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LIBOR (Gelboim) and the Implications of its Unwritten Rule

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Words once said can never be unsaid, but can law not said be law? On May 23, 2016, the Second Circuit issued its opinion in the London Interbank Offered Rate ("LIBOR") Multi-District Litigation ("MDL"), *Gelboim v. Bank of Am. Corp.*, -- F.3d –, 2016 U.S. Dist. LEXIS 9366 (2d Cir. 2016) ("*Gelboim*"), vacating the Southern District of New York's dismissal of the plaintiffs' antitrust claims for lack of antitrust standing,[1] and remanding for further proceedings. In *Gelboim,* the Second Circuit sharply criticized the district court's findings concerning antitrust injury, determining that, among other things, "(1) horizontal price-fixing constitutes a *per se* antitrust violation; (2) a plaintiff alleging a *per se* antitrust violation need not separately plead harm to competition; and (3) a consumer who pays a higher price on account of horizontal price-fixing suffers antitrust injury." *Gelboim,* 2016 U.S. App. LEXIS 9366, at *3.

What is turning out to be perhaps the most litigated aspect of *Gelboim* is not what the Second Circuit affirmatively held, but what it did not. As *Gelboim* re-states, antitrust standing is a two prong inquiry in the Second Circuit: (1) whether the plaintiffs have suffered antitrust injury; and (2) whether the plaintiffs are efficient enforcers of the antitrust laws. *Gelboim,* 2016 U.S. App. LEXIS 9366, at *22. *Gelboim* focuses largely on the first inquiry, antitrust injury, confining its remarks about the efficient enforcer analysis to a summary discussion of the four factors courts consider.[2] Yet, in the month since the opinion came out, several groups in the Southern District of New York have focused on the Second Circuit's efficient enforcer discussion. Stripping the appellate court's discussion of its context and caveats, these parties have argued that *Gelboim* affirmatively prevents market participant plaintiffs in horizontal price-fixing cases from being deemed efficient enforcers and, in turn, establishing antitrust standing.[3] To that we say, let us not repeat the error of *LIBOR I*.

Gelboim simply did not reach any conclusions regarding the efficient enforcer prong of antitrust standing because "[t]he district court did not reach this issue." *Id.* at *38. The appellate court acknowledged that it was "not in a position to resolve these issues, which may entail further inquiry, nor are we inclined to answer the several relevant questions without prior consideration of them by the district court." *Id.* The *Gelboim* efficient enforcer discussion thus should be interpreted as a guidepost and strong suggestion that courts not deviate from established jurisprudence, such as the *LIBOR I* court did when it evaluated the first prong concerning antitrust injury.

Gelboim acknowledges that the first efficient enforcer factor, the directness of the asserted injury, examines the link between the Plaintiffs' harm and the Defendants' conduct, sometimes referred to as "causation" or "remoteness." *Gelboim,* 2016 U.S. App. 9366, at *38-39. *See also Sunbeam TV Corp. v. Nielson Media Research, Inc.,* 711 F.3d 1264, 1272 (11th Cir. 2013) (referring to first factor as whether the alleged injuries "were direct or remote"); 2A Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law,* ¶339 (3d Ed. 2007) ("Areeda"). Although this factor raised "a number of questions" in the LIBOR MDL, such as the relevant market and antitrust standing of those plaintiffs who did not deal directly with the banks as well as the potential

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application of "umbrella standing,"[4] the Second Circuit did not disturb well-settled law that the directness of the injury test is "no less elusive" than the application of the proximate cause doctrine in torts. *Blue Shield of Va. v. McCready,* 457 U.S. 465, 477 & n.13 (1982). As was always the case, plaintiffs satisfy this factor when they are the immediate victim of the defendants' violations. *See* Areeda, ¶335h, at 78.

The second factor, the existence of a more direct victim, is primarily concerned with whether the plaintiff is a consumer or market participant claiming harm to competition, or a competitor suffering from reduced profits. *Gelboim* reiterates this inquiry. *Gelboim,* 2016 U.S. App. LEXIS 9366, at * 41. Although some parties have latched on to the Second Circuit's unremarkable assertion that "[i]mplicit in the inquiry is recognition that not every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced,"[5] these same parties tend to gloss over that *Gelboim* did not hold that the LIBOR MDL plaintiffs were too attenuated, or deny standing to any class of plaintiff. *Gelboim,* 2016 U.S. App. LEXIS 9366, at *41-42. This factor "simply looks for a class of persons naturally motivated to enforce the antitrust laws" (*In re DDAVP Direct Purchaser Antitrust Litig.,* 585 F.3d 677, 689 (2d Cir. 2009)); it does not require the plaintiff to be the "best" plaintiff to bring a case. Id. ("'Inferiority' to other potential plaintiffs can be relevant, but it is not dispositive"). *See also* Areeda, ¶339a, at 109 ("A plaintiff may seem remote when a 'superior' plaintiff is available to vindicate the public interest [citation] although even an inferior plaintiff may be allowed standing when its injury is 'inextricably intertwined' with the violation").

The third factor concerns whether damages sought in a particular antitrust case are "highly speculative." Although the Second Circuit commented that the LIBOR MDL "presents some unusual challenges," it did not define the parameters for "highly speculative" damages. *Gelboim,* 2016 U.S. App. LEXIS 9366, at *42-43. Nonetheless, some parties have grasped on to the Second Circuit's language to argue that damages are too speculative in financial benchmark cases to allow these cases to proceed. These arguments miss the mark. The aim of the third factor is on whether the plaintiffs have evidence to support a "just and reasonable estimate" of damages. *Gelboim,* 2016 U.S. App. LEXIS 9366, at *42 (*citing U.S. Football League v. Nat'l Football League,* 842 F.2d 1335, 1378 (2d Cir. 1988) ("NFL")). Courts allow antitrust plaintiffs "considerable latitude in proving the amount of damages", which "need not conform to a particular theory or model." *NFL,* 842 F.3d at 1378. As *Gelboim* explained, "some degree of uncertainty stems from the nature of antitrust laws"; the real concern is "whether the damages would necessarily be 'highly speculative.'" *Gelboim,* 2016 U.S. App. LEXIS 9366, at *42-43. And according to the Supreme Court, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 265 (1946). *See also Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100, 102 (1969) ("a court may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs'") (*quoting Bigelow,* 327 U.S. at 264)). For this reason, "it does not come with very good grace for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." *In re Elec. Books Antitrust Litig.,* 2014 US. Dist. LEXIS 42537, at *51 (S.D.N.Y. Mar. 28, 2014) (*quoting J. Truett Payne Co., Inc. v. Chrysler Motors Corp.,* 451 U.S. 557, 565 (1981)). And complex damages calculations, even though they may—and often do in antitrust cases—require expert testimony, are "hardly beyond the ken of the federal courts." *Sanner v. Board of Trade,* 62 F.3d 918, 930 (7th Cir. 1995).

The last efficient enforcer factor pertains to duplicative recovery and the related difficulty in apportioning damages. Like many recent antitrust price-fixing cases, the LIBOR MDL complaint referenced government and regulatory investigations and suits, prompting the Second Circuit to state that "[s]ome of these government initiatives may seek damages on behalf of victims …" *Gelboim,* 2016 U.S. App. LEXIS 9366, at *43-44, although none have. Based on the incomplete

record before it, the appellate court was unclear how "issues of duplicate recovery and damage apportionment can be assessed." *Id.* What the Second Circuit did not say, although opponents may suggest otherwise, is that the existence of these government investigations serves as a bar to private action recovery. In fact, Congress intended quite the opposite: "By offering potential litigants the prospect of recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.'" *Hawaii v. Standard Oil Co.* 405 U.S. 251, 262 (1972). Indeed, "Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.* , 442 U.S. 330, 344 (1979) (emphasis in original). Thus, Section 4 has "two purposes: to deter violators and deprive them of the 'fruits of their illegality' and 'to compensate victims of antitrust violations for their injuries." *Pfizer, Inc. v. Govt. of India,* 434 U.S. 308, 314 (1978). The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), Pub. L. No. 108-237, 11 Stat. 665 (codified at 15 U.S.C. § 1, note), builds on this tradition, directing federal courts not to dismiss civil antitrust actions based on criminal prosecutions, and requiring antitrust amnesty applicants to cooperate with private plaintiffs as a condition of receiving leniency. Government and private antitrust actions go hand-in-hand, and *Gelboim* is consistent with this well-established pillar of antitrust law.

It is thus apparent that the Second Circuit's efficient enforcer discussion as written did not change the law in any respect. Parties advancing arguments to the contrary should bear in mind that the Supreme Court long ago determined that direct purchaser market participants have antitrust standing in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), when it chose this group of plaintiffs as the preferred enforcers of the federal antitrust laws, a notion *Gelboim* implicitly affirms. Citing *Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477, 489 (1977) ("*Brunswick*"), the Second Circuit explained that "[g]enerally, when consumers, because of a conspiracy, must pay prices that no longer reflect ordinary market conditions, they suffer 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Gelboim,* 2016 U.S. App. LEXIS 9366, at *24. The appellate court also refused to entertain an expansive reading of either *Brunswick or Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328 (1990) ("*ARCO*"), two cases often cited by critics as grounds for denying direct purchaser plaintiffs antitrust injury, determining that, "[a]t most, these cases stand for the proposition that competitors who complain of low fixed prices do not suffer antitrust injury." *Gelboim,* 2016 U.S. App. LEXIS 9366, at *36 (emphasis added).

The Second Circuit's application of *Brunswick* applies in equal force to the second prong of antitrust standing. This prong was never intended to be a vehicle for defendants to pick their plaintiff, nor to be examined in a vacuum as a separate and distinct element from antitrust injury. Rather, the efficient enforcer analysis should be considered in conjunction with antitrust injury as but one tool used to eliminate remote purchasers who cannot meet even a rudimentary standing threshold. The concern has always been "about whether the putative plaintiff is a proper party to 'perform the office of a private attorney general'" and thereby "vindicate the public interest in antitrust enforcement" (*Gelboim,* 2016 U.S. App. LEXIS 9366, at *44 (citations omitted)), and nothing written or unwritten by the jurists in *Gelboim* suggests otherwise.


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Endnotes

[1]*See In re LIBOR-Based Fin. Instruments Antitrust Litig.,* 935 F. Supp. 2d 666 (S.D.N.Y. 2013) (Buchwald, J.) ("LIBOR I").

[2]The four efficient enforcer factors are: (1) the "directness or indirectness of the asserted injury"; (2) the "existence of more direct victims of the alleged conspiracy"; (3) "the extent to which the [plaintiff's] damages claim is 'highly speculative'"; and (4) the "risk of duplicate recovers on the one hand, or the danger of complex apportionment of damages on the other." *Gelboim,* 2016 U.S. App. LEXIS 9366, at *38 (*quoting Associated General Contractors v. Cal. State Council of Carpenters,* 459 U.S. 519, 540-45 (1983)). Because the issue had already been fully briefed, the Second Circuit also reversed Judge Buchwald's subsequent determination regarding the plaintiffs' conspiracy allegations, finding that the plaintiffs' complaint "contained numerous allegations that clear the bar of plausibility." *Gelboim,* 2016 U.S. App. LEXIS 9366, at *47-48.

[3]*See In re London Silver Fixing, Ltd. Antitrust Litig.,* No. 14-Md-02573, Letter (S.D.N.Y. May 25, 2016) (ECF No. 128); *In re Commodity Exchange, Inc., Gold Futures and Options Trading Litig.,* No. 14-md-2548 (VEC), Letter (S.D.N.Y. May 25, 2016) (ECF No. 141); *In re Foreign Exchange Benchmark Rates Antitrust Litig.,* No. 13 Civ. 07789 (LGS), Letter, (S.D.N.Y. May 26, 2016) (ECF No. 611); *In re Platinum & Palladium Antitrust Litig.,* No. 14-cv-9391, Letter (S.D.N.Y. May 27, 2016) (ECF No. 140); *7 West 57th Street Realty Company LLC v. Citigroup Inc., et al.,* No. 13-cv-0981 (PGG), Letter (S.D.N.Y. June 13, 2016) (ECF No. 204).

[4]"Umbrella standing" refers to antitrust standing of umbrella purchasers in situations where, for example, the cartel controls only part of a relevant market and the consumer purchases from a non-cartel member but alleges that he/she sustained injury by virtue of the cartel's price-fixing in the market as a whole. *See Gelboim,* 2016 U.S. App. LEXIS 9366, at *39-40.

[5]*See, e.g., In re London Silver Fixing, Ltd. Antitrust Litig.,* No. 14-Md-02573, Letter, at 3 (S.D.N.Y. May 25, 2016) (ECF No. 128); *In re Commodity Exchange, Inc., Gold Futures and Options Trading Litig.,* No. 14-md-2548 (VEC), Letter, at 3 (S.D.N.Y. May 25, 2016) (ECF No. 141); *In re Platinum & Palladium Antitrust Litig.,* No. 14-cv-9391, Letter, at 3 (S.D.N.Y. May 27, 2016) (ECF No. 140); *In re Foreign Exchange Benchmark Rates Antitrust Litig.,* No. 13 Civ. 07789 (LGS), Non-Settling Defendants' Supplemental Memorandum of Law in Support of Their Motion to Dismiss the Claims of the OTC Plaintiffs for Lack of Antitrust Standing, at 1 (S.D.N.Y. June 2, 2016) (ECF No. 615).

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