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HARM TO COMPETITION AND THE COMPETITIVE PROCESS: A CIRCULAR CHARADE IN THE LIBOR ANTITRUST LITIGATION

Sharon E. Foster[*]

Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is The Law.[1]

I. INTRODUCTION

Must the injury to a plaintiff be caused by the defendant's competitive process for there to be harm to competition and, thus, an antitrust injury? According to the holding of the United States District Court for the Southern District of New York in *In re LIBOR-Based Financial Instruments Antitrust Litigation*[2] (*In re LIBOR*), the answer is "yes." Plaintiffs in *In re LIBOR* were consumers of interest rate sensitive financial products. They alleged that the defendants, participating panel bank members for the U.S. Dollar LIBOR, agreed to manipulate the U.S. Dollar LIBOR,[3] a benchmark for interest rates. This manipulation allegedly caused damage to the plaintiffs in violation of section 1 of the Sherman Act (anti-cartel antitrust law). The court dismissed the antitrust claims, asserting a novel theory: In order to have the requisite "antitrust injury" (a requirement for a civil antitrust action)[4] the defendants' conduct causing the plaintiffs' injuries must be a competitive process.[5] This paper asserts that the court's holding is erroneous because the defendants' conduct of manipulating LIBOR harmed competition and caused the plaintiffs' injuries, which is sufficient to allege an antitrust injury.

Section II of this paper provides background on the defendants' alleged LIBOR manipulation in *In re LIBOR*. LIBOR is an interest rate benchmark used by about 75% of interest rate sensitive financial products around the world.[6] Control of the benchmark equates to control

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[1] W. H. AUDEN, COLLECTED POEMS 208 (Edward Mendelson ed.) (1976).

[2] 935 F. Supp. 2d 666, 687 (S.D.N.Y. 2013).

[3] LIBOR stands for "London Interbank Offered Rate." Sharon E. Foster, *LIBOR Manipulation And Antitrust Allegations*, 11 DEPAUL BUS. & COM. L.J. 291, 292 (2013).

[4] Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981).

[5] *In re* LIBOR, 935 F.Supp.2d at 687.

[6] Lauren Oppenheimer et al., UNDERSTANDING LIBOR, THIRD WAY (2012), http://

the price of interest. According to the plaintiffs' allegations, substantially confirmed by recent settlement agreements between some of the defendants and various competition authorities around the world,[7] the defendants provided fraudulent data to manipulate the interest rates, thereby causing plaintiffs' injuries. The plaintiffs sued for antitrust violations and other causes of action in the *In re LIBOR* matter.

Section III of this paper explores the court's confusing process of trying to define an "antitrust injury," which is perhaps indefinable.[8] To have standing to sue in a civil antitrust matter, plaintiffs must allege an "antitrust injury."[9] Attempts to categorize harm that constitutes an "antitrust injury" have been about as helpful as Justice Stewart's explanation regarding what constitutes obscenity: "I know it when I see it."[10]

Although courts have not been clear in defining "antitrust injury," the term has generally been held to mean that the plaintiffs' injuries stem from the defendants' conduct, which also harms competition.[11] This inevitably leads to an examination of what conduct courts believe harms competition. While the law is not a model of clarity here, there seems to be a consensus that wealth transfers based on fraud, misrepresentation, or anticompetitive markets harm competition.

Section IV of this paper examines the "competitive process" in the antitrust context on which the District Court's opinion is premised. Interestingly, all relevant authority treats "competitive process" as synonymous with harm to competition. The court, however, cites no authority in its finding that there can be no harm to competition if the

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content.thirdway.org/publications/570/Third_Way_Memo_-_Understanding_Libor.pdf; British Bankers' Association, available at http://www.bbalibor.com/bbalibor-explained/the-basics; Financial Services Authority, FINAL NOTICE (27 June 2012) at ¶¶ 3 and 13; Jacob Gyntelberg and Philip Wooldridge, *Interbank Rate Fixings During The Recent Turmoil*, BIS QUARTERLY REVIEW (March 2008) p. 59; Foster, *Supra* note 3, at 297-99.

[7] Financial Services Authority, FINAL NOTICE (Barclays) (27 June 2012); Statement of Facts, nonprosecution agreement, dated June 26, 2012, between the United States Department of Justice, Criminal Division, Fraud Section, and Barclays Bank PLC; Commodity Futures Trading Commission Order, In the Matter of Barclays, CFTC Docket No. 12-25; Financial Services Authority, FINAL NOTICE (Royal Bank of Scotland) (6 February 2013); Plea agreement: United States of America v. RBS Securities Japan (5 February 2013); Order Instituting Proceedings, In the matter of: Royal Bank of Scotland PLC (Commodity Futures Trading Commission)(6 February 2013); Order Instituting Proceedings, In the matter of: UBS AG, United States, Commodity Futures Trading Commission, (19 December 2012); Statement of Facts, Non-prosecution agreement: UBS AG, United States, Department of Justice, (18 December 2012); Final Notice, Imposing financial penalty: UBS AG, United Kingdom, Financial Services Authority, (19 December 2012).

[8] Antitrust injury as a requirement for standing in a private antitrust: Coors Brewing Co. v. Miller Brewing Co., 889 F.Supp. 1394, 1400 (D. Colo. 1995) citing to Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 899 F.2d 951, 960–61 (10th Cir. 1990), *cert. denied*, 497 U.S. 1005, (1990) (applying Cargill, Inc. v. Monfort, Inc., 479 U.S. 104 (1986) and Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc., 429 U.S. 477 (1977)). *See* City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 652 n. 14 (10th Cir.1992); Sharp v. United Airlines, Inc., 967 F.2d 404, 406 (10th Cir. 1992), *cert. denied*, 506 U.S. 974 (1992); Anesthesia Advantage, Inc. v. Metz Group, 759 F.Supp. 638 (D.Colo.1991). *See also* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart J., concurring).

[9] *Jacobellis*, 378 U.S. at 197 (Stewart J., concurring).

[10] *Id.*

[11] *Id.*

defendants' conduct is not a "competitive process." Indeed, there is a whole body of law relating to noncompetitive conduct harming competition in the standard setting cases. Accordingly, Section V of this paper explores the standard setting cases disregarded by the *In re LIBOR* court as distinguishable. The court's distinction, however, is in error because the standard setting cases all involved processes that are arguably not competitive. Specifically, these cases involved information sharing, just as in the *In re LIBOR* case, yet the courts found harm to competition.

II. THE LIBOR MANIPULATION CONDUCT

LIBOR is a benchmark to which, at the time in question, 75% of interest rate sensitive financial products around the world were pegged.[12] Approximately $750 trillion in financial products exist globally.[13] Approximately $560 trillion of that $750 trillion directly reference LIBOR rates,[14] which is about a 75% market share. Controlling LIBOR equates to controlling interest rates.

LIBOR was conceptualized as an interest rate benchmark based on the estimated interest rate one bank would pay to borrow unsecured funding from another bank.[15] The British Bankers Association, which administered LIBOR from its inception and through the relevant time period,[16] collects 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 11:00 a.m.?"[17]

The given rates are calculated on a daily basis for fifteen different time periods, from overnight loans up to twelve month loans.[18] Depending on the currency involved, a panel of six to eighteen banks submits data.[19] For example, the U.S. Dollar LIBOR panel consists of

[12] Oppenheimer, *supra* note 6; BBALIBOR, *supra* note 6; FINANCIAL SERVICES, *supra* note 6, at ¶¶ 3 and 13; Gyntelberg & Wooldridge, *supra* note 6,at 59; Foster, *supra* note 3, at 297-99.

[13] THE NEW YORK TIMES (August 23, 2012), *LIBOR* (Barclays Interest Rate Manipulation Case). This amount has been calculated as high as $800 trillion (*see, e.g.*, Congressional Record (August 2, 2012) (S5959)) and as low as about $360 trillion (*see, e.g.*, *Barclays Paying $453 Million to Settle LIBOR Probe; CEO Quits*, 18 No. 17 Westlaw Journal Derivatives 2 (July 6, 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. Foster, *supra* note 3, at 297-99.

[14] Oppenheimer et al., *supra* note 6; Foster, *supra* note 3, at 297-99.

[15] BBALIBOR, *supra* note 6; Bank of England, *Trends in Lending* (July, 2012) available at http://www.bankofengland.co.uk/publications/Documents/other/monetary/trendsJuly12.pdf; FINANCIAL SERVICES, *supra* note 6; Alvin L. Arnold, *Financing: Understanding Libor*, 44 No. 6 MORTGAGE & REAL ESTATE EXECUTIVES REPORT 6 (May 15, 2011); Foster, *supra* note 3, at 297-99.

[16] THE WHEATLEY REVIEW OF LIBOR: FINAL REPORT 5 (2012); Foster, *supra* note 3, at 297-99.

[17] *LIBOR: Frequently Asked Questions*, CONGRESSIONAL RESEARCH SERVICE (July 16, 2012), http://www.fas.org/sgp/crs/misc/R42608.pdf.

[18] *Id.*; FINANCIAL SERVICES, *supra* note 6, at ¶ 34; Foster, *supra* note 3, at 297-99.

[19] BBALIBOR, *supra* note 6; FINANCIAL SERVICES, *supra* note 6, at ¶ 34; Foster, *supra* note 3, at 297-99.

eighteen banks submitting the requested data.[20] The interest rate benchmark is then calculated by "the average of the second and third quartile submissions, since the highest and lowest are rejected."[21] Participating banks were selected according to their reputation, credit quality, and activity in the major international financial market of London.[22]

LIBOR is an indicator of the financial stability of the major banks in the world:[23] a higher interest rate paid by a bank suggests the bank is at risk, while a lower interest rate suggests a bank is less risky.[24] Beginning around September 2007, the start of the financial crisis, LIBOR data was manipulated by submitting artificially low rates to make it appear that the participating banks were stable.[25]

According to the plaintiffs in the *In re LIBOR* litigation, the agreements to suppress LIBOR during this period by the defendants amounted to price fixing, which resulted in damages to plaintiffs.[26] Some plaintiffs purchased interest rate swaps from the defendants, which provided that the plaintiffs would receive payments based on LIBOR. When the defendants allegedly suppressed LIBOR, the plaintiffs received lower payments from the defendants.[27] Some plaintiffs allegedly received artificially depressed amounts of interest on debt securities (bonds) with interest rates tied to LIBOR.[28] Some plaintiffs allegedly paid higher prices for Eurodollar futures contracts as a result of suppressed LIBOR rates.[29] Finally, some plaintiffs allege that the artificially depressed LIBOR rates reduced the value of "*tens of billions of dollars in LIBOR-based financial instruments the [plaintiffs] held or*

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[20] BBALIBOR, *supra* note 6; U.K. FINANCIAL SERVICES, *supra* note 6, at ¶ 34; Foster, *supra* note 3, at 297-99.

[21] Peter Vinella, *The Trials of Libor Litigation*, 19 No. 14 Westlaw Journal Derivatives 2 (2013).

[22] Participating banks were 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. BBALIBOR, *supra* note 6; Liam Vaughan, *Secret Libor Committee Clings to Anonymity Following Scandal*, BLOOMBERG (August 21, 2012), http://www.bloomberg.com/news/2012-08-20/secret-libor-committee-clings-to-anonymity-after-rigging-scandal.html. Banks recently on LIBOR panels included: Abbey National PLC; Bank of America; Bank of Tokyo-Mitsubishi UFJ Ltd; Bank of Nova Scotia; Barclays Bank PLC; BNP Paribas; Canadian Imperial Bank of Commerce; Citibank NA; 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 Corporation; The Norinchukin Bank; The Royal Bank of Scotland Group; and UBS AG. Many of these banks have participated in more than one panel. BBALIBOR, *supra* note 6; Commodity Futures Trading Commission Order, In the Matter of Barclays, C.F.T.C. Docket No. 12-25, at 6; Foster, *supra* note 3, at 297-99.

[23] *See* BBALIBOR, *supra* note 6.

[24] Arnold, *supra* note 15; Foster, *supra* note 3, at 297-99.

[25] FINANCIAL SERVICES, *supra* note 6, at ¶¶ 102-45; Non-prosecution Agreement between United States Department of Justice and Barclays Bank PLC (June 26, 2012) at 15-22; Commodity Futures Trading, *supra* note 22, at 19-25; Foster, *supra* note 3, at 297-99.

[26] *In re LIBOR*, 935 F.Supp.2d at 677.

[27] *Id*. at 682.

[28] *Id*.

[29] *Id*.

purchased."[30] According to the court in the *In re LIBOR* case, these alleged damages failed to establish an antitrust injury because manipulating LIBOR is not a competitive process.[31] While defining an "antitrust injury" is an elusive exercise, manipulating LIBOR *did* cause antitrust injury in this case.[32] The court's requirement of a "competitive process," as explained in more detail below, is not a recognized antitrust injury requirement, nor should it be.

III. WHAT CONSTITUTES AN ANTITRUST INJURY?

The requirement of an antitrust injury in a civil antitrust action is premised upon the statutory interpretation of the Clayton Act, which states, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue."[33] With these words Congress sought to create a private right of action to deter antitrust violations.[34] Congress recognized the political nature of antitrust enforcement by the government as well as the potential for a lack of enforcement due to political reasons.[35]

The Clayton Act is broad and leaves much of its practical effect to judicial interpretation. As with other areas of antitrust law, the court must balance between a broad application of the law, and its danger of "false positives," against a narrow application, and its dangers of "false negatives."[36] This balancing act has led to undesirable swings between over protection and under protection due, in part, to the political nature of the antitrust problem. Courts have yet to articulate an intelligible theory of "antitrust injury,"[37] but have generally held that it is the type of injury Congress was concerned with in providing for a private right of action.[38] This Congressional concern has been defined as "harm to

[30] *Id*. (emphasis added).

[31] *Id.* at 677.

[32] *Id*.

[33] 15 U.S.C. § 15 (1914).

[34] Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 313-314 (1978). *See also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 n.10 (1977); Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968); Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 572-73 n.10 (1982); Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982).

[35] Cong. Rec. 9245-47 (1914).

[36] *Brunswick*, 429 U.S. at 489; Yavar Bathaee, *Developing an Antitrust Injury Requirement for Injunctive Relief that Reflects the Probablity of Anticompetitive Harm*, 13 FORDHAM J. CORP. & FIN. L. 329, 333-35 (2008).

[37] Bathaee, *supra* note 35 at 335-36.

[38] *Blue Shield of Va*., 457 U.S. at 478. *See* Lago & Sons Dairy, Inc. v. H.P. Hood, Inc., 892 F.Supp. 325, 339 (D.N.H., 1995) (citing to Sullivan v. Tagliabue, 25 F. 3d 43, 46 (1st Cir. 1994); Associated Gen. Contractors of California v. California State Council of Carpenters, 103 S.Ct. 897, 908-12 (1983). *See also* Los Angeles Raiders v. NFL, 484 U.S. 826 (1987); R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F. 2d 139, 146 (C.A.9 (Cal.), 1989.); Xerox Corp. v. Media Sciences Intern, Inc., 511 F. Supp. 2d 372, 380 (S.D.N.Y. 2007); Los Angeles Memorial Coliseum Comm'n v. NFL, 791 F. 2d 1356, 1363 (9th Cir. 1986), *cert. denied sub nom*.; Balaklaw v. Lovell, 14 F. 3d 793, 798 (2d Cir. 1994).

competition."[39]

A. Antitrust Injury

The court interpreted the statutory language "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws,"[40] as requiring more than a typical causation damages analysis. A plaintiff in a civil antitrust action must establish antitrust injury by showing that the defendant's conduct caused injury to the plaintiff.[41] The plaintiff must also establish whether he is an "efficient enforcer." This means that his antitrust injuries must not be too indirect, remote, or speculative, and that there are no other plaintiffs better suited to vindicate the harm. Additionally, the plaintiff must show that there is no risk of duplicative recoveries, and that he can efficiently and effectively enforce the judgment.[42] The *In re LIBOR* court did not reach the efficient enforcer requirement, therefore it is discussed in this paper.[43]

Antitrust laws are intended to prevent harm to competition.[44] These laws are not meant to protect a competitor from competition.[45] For example, when the plaintiff is a competitor of the defendant, the plaintiff's damages may be a result of enhanced competition rather than negative effects on competition. The defendant's conduct may violate antitrust laws and harm the plaintiff. However, if the plaintiff's harm is not a result of actual or probable harm to competition, there is no injury.[46] Therefore, a defendant's conduct must harm plaintiff's competition for an antitrust injury to exist.

The first step in determining if there is an antitrust injury is to identify the "harm to competition associated with the [conduct]."[47] It is this first step that the court in *In re LIBOR* found lacking on the basis that there could be no harm to competition, because the act of setting the LIBOR benchmark was not, in itself, a "competitive process."[48] As will be

[39] Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990); *Brunswick*, 429 U.S. at 489; Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 622 (2003) (arguing that antitrust requires an injury to competition).

[40] 15 U.S.C. §15 (2013).

[41] *J. Truett Payne Co*., 451 U.S. at 562.

[42] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); *Associated Gen. Contractors of California*, 103 S.Ct. at 908-12; Todorov v. D.C.H. Healthcare Authority, 921 F. 2d 1438, 1451-52 (11th Cir. 1991); Sunbeam Television Corp. v. Nielsen Media Research, Inc., 711 F. 3d 1264, 1271-72 (11th Cir. 2013).

[43] *In re* LIBOR, 935 F.Supp.2d 666, 686 (S.D.N.Y 2013).

[44] Brooke Group. Ltd. V. Brown & Williamson Tobacco Corp., 509 U.S. 209, 251 (1993); *see* Nichols v. Mahoney, 608 F.Supp.2d 526, 544 (S.D.N.Y. 2009).

[45] *Brunswick*, 429 U.S. at 477*;* Bathaee, *supra* note 36 at 337.

[46] *Brunswick*, 429 U.S. at 477.

[47] John E. Lopatka, William H. Page, *Who Suffered an Antitrust Injury in the Microsoft Case?* 69 GEO. WASH. L. REV. 829, 832 (2001).

[48] In re LIBOR, *supra* note 43 at 738. A court may or may not find harm to competition depending upon its underlying philosophical perspective that competition is harmed by inefficiency, elimination of small businesses, lack of protection of consumers, or a combination of these factors. Bathaee, *supra* note 36 at 335-36.

explained later, the court was incorrect in its conclusion because conduct that is not a "competitive process" may certainly harm competition.

B. Harm to Competition[49]

Only a likelihood that competition will be reduced or harmed is required for an antitrust injury to exist.[50] Conduct that tends to promote competition, for example, increasing the number of competitors or reducing prices, does not harm competition and therefore does not cause an antitrust injury.[51]

Conversely, conduct that decreases the number of competitors and/or increases prices[52] may harm competition.[53] In some cases, a decrease in the number of competitors is due to conduct that should be encouraged, such as innovation or improvements in quality and service.[54] In such cases, no inefficiencies are associated with the conduct and there is no harm to competition.[55] When considering what harms competition, courts have looked at how consumers are impacted in economic reality.[56] There is an exception however, lower prices are usually not an antitrust violation when they benefit the consumer. For example, lower prices that are predatory when a company sets prices below costs to eliminate competition and later raises them once the competition is eliminated.[57]

In a monopsony situation, where market power is on the buying side of the market rather than the production side, the monopsonist may be able to buy for less and thus sell for less, benefiting consumers. The monopsonist usually drives down supplier prices by restricting purchases, resulting in a reduction of outputs (production) and higher prices to consumers. As with predatory pricing, this is manifest in short

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[49] M. Laurence Popofsky, Adam J. Gromfin, *Bundled Discounting: From Lepage's to PeaceHealth, & Beyond*, 9 SEDONA CONF. J. 99, 109 (2008); *PeaceHealth*, 2007 WL 2473229 at *17 n.21. In *Peacehealth* the "Ninth Circuit found [harm to competition] "redundant because it is no different than the general requirement of 'antitrust injury' that a plaintiff must prove in any private antirust action. Thus, the Court chose not to adopt the "superfluous" requirement."

[50] *Brunswick*, 429 U.S. at 477, 489; *Atl. Richfield Co.*, 495 U.S. at 344; Paycom Billing Servs. v. MasterCard Int'l, Inc., 467 F.3d 283, 290 (2d Cir. 2006); Alternative Electrodes, LLC v. Empi, Inc., 597 F.Supp.2d 322, 328-29 (E.D.N.Y. 2009); Naso v. Park, 850 F.Supp. 264, 271 (S.D.N.Y. 1994) (citing to Volmar Distributors, Inc. v. New York Post Co., Inc., 825 F.Supp. 1153, 1159-60 (S.D.N.Y. 1993)); *Xerox Corp.*, 511 F.Supp.2d at 380-81.

[51] *Brunswick*, 429 U.S. at 477, 489; *Atl. Richfield Co.*, 495 U.S. at 344; U.S. v. Solinger, 457 F.Supp.2d 743, 759 (W.D.KY. 2006) (citing to HyPoint Tech, Inc., 949 F.2d at 877).

[52] Lopatka, *supra* note 47 at 832-83 ("We believe that the most reliable measure of harm to competition is the effect of the practice on price and output.").

[53] *Solinger*, 457 F.Supp.2d at 760 (W.D.KY. 2006) (citing to Valley Products Co. Inc., v. Landmark, a Div. of Hospitality Franchise Systems, Inc., et al., 128 F.3d 398, 403 (6th Cir. 1997).

[54] *See Solinger*, 457 F.Supp.2d at 760 (W.D.KY. 2006) (citing to Valley Products Co., Inc.,, 128 F.3d at 403; *Blue Shield of Va.*, 457 U.S. at 482-84 (1982) (citing to Reiter v. Sonotone Corp., 442 U.S. 330 (1979)).

[55] Lopatka, *supra* note 47 at 829, 832-33.

[56] U.S. v. Conn. Nat'l Bank, 418 U.S. 656, 662 (1974); U.S. v. Grinnell Corp., 384 U.S. 563, 575-76 (1966); *see* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 456 (1986).

[57] *Atl. Richfield Co.*, 495 U.S. at 337-38, 340; Kartell v. Blue Shield of Massachusetts, 749 F.2d 922, 930–931 (1st Cir.1984); Addamax Corp. v. Open Software Foundation, Inc., 888 F.Supp. 274, 279-80 (D.Mass. 1995).

term lower prices, which lead to long term higher prices, thereby harming competition and the consumer.[58] Additionally, the suppression or exclusion of innovation may be "tantamount to a cartel's output restriction,"[59] resulting in inefficiencies and/or higher prices causing harm to competition.[60]

Harm to competition rarely comes in the form of a direct attack. If the defendant's conduct indirectly, but foreseeably harms competition, it may provide the basis for an antitrust injury even though the harm was unintended. For example, an anticompetitive scheme may indirectly but inevitably harm or threaten to harm competition by reducing consumer choice by eliminating competitors, resulting in increased prices.[61] Furthermore, providing data to competitors through trade associations to help set standards (discussed in Section V below), or to help competitors judge market conditions may suppress and thereby harm competition, albeit indirectly.[62]

However, collaboration between competitors may have procompetitive effects.[63] The Department of Justice ("DOJ") and Federal Trade Commission ("FTC") have published the Antitrust Guidelines for Collaborations Among Competitors (2000) ("Guidelines") to help assess whether competitor collaboration harms competition and is thus an antitrust violation. According to the Guidelines: "[C]ompetitor collaboration comprises a set of one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting there from."[64] This may include information sharing through trade associations.[65]

In determining if the competitor collaboration harms competition, the DOJ and FTC look at whether the collaboration:

> [I]ncreas[es] the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement. Such effects may arise through a variety of mechanisms. Among other

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[58] *See* J. Jacobson & G. Dorman, *Joint Purchasing, Monopsony and Antitrust*, The Antitrust Bulletin, 1, 17 (Spring, 1991); Areeda et al., ANTITRUST LAW, 361 n.10 (2nd ed. 2001); Addamax Corp. v. Open Software Foundation, Inc., 888 F.Supp. 274, 279-80 (D.Mass. 1995); Lawrence A. Sullivan, Warren S. Grimes, *The Law Of Antitrust: An Integrated Handbook* 76 (Second ed. 2006).

[59] Lopatka, *supra* note 47 at 829, 835.

[60] Lopatka, *supra* note 47 at 829, 835.

[61] Blue Shield of Virginia v. McCready, 457 U.S. at 482-84; *see Xerox Corp.*, 511 F.Supp.2d at 381; *Alternative Electrodes, LLC*, 597 F.Supp.2d at 328-29; A. Michael Ferrill, Leslie Sara Hyman, Soledad Valenciano, *Antitrust And Consumer Protection*, 64 SMU L. Rev. 19, 37 (2011).

[62] American Column & Lumber v. United States, 257 U.S. 377, 398-99 (1921); U.S. v. Container Corp. of America, 393 U.S. 333 (1969); U.S. v. U.S. Gypsum Co., 438 U.S. 422, 457 (1978).

[63] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors*, (2000), http:// www.ftc.gov/os/2000/04/ftcdojguidelines.pdf [hereinafter *Guidelines*].

[64] *Id.*

[65] *Id.* at 3. If the information sharing is likely to disrupt price setting by free market forces there is harm to competition. *See* FTC v. Indiana Federation of Dentists, 476 U.S. 447, 461-62 (1986).

things, agreements may limit independent decision making or combine the control of or financial interests in production, key assets, or decisions regarding price, output, or other competitively sensitive variables, or may otherwise reduce the participants' ability or incentive to compete independently.

Competitor collaborations also may facilitate explicit or tacit collusion through facilitating practices such as the exchange or disclosure of competitively sensitive information or through increased market concentration. Such collusion may involve the relevant market in which the collaboration operates or another market in which the participants in the collaboration are actual or potential competitors.[66]

…

[Additionally][t]he nature of the agreement is relevant to whether it may [harm competition]. For example, by limiting independent decision making or combining control over or financial interests in …decisions on price, output, or other competitively sensitive variables, an agreement may create or increase market power or facilitate its exercise by the collaboration, its participants, or both. An agreement to limit independent decision making or to combine control or financial interests may reduce the ability or incentive to compete independently. An agreement also may increase the likelihood of an exercise of market power by facilitating explicit or tacit collusion, either through facilitating practices such as an exchange of competitively sensitive information or through increased market concentration…. In some cases, …a determination of anticompetitive harm may be informed by consideration of market power.[67]

…

Agreements that facilitate collusion sometimes involve the exchange or disclosure of information. The Agencies recognize that the sharing of information among competitors may be [pro-competitive]….

[66] *Guidelines*, *supra* note 63, at 6.
[67] *Id.* at 12.

Nevertheless, in some cases, the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables. The competitive concern depends on the nature of the information shared. Other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables.[68]

The economic reality of competitor collaboration, similar to the LIBOR information sharing for the benchmark, is that it has the potential to facilitate conduct harmful to competition. In *In re LIBOR*, the alleged LIBOR manipulation conduct involved sharing sensitive price information, including fraudulent price information, which encouraged collusion on interest rate prices. While this conduct may be indirect in the sense that the defendants did not agree to fix interest rates, the defendants' agreement to fix the benchmark that controlled interest rates nevertheless disrupted price setting by free market forces and caused harm to competition.[69]

Finally, some courts examine the alleged harm to competition to see if there is any harm to consumer welfare. Generally, under a consumer welfare analysis, harm to competition, "does not invoke the Sherman Act until it harms consumer welfare."[70] Consumer welfare is maximized when economic resources are allocated to their best use,[71] and when consumers are assured competitive price and quality.[72] Accordingly, an act is deemed anticompetitive under the Sherman Act only when it harms allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality.[73]

Accordingly, an antitrust plaintiff must establish harm to competition, which entails allocative inefficiency (economic resources not allocated to best use)[74] and harm to consumers (prices are or will be above

[68] *Id.* at 15.

[69] *FTC*, 476 U.S. at 461-62.

[70] Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995). *See* Hon. Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59 (2010) (on anticompetitive effects and consumer welfare)*; see Reiter*, at 442 U.S. 343 (1979) (Congress designed the Sherman Act as a "consumer welfare prescription.") (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978)).

[71] *See* Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City, 452 U.S. 378, 387-88 (1981).

[72] *See* Products Liab. Ins. Agency Inc. v. Crum & Foster Ins. Cos., 682 F.2d 660, 663-64 (7th Cir. 1982).

[73] *Cf.* Brook Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993) (below-cost pricing is not anticompetitive in itself because, although it causes allocative inefficiency, it brings lower aggregate prices in the market). Cudahy & Devlin, *Anticompetitive Effect*, 95 Minn. L. Rev. 59 (2010).

[74] *See Rebel Oil Co., Inc.*, 51 F.3d at 1433; Gregory T. Gundlach, Joan M. Phillips, *Contributions and Challenges of Marketing to Antitrust*, 47 N.Y.L. SCH. L. REV. 51 (2003); Bork, *supra* note 70 at 127.

competitive levels or of diminished quality).[75] In the LIBOR manipulation, both factors were present because the fraudulent LIBOR data created allocative inefficiencies (harm to competition),[76] and the plaintiffs' financial products were of diminished quality (consumer harm).[77]

C. Harm to Competition in International Antitrust

Cases addressing the extraterritorial application of United States antitrust laws on foreign conduct illustrate what is "harm to competition." In the international context, extraterritorial jurisdiction requires "domestic effects," which is harm to domestic competition (the traditional harm to competition test for antitrust injury).[78] As a result, the foreign conduct in question must have "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce[or a domestic competitor.],[79] and have an effect of a kind that antitrust law considers harmful, i.e., the "effect" must "giv[e] rise to a [Sherman Act] claim."[80]

In the international context, of course, there are many additional issues like remoteness (a worldwide injury is probably not enough under the effects test)[81], domestic nature[82] and comity.[83] For the purposes of this paper, however, only international cases are considered to see, under the effects test, what is considered harm to competition.

[75] See Reza Dibadj, *Article 82: Gestalt, Myths, Questions*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 615, 629-31 (2007) for an interesting critique on attempts to define consumer welfare and allocative efficiency.

[76] Justine R. Watkins, *Always Low Prices, Always At A Cost: A Call To Arms Against The Wal-Martization of America*, 40 J. MARSHALL L. REV. 267 (2006); Clara Torres-Spelliscy, *Safeguarding Markets From Prenicious Pay to Play: A Model Explaining Why SEC Regulates Money in Politics*, 12 CONN. PUB. INT. L.J. 361, 403 (2013) (citing to Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 673 (1984)).

[77] *In re* Libor, 935 F.Supp.2d at 676.

[78] Christopher Sprigman, *Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction Over International Cartels*, 72 U. CHI. L. REV. 265, 277-78 (2005).

[79] 15 U.S.C. § 6(a); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 162 (2004).

[80] *F. Hoffmann-La Roche Ltd.*, 542 U.S. at 162; Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (citing Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 582 (1986); United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 415 (1987); 1 P. Areeda & D. Turner, Antitrust Law ¶ 236 (1978); *cf.* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962); Steele v. Bulova Watch Co., 344 U.S. 280, 288 (1952); United States v. Sisal Sales Corp., 274 U.S. 268, 275–276 (1927); Metallgesellschaft AG v. Sumitomo Corp. of America, 325 F.3d 836, 842 (7th Cir. 2003); Sprigman, *supra* note 78 at 277-78.

[81] *Metallgesellschaft AG*, 325 F.3d at 842; *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310, 318-320 (E.D.N.Y., 2012).

[82] *F. Hoffmann-La Roche Ltd.,* 542 U.S. at 162.

[83] *Id.*; *Hartford Fire Ins. Co.*, 509 U.S. at 796 (citing *Matsushita Elec. Industrial Co*., 475 U.S. at 582; *Aluminum Co. of America*, 148 F.2d at 444; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 415 (1987); Areeda & Turner, *supra* note 79; *cf. Continental Ore Co.*, 370 U.S. at 704; *Steele*, 344 U.S. at 288; *Sisal Sales Corp.*, 274 U.S. at 275–76; *Metallgesellschaft AG*, 325 F.3d at 842; Sprigman, *supra* note 78.

Foreign conduct that results in higher prices in the United States, for example, is harm to competition under the effects test.[84] Further, eliminating competitors harms competition.[85] Finally, manipulating prices through a scheme, such as control and manipulation of a benchmark, harms competition under the effects test.[86] The common denominator is that "all factors which *contribute* to determine prices, must be kept free to operate unhampered by agreements." [emphasis added].[87]

Certainly, a benchmark such as LIBOR contributes to determine prices.[88] To hold that the manipulation of LIBOR cannot cause harm to competition because the setting of the benchmark is not a "competitive process" ignores economic reality and the effects test.[89] It further instructs domestic and international cartels to undermine competition laws. While some may laud the evisceration of private antitrust enforcement, the "competitive process" requirement promulgated by *In re LIBOR* opinion, will curtail antitrust enforcement by the DOJ and the FTC both domestically and internationally.[90]

D. Harm to Competition in *In re* LIBOR

LIBOR manipulation harms competition under all recognized antitrust theories. LIBOR manipulation determines price by collusive, nonfree market agreements—it is horizontal price fixing.[91] It harms consumers, such as the plaintiffs in the *In re LIBOR* case.[92] Finally, it harms competition in terms of allocative inefficiency due to the inefficiency of fraud.[93] Whether or not manipulating LIBOR is a competitive process is irrelevant.

[84] *F. Hoffmann-La Roche Ltd.*, 542 U.S. at 175.

[85] *See Continental Ore Co.*, 370 U.S. at 690 (raising rivals' costs by eliminating supply source in attempt to eliminate competitor); *Aluminum Co. of America*, 148 F.2d at 434-35; Timberlane Lumber Co. v. Bank of America, N.T. and S.A., 549 F.2d 597 (9th Cir. 1976).

[86] Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 859 (7th Cir. 2012).

[87] *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 445 (1945) (addressing international agreement fixing prices indirectly by withdrawing supply from the market through a quota of production scheme which, in itself, was not a competitive process). *See also Timberlane Lumber Co.*, 549 F.2d 597 (harassment including false arrest of manager and defamatory newspaper articles to eliminate competitor).

[88] *See Minn-Chem, Inc.*, 683 F.3d at 859.

[89] 15 U.S.C. § 6(a); *F. Hoffmann-La Roche Ltd.,* 542 U.S. at 165; Peter D. St. Phillip, Jr. and Raymond P. Girnys, *No Antitrust Injury In LIBOR Rate-Setting?—What Happened To Effects?*, Competition Policy International (May 30, 2013), https://www.competitionpolicyinternational.com/no-antitrust-injury-in-libor-rate-setting-what-happened-to-effects.

[90] *See Minn-Chem, Inc.*, 683 F.3d at 853, 856.

[91] *In re* LIBOR, 935 F.Supp.2d at 687; U.S. v. Masonite Corporation, 316 U.S. 265, 276 (1942); Am. Tobacco Co. v. United States, 147 F.2d 93 (6th Cir. 1944), aff'd, 328 U.S. 781 (1946); U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 220-22 (1940). *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); Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1361 (10th Cir. 1989); Foster, *supra* note 18, at 315-16.

[92] *In re* LIBOR, 935 F.Supp.2d at 666.

[93] Watkins, *supra* note 76; Torres-Spelliscy, *supra* note 76.

There is a consensus that conduct which effects price in a collusive, nonfree market manner is harmful to competition.[94] For antitrust purposes, the wealth transfer is created by nonfree market actions is unfair to the extent that it exceeds a competitive market value.[95] A competitive market is open to access and rivalry and does not permit inefficient, collusive conduct.[96] Efficiency, in antitrust law, refers to whether the practice is beneficial to society, not to the individual.[97] Additionally, it is universally held that eliminating competitors harms competition unless it results from market efficiencies that are beneficial to society such as innovation, quality, or service.[98]

Competitor elimination is a wealth transfer issue because it relates to price (more competitors—lower prices). Wealth transfers based on non-competitive markets, fraud, or misinformation, are allocatively inefficient and harmful to competition because it causes greater losses than gains to society.[99]

A critical distinction between the *In re LIBOR* case and the seminal antitrust cases of *Brunswick*[100] and *ARCO*[101] is that they are not horizontal price fixing cases.[102] Indeed, there are no horizontal price fixing cases where a court engaged in a "no harm to competition" analysis and found there to be an antitrust injury.[103] Horizontal price fixing cases lack an antitrust injury due to normal damage considerations

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[94] Lopatka, *supra* note 51 at 832-33 ("We believe that the most reliable measure of harm to competition is the effect of the practice on price and output."); *Blue Shield of Va.*, 457 U.S. at 482-84; *See, e.g., Xerox Corp.,* 511 F.Supp.2d at 381*; Alternative Electrodes, LLC,* 597 F.Supp.2d at 328-29. Ferrill, Hyman & Valenciano, *supra* note 60; *Guidelines* at p.15; *Rebel Oil Co., Inc.*, 51 F.3d at 1433. Cudahy & Devlin, *Anticompetitive Effect*, 95 Minn. L. Rev. 59 (2010). *Aluminum Co. of America*, 148 F.2d at 445; *F. Hoffmann-La Roche Ltd.,* 542 U.S. at 175.

[95] Robert Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 Hastings L.J. 65 (1982); *See* Robert H. Lande, *A Traditional And Textualist Analysis Of The Goals Of Antitrust: Efficiency, Preventing Theft From Consumers, And Consumer Choice*, 81 FORDHAM L. REV. 2349, 2373 (2013) (wealth transfer concerns of antitrust law and efficiency concerns for antitrust laws are not mutually exclusive).

[96] Thomas W. Snyder and William Fitzsimmons, *Putting A Price On Dirt: The Need For Better-Defined Limits On Government Fees For Use Of The Public Right-Of-Way Under Section 253 Of The Telecommunications Act Of 1996*, 64 FED. COMM. L.J. 137, 167 (2011)(A competitive market is a market in which no single entity or combination of entities can exert undue market power to control prices or the values of assets).

[97] For antitrust purposes, efficiency is conduct that increases output or consumer welfare. Frank X. Taney, *Rewriting The Law Of Resale Price Maintenance: The Kodak Decision And Transaction Cost Economics*, 143 U. PA. L. REV. 321, 339 (1994).

[98] *Blue Shield of Va.,* 457 U.S. at 482-84; *See, e.g., Xerox Corp.*, 511 F.Supp.2d at 381; *Alternative Electrodes, LLC*, 597 F.Supp.2d at 328-29. Ferrill, Hyman & Valenciano, *supra* note 60; *Continental Ore Co.*, 370 U.S. at 690 (raising rivals' costs by eliminating supply source in attempt to eliminate competitor); *Aluminum Co. of America,* 148 F.2d at 434-35; *Timberlane Lumber Co.,* 549 F.2d at 597.

[99] Watkins, *supra* note 76, at n.94; Torres-Spelliscy, *supra* note 76, at 403.

[100] *Brunswick*, 429 U.S. at 477.

[101] *Atl. Richfield Co.*, 495 U.S. at 328.

[102] *In re LIBOR*, 935 F. Supp.2d at 687, is a horizontal price fixing case; Foster, *supra* note 3, at 316-18.

[103] Ariel Katz, *Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power*, 49 Ariz. L. Rev. 837, 892 (2007); Carole A. Casey, *The Rule of Reason Analysis of Dual Distribution Systems: Does it Further the Purposes of the Sherman Act?* 29 B.C. L. Rev. 431, 435 (1988).

such as lack of causation, lack of foreseeability, speculation, or remoteness (efficient enforcer rule). But the *In re LIBOR* court's decision is not based on these factors. It finds no harm to competition because the LIBOR process is not a "competitive process." This suggests, for the first time, a court may base its "no antitrust injury" decision in a horizontal price fixing case on a "no harm to competition" analysis.

In re LIBOR does not involve competitive conduct harmful to competitors but beneficial to consumers.[104] The *In re LIBOR* plaintiffs were consumers of the defendants' financial products. Accordingly, the *In re LIBOR* case does not involve a competitor's suit as in the seminal antitrust injury cases of *Brunswick* and *ARCO*. Furthermore, in *Brunswick* and *ARCO,* the nonparty consumers were benefitted by the defendants' conduct.

Whether manipulating LIBOR harms competition depends on whether the conduct caused an improper wealth transfer. For example, there may be harm if plaintiffs paid a higher price, or received reduced profits, or if competitors were eliminated. The allegations in *In re LIBOR* suggest that the answers to these questions are affirmative.[105] Also, if defendants' conduct resulted in allocative inefficiencies then the allegations in *In re LIBOR* would also suggest that the answer is affirmative.[106] The plaintiffs lost profits or paid higher prices because the defendants manipulated LIBOR. Defendants' conduct was not allocatively efficient because advancing misinformation or fraud is allocatively inefficient.[107] Accordingly, the plaintiffs' allegations should be sufficient to establish harm to competition.

IV. WHAT IS THE "COMPETITIVE PROCESS"?

Whether the LIBOR process is a "competitive process" is irrelevant in determining if competition was harmed.[108] There is neither binding nor

[104] To posit that suppressing the LIBOR interest rate benchmark benefits consumers of some financial products, such as mortgages with adjustable interest rates tied to LIBOR is in error. LIBOR rates relevant to mortgages may have been adjusted up for the readjustment date and back down the next day. Adams v. Bank of Am. Corp., No. 12-cv-07461 (S.D.N.Y. Oct. 4, 2012); Foster, *supra* note 3, at 319.

[105] *In re* LIBOR, 935 F.Supp.2d at 697.

[106] *Id.*

[107] Watkins, *supra* note 76, at n.94; Torres-Spelliscy, *supra* note 76 at 403.

[108] Evidently, the parties stipulated that the LIBOR process was not a competitive process. *In re LIBOR*, 935 F. Supp. 2d at 687. While parties' stipulations may streamline litigation, they do not change facts. Is the LIBOR data provided by panel members a competitive process? Is being a panel member so you can provide the data and, hence control interest rates, a competitive process? That depends on how one defines a competitive process. It has been defined in many ways: a process market organization is open, small competitors have a right to compete on the merits and their ability to compete not impaired by dominant entrepreneurs. Protecting the competitive process requires restraint of dominant entrepreneurs conduct not related to competition on the merits and that prevents other entrepreneurs from competing. *See* Luca Rubini, MICROSOFT ON TRIAL: ECONOMIC AND LEGAL ANALYSIS OF A TRANSATLANTIC ANTITRUST CASES 470 (2010); Cris M. Currie, *Opinion Wanted: A Theoretical Construct for Mediation Practice*, 53 DISP. RESOL. J. 70, 72 (1998) (citing to M. Deutsch, THE RESOLUTION OF CONFLICT (1973) ("Competitive processes are those which seek to satisfy personal interests at the expense of joint interests, inhibit the expression of

persuasive authority in *In re LIBOR* to suggest that if the practice in question is not a competitive process there can be no harm to competition. Indeed, the authority suggests that if the practice is a facilitating practice, then the opposite is true.[109] At least one lower court has held that antitrust laws were meant to protect the "competitive process."[110] In this context, "competitive process" is synonymous with "harm to competition."[111] If harm to the "competitive process" is synonymous with "harm to competition," then, according to the *LIBOR* court, one must suffer harm to competition in order to have harm to competition.

To support the assertion that harm to competition leads to harm to the competitive process,[112] the proper question is whether agreeing to submit

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disagreement, lean toward overconformity and rigidity rather than flexibility and creativity, and overemphasize differences while ignoring commonalities. They typically lead to poor communication, misperception, misjudgment, and an over valuing of self-consistency."). *See also* M. Deutsch, "A Framework for Teaching Conflict Resolution in the Schools," in 2 B.H. Sheppard, M.H. Bazerman, and R. Lewicki, (Ed.), RESEARCH ON NEGOTIATION IN ORGANIZATIONS 189-203 (1990); Harry S. Gerla, *Federal Antitrust Law and Trade and Professional Association Standards and Certification*, 19 U. DAYTON L. REV. 471, 474 (1994) (citing to Indian Head, Inc. v. Allied Tube & Conduit Corp., 486 U.S. 492, 501 (1988)) ("the rivalrous process through which competitors seek to divert business from rivals by offering superior products and services to consumers; [or the] aggregate net output of goods and services. Thus, if a restraint does not negatively impact net output, it does not adversely affect competition. Conversely, if a restraint enhances output, it is pro-competitive."). One could argue that the LIBOR setting process was a competitive process particularly when one considers the qualifiers as articulated by the BBA in selecting panel members, such as reputation, credit quality, and activity in London as London is a major international financial market. Jacob Gyntelberg & Philip Wooldridge, *Interbank Rate Fixings During Recent Turmoil*, (March 2008), http://www.bis.org/publ/qtrpdf/r_qt0803g.pdf. For an interesting treatment of the definitional problems in antitrust law *see* Cudahy & Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59 (2010).

[109] *Aluminum Co. of Am.*, 148 F.2d at 445 (addressing international agreement fixing prices indirectly by withdrawing supply from the market through a quota of production scheme which, in itself, was not a competitive process); *see Timberlane Lumber Co.,* 549 F.2d at 597 (harassment, including false arrest of manager and defamatory newspaper articles to eliminate competitor, arguably not a competitive process); Radiant Burners, Inc. v. People's Gas Light & Coke Co., 364 U.S. 659, 360 (1961); MCI Commc'n Corp. v. AT&T, 740 F.2d 980 (D.C. Cir. 1984); Gerla, *supra* note 108, at 471-72.

[110] Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 902 (9th Cir. 2008).

[111] *Id.* at 902-03 (citing to *Brunswick,* 429 U.S. at 489; Volvo Trucks N. Am., Inc. v. Reeder–Simco GMC, Inc., 546 U.S. 164 (2006) ("Interbrand competition, our opinions affirm, is the primary concern of antitrust law." (internal quotation omitted)); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) ("The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."); *Atl. Richfield Co.,* 495 U.S. at 331 (holding that a firm does not incur an antitrust injury when it loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum-price-fixing scheme); *Cargill, Inc.*, 479 U.S. at 113 (extending antitrust injury requirement to suits for injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26); *J. Truett Payne Co.,* 451 U.S. at 562 (extending antitrust injury requirement to price discrimination suits arising under § 2 of the Clayton Act). The Court's reasoning and conclusions in *Brooke Group*, as reaffirmed recently in *Weyerhaeuser*, accordingly show a measured concern to leave unhampered pricing practices that might benefit consumers, absent the clearest showing that an injury to the competitive process will result. United States v. Microsoft, 253 F.3d 34, 58 (D.C. Cir. 2001); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1060–61 (8th Cir. 2000); *see* Cudahy & Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59 (2010).

[112] *See* Peter J. Prommer, *The Pioneer and Generic Drug Manufacturer Agreements: Is the Sherman Act Big Enough to Swallow These Pills?* 2002 U. ILL. J.L. TECH. & POL'Y 215, 222 (2002); Lopatka, *supra* note 51 at 834-36.

fraudulent LIBOR data harms the competitive process. The question is not whether the LIBOR process is competitive. Therefore, the court's holding that there can be no harm to competition because the LIBOR process is not itself a competitive process departs from precedent.[113]

V. STANDARD SETTING ANALOGY

Because LIBOR is a benchmark set by market participants with market power, it is analogous to market participants setting industry standards. The standard setters may harm competition if they are driven by anticompetitive reasons, such as their own personal interests, rather than for the welfare of the consumer.[114] A standard for pricing goods or services in a particular industry would certainly be the type of conduct that harms competition regardless of whether standard settings is a competitive process.[115]

While setting standards and benchmarks certainly have procompetitive aspects, courts have never held these activities to be immune from antitrust laws because the process of setting standards is not a competitive process. Indeed, courts have recognized that the process of standard setting and information sharing between competitors is highly suspect under antitrust law, particularly where the standards are set by competitors [116] with significant market power [117] and no safeguards.[118]

The *In re LIBOR* court did address the standard setting law, however, the court concluded that there can be no harm to competition if the LIBOR setting process is not competitive. Instead the court concluded that in each of the plaintiffs' standard setting cases, there was a distinction because there was harm to competition in the cited cases but

[113] Peter D. St. Phillip, Jr. & Raymond P. Girnys, *No Antitrust Injury In Libor Rate-Setting?—What Happened To Effects?*, COMPETITION POLICY INTERNATIONAL (May 30, 2013), https://www.competitionpolicyinternational.com/no-antitrust-injury-in-libor-rate-setting-what-happened-to-effects.

[114] Elbert L. Robertson, *A Corrective Justice Theory of Antitrust Regulation*, 49 CATH. U. L. REV. 741, 7761-62 (2000); *Radiant Burners*, 364 U.S. at 360; S. Pac. Commc'ns Co. v. Am. Tel. and Tel. Co., 740 F.2d 980 (D.C. Cir. 1984); Gerla, *supra* note 108, at 481; citing David Hemenway, Industrywide Voluntary Product Standards 8 (1975). *Cf.* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

[115] Gerla, supra note 108, at 494 (citing FTC v. Superior Trial Lawyers Ass'n, 493 U.S. 411, 432-36 (1990); *Am. Column & Lumber Co*, 257 U.S. at 377; Nat'l Elec. Contractors Ass'n v. Nat'l Contractors Ass'n, 689 F.2d 1196 (4th Cir. 1982), *cert. denied*, 463 U.S. 1234 (1983)).

[116] Gerla, *supra* note 108; 2 JULIAN O. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION 6I-26-7 (1993); Consol. Metal Prods. v. Am. Petroleum Inst., 846 F.2d 284, 295 (5th Cir. 1988) (emphasizing lack of competitor representation on decision making body); Eliason Corp. v. Nat'l Sanitation Found., 614 F.2d 126 (6th Cir. 1980), *cert. denied*, 449 U.S. 826 (1981) (standards by independent nonprofit organization upheld in spite of claim that they allegedly favored larger manufacturers over smaller manufacturers and impeded innovative designs).

[117] Market power is another definitional nightmare. Generally, it is the power to raise prices or eliminate competitors, reduce output, dominate customers or suppliers without suffering significant negative consequences. Gerla, *supra* note 108. *See also* Hovenkamp, *supra* note 39, at 272-73; *Grinnell Corp.*, 384 U.S. at 563; U.S. v. E. I. du Pont De Nemours & Co., 351 U.S. 377, 391 (1956); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007).

[118] *Allied Tube & Conduit Corp.*, 486 U.S. at 500-01.

none in the *LIBOR* case.[119] The court ignored the fact that each of the standard setting cases involved conduct similar to the LIBOR process of sharing information to set a standard or benchmark and that such conduct harmed competition.[120] The only relevant distinction between the standard setting cases distinguished by the court and the LIBOR setting conduct is that past courts did not require that the standard setting conduct be a "competitive process" to find harm to competition. Indeed, quite the opposite is true: courts have held it sufficient that standard setting conduct harmed competition.

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[119] *In re* LIBOR, 935 F.Supp.2d at 691-92.

[120] *Allied Tube & Conduit Corp.*, 486 U.S. at 500-01 (In this case there was an attempt to exclude respondent's product from the market. However, the Court noted: "[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm."). *Id.* at n.5 ("Product standardization might impair competition in several ways.... [It] might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices."). Areeda, *supra* note 58, at 373. When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, *cf. Hydrolevel*, 456 U.S., at 570–73 (noting absence of "meaningful safeguards"), those private standards can have significant procompetitive advantages.

The Court does not require the standard setting process be a "competitive process" to be anticompetitive or harmful to competition. *Indiana Fed'n of Dentists*, 476 U.S. at 456 (specifically rejecting 7th Cir. position, similar to *In re LIBOR* court's, that defendant association's members did not compete regarding the agreement to suppress information). In *Allied Tube* the Court held: "[T]hese criticisms of the Commission's findings [are not] well founded. The Commission's finding that '[i]n the absence of . . . concerted behavior, individual dentists would have been subject to market forces of competition, creating incentives for them to . . . [provide information to insurance companies]… finds support not only in common sense and economic theory, upon both of which the FTC may reasonably rely, but also in record documents.'" The Court rejects the competitive process requirement for the sharing of information.

Nat'l Soc'y of Prof'l Eng'rs v. U.S., 435 U.S. 679, 692, 98 (1978) (where a trade association agreed to standardize a process of no competitive bidding, the Court held: "an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face."); Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1303 (5th Cir. 1971) (actions taken . . . for anticompetitive purposes are subject to antitrust strictures where the actions interfere with price, no requirement that the "actions" be a "competitive process"); Plymouth Dealers' Ass'n of N. Cal. v. U.S., 279 F.2d 128, 132 (9th Cir.1960) (competitors provide information for list prices; the competition between the Plymouth dealers and the fact that the dealers used the fixed uniform list price in most instances only as a starting point, is of no consequence. It was an agreed starting point; it had been agreed upon between competitors; it was in some instances in the record respected and followed; it had to do with, and had its effect upon, price); *In re* Rail Freight Fuel Surcharge Antitrust Litig., 587 F. Supp. 2d 27, 41 (D.C. Cir. 2008) (alleging an injury to competition by allegation paid supracompetitive prices due to defendants price fix through their use of fuel surcharges; no requirement that the fuel surcharge process be a competitive process); Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 988 (9th Cir. 2000) (finding harm to competition by collusive price manipulation where defendants conspired to reduce milk prices); Ice Cream Liquidation, Inc. v. Land O'Lakes, Inc., 253 F. Supp. 2d 262, 272 (D. Conn. 2003) (alleging that cooperatives of dairy farmers conspired to fix the prices of dairy products – "plaintiff claims to have been forced to pay prices not set by free market competition, but rather by defendants' price-fixing scheme; the injury alleged by plaintiff is the type of injury the Sherman Act, which seeks to preserve free and unfettered competition, was designed to prevent.").

VI. CONCLUSION

"If you're not confused, then you don't understand."[121] In *In re LIBOR* the court did not answer whether LIBOR manipulation, primarily anticompetitive wealth transfers in the form of price fixing or elimination of competitors and allocative inefficiencies, directly harmed plaintiffs. Rather, the court created a new requirement that only those activities that are a product of a competitive process can harm competition. There is no statute, case law, nor scholarly authority for this new requirement—but it effectively eviscerates disfavored private civil antitrust law. If this holding stands, it may lead to negative unintended consequences in international antitrust enforcement.

[121] Grey Owl Capital Management, *Market Outlook: If You're Not Confused, Then You Don't Understand*, SEEKING ALPHA (Jan. 28, 2010, 8:20 A.M.) http://seekingalpha.com/article/185054-market-outlook-if-youre-not-confused-then-you-dont-understand (quoting Edward R. Murrow).