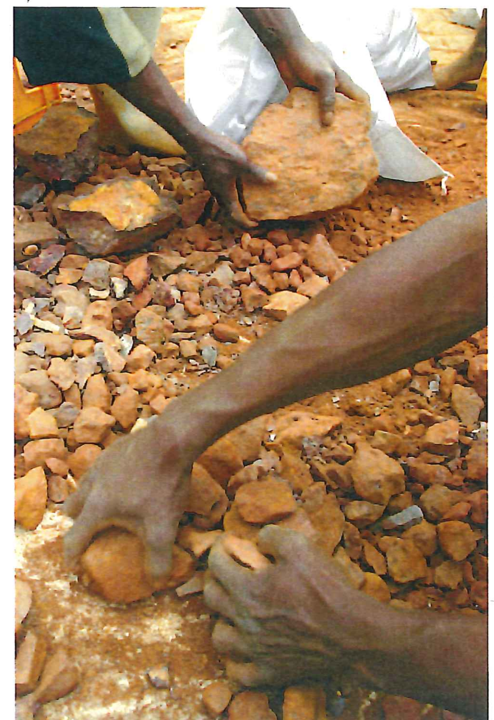

REUTERS/Finbarr O'Reilly

Congolese miners bag raw chunks of cassiterite, the base element of tin. The Dodd-Frank Act directed the SEC to implement a rule requiring greater transparency regarding the source of certain minerals, including tantalum, tin, tungsten and gold.

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Libor litigation grows despite 'big win' for banks in multidistrict litigation

By C. Bailey King Jr., Esq., and Timothy P. Lendino, Esq.
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Since U.S. District Judge Naomi Reice Buchwald's recent decision dismissing antitrust and racketeering class action claims against global banks for manipulating the London Interbank Offered Rate,[1] many institutional investors have filed individual claims based on common-law fraud. This trend of non-class action, non-antitrust suits is expected to continue as litigants legally maneuver around Judge Buchwald's decision.

Although Judge Buchwald's decision has been seen as a "big win" for the banks, they will now have to battle institutional investors on multiple fronts.[2] Banks will be forced to defend against individual suits across the United States, as institutional investors strategically select state courts as their preferred forum and plead individualized claims for fraud and misrepresentation. In this way, they avoid federal transfer to the multidistrict antitrust litigation pending in Manhattan before Judge Buchwald.

BACKGROUND

On June 27, 2012, Barclays Bank PLC made international headlines when the investment banking giant announced it had entered into a $450 million settlement with government regulators for its role in manipulating Libor.[3]

In the last year, government investigations commenced, and a frenzy of private lawsuits were filed on behalf of various institutional investors.

To date, government investigators and private litigants have accused at least 12 international banks of colluding to manipulate Libor. The panel banks have been under increasing scrutiny, and to date, three banks (Barclays, UBS and RBS) have agreed to pay almost $2.5 billion in settlements to regulatory agencies.

> Government investigators and private litigants have accused at least 12 international banks of colluding to manipulate Libor.

Libor is one of several benchmarks banking institutions use to set the interest rates for lending on countless financial transactions. Libor is set and overseen by the British Bankers' Association, an industry group in London.[4] Every weekday, leading banks around the world each submit a figure to the BBA based on the rate at which they estimate they could borrow funds from other banks. The BBA throws out the high and low submissions and averages the remaining submissions into one rate — this is Libor.[5] Libor is then calculated for 10 different currencies and 15 borrowing periods (maturity dates). After Libor is calculated, it is published on a daily basis by Thomson Reuters.[6]

Libor is an important number because it is used by the financial industry to set interest rates in trillions of dollars worth of loans and investments. Libor is often used to price financial instruments, such as interest rate swap transactions and futures contracts. Banks allegedly conspired to submit low rates to the BBA in order to artificially suppress Libor during the financial crisis because high rates would have indicated that the banks were financially weak. As a consequence, banks may have also robbed investors of billions of dollars in returns on investments.

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IMPACT ON INVESTORS

Large public and private institutional investors, such as municipalities and pension funds, are likely to be the biggest victims of the Libor rate-fixing scandal.[7] Institutional investors have been among the first to claim losses from the alleged rate-fixing, because the bond market relies heavily on Libor. In addition, institutional investors are significantly exposed to investment losses through the purchase of interest rate swaps, which are often tied to Libor as well.[8]

Institutional investors use swaps when they want to issue a bond at a floating interest rate but protect themselves from future swings in rates. In a standard swap, the investor exchanges the floating interest rate promised to bond investors for a fixed rate, making future budgets more predictable. The problem for institutional investors is that while they paid fixed rates to their banks, the floating rates they received in return were

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tied to Libor. Thus, if Libor was suppressed by banks, investment returns for institutional investors in these swap transactions would be diminished.

Institutional investors are still calculating their losses, which could be significant on large investments. For example, the North Carolina Department of State Treasurer, which oversees the state's public pension plans, reportedly made two major swaps tied to $1.3 billion of bonds at a time Libor was suspected of being manipulated.[9] By one calculation, that could have meant losses for North Carolina of around $10 million on those two swaps.[10]

MULTIDISTRICT LITIGATION

Over the last year, a multitude of antitrust class action lawsuits were filed by institutional investors alleging banks conspired to suppress Libor. For bond holders and other investors whose investments were based on Libor, their return on investment was lower than it would have been if the banks had not suppressed Libor.

In large part, the government investigations spawned the private lawsuits, as the admissions from the Barclays, UBS and RBS settlements provided fodder for civil complaints. Those antitrust lawsuits, and other types of lawsuits based on Libor manipulation, were consolidated for multidistrict litigation in the U.S. District Court for the Southern District of New York.[11]

On March 29, 2013, Judge Buchwald, the judge overseeing the multidistrict litigation, dismissed the antitrust and Racketeer Influenced and Corrupt Organizations Act claims, ruling that the investors could not show an antitrust injury and did not have standing. In particular, Judge Buchwald concluded that the claimants could not show their alleged injury was the result of anti-competitive behavior, because the rate-setting process by panel banks was collaborative, not competitive.

The decision shocked onlookers, and even Judge Buchwald described her ruling as "unexpected."[12] The ruling was particularly unexpected in light of the significant penalties already levied by government regulators. Judge Buchwald justified the result by explaining how the private plaintiffs' claims faced a higher burden under the specific statutes at issue, as compared to the standards required of government regulators.

In addition, Judge Buchwald declined to exercise supplemental jurisdiction over the remaining state law claims.

Although this ruling is a major victory for the banks accused of Libor manipulation, the decision provided a roadmap for the types of claims Judge Buchwald believes may be sufficient to survive a motion to dismiss. In particular, Judge Buchwald said the facts alleged by Libor plaintiffs are better suited for fraud and misrepresentation claims than antitrust claims. Specifically, she said, "plaintiffs' injury would have resulted from defendants' misrepresentation, not from harm to competition."[13]

In addition, claims that individual Libor-participating banks breached swap agreements with individual investors are still viable. The result of this decision, therefore, is that individualized claims for fraud and breach of contract, while not as amenable to class actions or treble damages, may still be viable.

statute and federal securities claims. In short, the complaint alleges that the panel banks manipulated Libor and then made public assurances that it had not been manipulated.

Similarly, in late June, the Regents of the University of California filed a lawsuit in California federal court pursuing claims of fraud, unjust enrichment and unfair trade practices.[16] The San Diego Association of Governments filed a similar suit in another California federal court on the same day.[17]

These recent filings illustrate the path left open by Judge Buchwald's ruling — to pursue claims on fraud, misrepresentation, breach of contract or other theories in individual lawsuits. Fraud-based legal theories, however, are not typically suitable for certification of a nationwide class action. In addition, many smaller investors may not have the financial incentive to go at it alone in a Libor-based suit against the banks.

Judge Naomi Reice Buchwald said the facts alleged by Libor plaintiffs are better suited for fraud and misrepresentation claims than antitrust claims.

As for the antitrust claims, Judge Buchwald dismissed those without prejudice. Since then, some of the plaintiffs have been granted a limited right to move to amend the complaint in order to address the antitrust injury issue.[14] The motion to amend the complaint is currently pending, although it appears unlikely it will be granted, based on Judge Buchwald's skepticism of an amendment fixing the claims.[15]

Other plaintiffs have asked the court to certify certain issues from the dismissal order for immediate appeal to the 2nd U.S. Circuit Court of Appeals. That certification motion is also pending. It appears an appeal to the 2nd Circuit will ultimately be filed by certain plaintiffs.

INDIVIDUAL LAWSUITS

In the meantime, one plaintiff from the multidistrict litigation, Charles Schwab, decided to take the approach suggested by Judge Buchwald. On April 29 Charles Schwab filed a new complaint in California state court, asserting common-law fraud, breach of contract, unjust enrichment, violation of California's trade practices

For larger investors with significant potential losses, similar to Charles Schwab, individualized lawsuits for fraud, misrepresentation and breach of contract appear to be the best course of action. Therefore, other large investors are likely to file individual suits in state courts in the coming months.

DAMAGES ISSUES

Although proving liability has been made difficult by Judge Buchwald's decision, a larger obstacle remains due to the difficulty of calculating and proving damages. Economists and analysts are currently working to calculate investors' losses related to Libor. Determining damages is particularly challenging because the alleged manipulation occurred in varying degrees every day for several years. To determine the degree of manipulation, economists are referencing other benchmarks to estimate what daily Libor rates would have been without rigging.

Economists are calculating how much Libor diverged from other benchmarks that track the costs of unsecured funds to banks,

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such as the Federal Reserve's eurodollar deposit rate, as well as instruments linked to credit risk, such as credit default swaps.[18] Moreover, each investor likely has a unique, individualized loss, depending on how Libor manipulation might have impacted various transactions or instruments held at different periods of time.

To make damages even more complicated, not every investment was damaged by Libor manipulation. For example, most institutional investors who show losses on one investment are likely to have benefitted on other positions in their portfolios, reducing their total losses. It is unclear at this point whether courts will require a "netting" of damages.

In an individualized claim arising out of a single transaction (the type of claim that appears viable under Judge Buchwald's decision), plaintiffs should have stronger arguments against "netting." Regardless, sorting out damages will prove to be challenging for claimants.

FUTURE

Despite Judge Buchwald's dismissal of the antitrust claims in the Libor multidistrict litigation, Libor litigation is likely to grow as institutional investors with potentially large claims decide to file individual lawsuits. Indeed, common-law fraud and contract claims against banks that sold Libor-pegged instruments may have a greater chance of success. Institutional investors who choose to bring individual claims may also find it easier to allege claims for fraud based on representations the defendant banks may have made to the plaintiff as its client. In addition, it may be easier to calculate damages arising from one or two transactions for a single plaintiff, such as an interest rate swap.

Given the size of the market for investments tied to Libor, the Libor scandal could prove to be the most significant type of litigation arising out of the financial crisis, and it has only just begun. WJ

NOTES

1 *In re Libor-Based Fin. Instruments Antitrust Litig.*, No. 11-MD-2262, 2013 WL 1285338 (S.D.N.Y. Mar. 29, 2013).

2 Keri Geiger, *Economists Tackle Puzzle of Libor Losses for Investors*, Bloomberg, June 26, 2013, *available at* http://www.bloomberg.com/news/2013-06-27/economists-build-libor-time-machines-as-losses-puzzle-investors.html.

3 John Waggoner, *Libor Scandal Explained and What Rate-Rigging Means To You*, USA Today, July 18, 2012, available at http://usatoday30.usatoday.com/money/perfi/credit/story/2012-07-18/libor-interest-rate-scandal/56322230/1.

4 *See* BBALibor – The Basics, http://www.bbalibor.com/bbalibor-explained.

5 *Id.*

6 *Id.*

7 Stephen Gandel, *Wall Street's Latest Sucker: Your Hometown*, CNNMoney, July 11, 2012, *available at* http://finance.fortune.cnn.com/2012/07/11/libor-sucker-hometowns/.

8 *Id.*

9 Nathaniel Popper, *Banks Face Suits as States Weigh Libor Losses*, N.Y. Times, Sept. 4, 2012, *available at* http://www.nytimes.com/2012/09/05/business/banks-facing-suits-as-states-weigh-their-libor-losses.html?_r=0.

10 *Id.*

11 *See In re Libor-Based Fin. Instruments Antitrust Litig.*, No. 11-MD-2262, *consolidated amended complaint filed* (S.D.N.Y. Apr. 30, 2012).

12 *In re Libor-Based Fin. Instruments Antitrust Litig.*, 2013 WL 1285338, at *62.

13 *Id.*

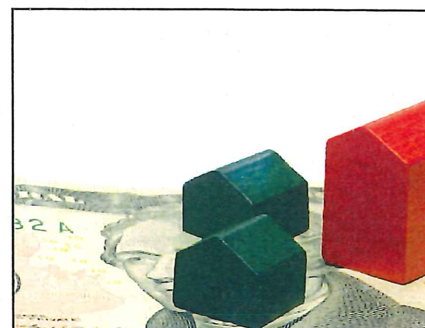
14 *In re Libor-Based Fin. Instruments Antitrust Litig.*, No. 2011-MD-2262, 2013 WL 1947367 (S.D.N.Y. May 3, 2013).

15 *Id.*

16 *Regents of the Univ. of Cal. v. Bank of Am. Corp., et al.*, No. 13-2921, *complaint filed* (N.D. Cal. June 25, 2013).

17 *San Diego Ass'n of Gov'ts v. Bank of Am. Corp. et al.*, No. 13-1466, *complaint filed* (S.D. Cal. June 25, 2013).

18 *See* Geiger, *supra* note 2.



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