Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Libor Rulings May Not Doom Forex Antitrust Claims

By **Melissa Lipman**

Law360, New York (April 18, 2014, 9:29 PM ET) -- The banks accused of manipulating foreign exchange rates will almost certainly turn to a pair of decisions dismissing similar antitrust claims over the setting of the London interbank offered rate, but key differences in the way the two benchmarks are set mean that the Libor rulings won't necessarily doom the forex antitrust claims, attorneys say.

When the Libor scandal broke and led to billions of dollars in fines for some of the world's biggest banks from antitrust enforcers around the world, record-breaking private antitrust suits seemed sure to follow.

But in a pair of cases in New York federal court, two separate district judges have reached the same conclusion: while plaintiffs may be able to make some fraud and Commodities Exchange Act claims stick against the banks involved in setting the rate, they do not have standing to bring antitrust claims. The problem, the judges reasoned, is that the Libor-setting process was a cooperative, rather than a competitive, one.

Those decisions certainly create a hurdle for the plaintiffs to surmount in the forex litigation, but it is far from clear that the defendants will have as easy a time escaping claims that they conspired to manipulate the currency exchange rates, experts said.

"Libor's not on all fours with forex," said Bingham McCutchen LLP partner Jon Roellke. "The Libor decisions are just one piece of this puzzle with respect to application of the antitrust laws."

The consolidated forex class action, which is being brought on behalf of thousands of investors by several retirement plans and investment funds, accuses 12 banks — including Bank of America Corp., Credit Suisse AG and JPMorgan Chase & Co. — of conspiring to manipulate foreign exchange rates, thereby diminishing the plaintiffs' returns on trades, pension plans and savings accounts.

One difference between the forex and Libor cases is that the two benchmarks are set very differently.

Libor and a host of associated benchmarks for different markets are based on estimates that a group of banks submit to the British Bankers' Association. The figures the banks provide are supposed to be their best estimate of the rate at which they could borrow money at a given time. The BBA then throws out the highest and the lowest estimates and averages the rest.

The problem, U.S. District Judge Naomi Reice Buchwald **concluded in early 2013**, was that the process "is not itself competitive" and the plaintiffs couldn't point to any anti-competitive effects that conduct had in any markets where the banks actually competed.

A year later, U.S. District Judge George B. Daniels took the same approach in a similar case over futures contracts linked to the Tokyo interbank offered rate.

"As Judge Buchwald recognized in the USD LIBOR Litig[ation], the setting of the USD LIBOR benchmark rate is not competitive; rather, it is a cooperative effort wherein otherwise competing banks agreed to submit estimates of their borrowing costs to facilitate calculation of an interest rate index," Judge Daniels **wrote in his March 28 opinion**.

The benchmark at issue in the forex case — called the WM/Reuters Closing Spot Rates — works differently.

Instead of collecting estimated exchange rates, WM/Reuters calculates its closing rates in an "automated and anonymous" fashion, according to the **consolidated forex complaint**.

The rate is calculated when the market closes at 4 p.m. local time in London based on actual transactions as well as the so-called bid and ask order rates, quotes dealers give for the rates at which they are willing to buy and sell a given currency. WM/Reuters looks at the quotes and spot transactions made in the 30 seconds before and after closing and then calculates the median rate to get the benchmark.

And that is the "fundamental distinction" between the Libor and forex litigations, according to Block & Leviton LLP's Whitney Street.

"In the Libor case, [Judge Buchwald] concluded that the point at which the defendants were alleged to have been colluding, i.e., submitting estimated borrowing costs to the BBA, that was always meant to be a collaborative process," said Street. "Whereas here, even let's say that opinion is upheld, the forex case is nonetheless different because here ... the alleged manipulation was occurring in the context of a process that was supposed to be competitive."

In both cases, the plaintiffs have accused the banks of colluding to manipulate the rates. In Libor, the plaintiffs claimed that the banks conspired to understate their borrowing costs and keep Libor low. That would in turn keep the interest rates they had to pay on their own debts low, making the bank's risk look lower as a result, according to the Libor plaintiffs.

The forex plaintiffs claim that a handful of banks dominate the market and that a small group of traders handles the bulk of forex transactions. Those traders allegedly used chat rooms, instant messages and email to exchange information about their clients' trades in order to minimize their own risks and make supracompetitive profits by trading ahead of their clients' major trades, among other strategies.

While Judge Buchwald declined to wade into the dispute over whether or not the banks had actually conspired with one another on their Libor submissions, attorneys said the forex plaintiffs might have better luck getting past the motion to dismiss stage because of the differences in how the rates are calculated. At the very least, the case might be a closer call for U.S. District Judge Lorna G. Schofield, who is overseeing the forex litigation.

Still, several defense attorneys warned that the plaintiffs should not feel too comfortable that the differences between the two benchmarks will protect their claims from dismissal.

"The forex cases are different, and the forex cases in some ways are easier because the benchmark is set by actual transactions that are supposed to be a competitive process, [but] Libor and forex are not different in ways that should impact the antitrust analysis at the end of the day," Roellke said.

For example, the defendants can argue that the WM/Reuters rates are based on trades between willing buyers and willing sellers in one of the most liquid markets in the world and that, much like in the Libor cases, the benchmark itself is not being bought or sold and therefore is not part of the competitive process.

Ultimately, the Libor decisions may offer Judge Schofield a "good roadmap" for deciding a motion to dismiss in forex, according to Murphy & McGonigle PC's Robertson Park.

"They're in chat rooms, but how much are the chat rooms just them each feeling out what the other's doing and how much a concerted effort to coordinate and time their trading is another thing," Park said. "I just think it's tough ... maybe they'll develop some better evidence, and maybe there are some nuances that will persuade the judge she doesn't have to be bound by the earlier decisions."

"The Libor decisions do not bode well, at least on first blush," Park added.

--Editing by John Quinn and Philip Shea.