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LIBOR: Everything You Ever Wanted to Know But Were Afraid to Ask

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LIBOR: EVERYTHING YOU EVER WANTED TO KNOW BUT WERE AFRAID TO ASK

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I. INTRODUCTION

Since the LIBOR rigging scandal broke into the public consciousness in mid-2012, every day's news seems to bring with it reports of new litigation and regulatory actions. The effects of the debacle will likely play out in courts around the world for years.

The goal of this article is to present the reader with a general overview of the LIBOR: its genesis and development, how and why London bankers manipulated the LIBOR, the liability of implicated parties, criminal penalties, the impact of criminal penalties on director and officer insurance carriers, and what the future holds for the LIBOR.

II. THE LONDON INTERBANK OFFERED RATE (THE LIBOR)

The LIBOR developed in response to "rising demand around the 1960s for 'Euro' currencies—offshore, stateless, and often in dollars—that swept London and allowed companies and countries to borrow, deposit and repay while dodging domestic regulation and taxes.".”[1]

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> Geopolitical forces, especially the Vietnam War, coincided with the emergence of global trade imbalances and restrictive legislation in the U.S. and resulted in the unexpected and sudden creation of the Eurodollar market in London in the 1960s . . . . It was from this start that syndicated lending and capital markets recycled offshore dollars using floating interest rates based on [the] L[IBOR].[2]

At the time, no uniform index for determining the true interbank or reference rate existed.[3]

> For each [syndicated] loan, then, reference banks that were deemed representative of a cross section of the syndicate—or, for more neutrality, banks outside the syndicate—were chosen by the parties. The rates at which these reference banks could borrow would be aggregated to form the 'interbank rate' for the purpose of the loan.[4]

However, "[t]his method was cumbersome, and offered multiple opportunities for manipulation. This was especially true in London, where an older banking culture of gentlemanly capitalism prevailed, and where favors and family connections were still central to a bank's success."[5]

Many overseas banks had offices in London, which quickly became the home of the loosely regulated European currencies. A handful of enterprising London bankers organized several London banks "into consortia, sharing the risks for massive syndicated loans funded through a series of short-term deposits based on floating interest rates." [6]

Minos Zombanakis, who ran the London branch of Manufacturers Hanover, created the formula that would become the LIBOR. Within each syndicate, a group of "big reference banks . . . would report their funding costs shortly before a loan rollover date. The weighted average, rounded to the nearest 1/8th percent plus a 'spread' for profit, became the price of the loan for the next period."[7]

However,

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[1] Kirstin Ridley & Huw Jones, *Insight: A Greek Banker, the Shah and the Birth of Libor*, REUTERS (Aug. 7, 2012, 9:14 PM), http://www.reuters.com/article/2012/08/08/us-banking-libor-change-idUSBRE87702320120808.

[2] Ridley & Jones, *supra* note 1.

[3] Sean Vanatta, *Libor's Risks Emerged from Clubby London Banking Culture*, BLOOMBERG (Aug. 14, 2012, 1:58 PM), http://www.bloomberg.com/news/2012-08-14/libor-s-risks-emerged-from-clubby-london-banking-culture.html.

[4] *Id.*

[5] *Id.*

[6] Ridley & Jones, *supra* note 1.

[7] Vanatta, *supra* note 3.

> [t]he use of the interbank rate shifted interest-rate risks to borrowers, and in the turbulent climate of the late 1970s financial institutions developed new tools to offset these risks. The most important of these was the interest-rate swap, a form of derivatives contract that allowed a party to hedge differences in short- and long-term interest rates.[8]

The many possible interest rates "made the development of a transparent market difficult, because each swap contract might have different terms and be linked to different reference banks. Nonuniformity was a significant problem in a market already estimated to be worth several trillion dollars in the mid-1980s."[9] "The rise of the derivatives market generally, and interest-rate swaps in particular, thus created the need for a more systematic index."[10]

Furthermore, London banks were still somewhat skeptical about investing in the new instruments due to the necessity of bartering an underlying rate prior to entering into the new contracts.[11] The banks turned to the British Bankers' Association ("BBA"), an industry trade association whose main job is to lobby on banks' behalf and represent the banking industry.[12] The banks requested that the BBA devise a benchmark to act as a reference point for the new instruments.[13] The rate was intended to "facilitate[] the operation of markets, and ma[k]e benchmarking more transparent and objective."[14]

In October 1984 the BBA—working with other parties such as the Bank of England—established various working parties, which eventually culminated in the production of the BBAIRS terms, the BBA standard for Interest Swap rates.[15] From 1986 until 1998, banks submitted their rate quotes daily to the BBA LIBOR process by answering the question, "[a]t what rate do you think interbank term deposits will be offered by one prime bank to another prime bank for a reasonable market size today at 11 am [London time]?"[16] In 1998, the Foreign Exchange and Money Markets Committee,[17] an independent committee of market participants

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Historical Perspective*, BBALIBOR, http://www.bbalibor.com/bbalibor-explained/historical-perspective (last visited on Mar. 29, 2013).

[12] David Enrich & Max Colchester, *Before Scandal, Clash Over Control of Libor*, WALL ST. J. (Sept. 11, 2012), http://online.wsj.com/article/SB10000872396390443847404577631404235329424.html. According to the BBA's website, as of July, 2012, the Foreign Exchange and Money Markets Committee had "sole responsibility for all aspects of the functioning and development of [BBA LIBOR]." Landon Thomas, Jr., *Trade Group for Bankers Regulates a Key Rate*, N.Y. TIMES (July 6, 2012), http://www.nytimes.com/2012/07/06/business/global/the-gentlemens-club-that-sets-libor-is-called-into-question.html?pagewanted=all&_r=1&. That committee is composed largely of bankers and financial professionals. *Id.* The chairman of this committee is a representative from a panel of banks including some of the world's biggest institutions like Barclays, Citigroup, and UBS. *Id.* This committee submitted the rates that become the LIBOR average. *Id.*

[13] *Historical Perspective*, *supra* note 11.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Liam Vaughan, *Secret Libor Committee Clings to Anonymity Following Scandal*, BLOOMBERG (Aug. 21, 2012), http://www.bloomberg.com/news/2012-08-20/secret-libor-committee-clings-to-anonymity-after-rigging-scandal.html. The identities of the members of this committee, representatives

that oversees the LIBOR, decided that "a universal definition of a prime bank could no longer be given," and that banks needed to link the figures that they reported to their own market activity, "rather than [to] a hypothetical entity."[18] Banks were required, in submitting rates, to answer the 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 a[.]m.[]?"[19] "[The BBA] has overseen the process ever since, even as the club of gentlemen bankers making syndicated loans in the City of London evolved into the opaque and impersonal multitrillion-dollar interbank market."[20]

The LIBOR has become integrated into a majority of the world's financial products,[21] and currently provides the reference point for nearly all interest rate derivatives and variable rate loans available in the financial markets.[22] It is currently calculated for fifteen different loan durations, ranging from overnight to a year, and in ten currencies, including the pound, the dollar, the euro, and the Swedish krona.[23] The LIBOR rates "[are] used as a benchmark to set payments on about $800 trillion-worth of financial instruments, ranging from complex interest-rate derivatives to simple mortgages. The number determines the global flow of billions of dollars each year."[24] The rates signal a bank's health to financial markets, rising when banks are in trouble, and create the basis for payments on trillions of dollars in corporate debt, home mortgages, and financial contracts world-wide.[25] Moreover, the impact of even small rate shifts can be critical. "A small increase in [the] LIBOR can make a big difference for borrowers. For example, an extra 0.3 percentage points would add about $100 to the monthly payment on a $500,000, adjustable-rate mortgage, or $300,000 in annual interest costs for a company with $100 million in floating-rate debt."[26] Because of its pervasiveness in, and significance for, the financial markets, the rate has come to be known as "the world's most important number."[27]

Currently, member banks[28] report their LIBOR[29] submissions each morning

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from the world's largest banks, are not public knowledge. *Id.* In the past, the committee met in London at an undisclosed location every two months to review the LIBOR rate. *Id.*

[18] *See Historical Perspective*, *supra* note 11.

[19] *Id.*

[20] Thomas, Jr., *supra* note 12.

[21] Enrich & Colchester, *supra* note 12.

[22] *The Rotten Heart of Finance: The LIBOR Scandal*, ECONOMIST (June 7, 2012), http://www.economist.com/node/21558281 [hereinafter *The Rotten Heart of Finance*]; *see also* FIN. STABILITY OVERSIGHT COUNCIL, 2012 ANNUAL REPORT 56, *available at* http://www.treasury.gov/initiatives/fsoc/2012report/2012%20Annual%20Report.pdf.

[23] *See* FIN. SERVS. AUTH., FINAL NOTICE TO BANK 6 (2012), *available at* http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf

[24] *The Rotten Heart of Finance*, *supra* note 22.

[25] Carrick Mollenkamp, *Libor Fog: Bankers Cast Doubt on Key Rate Amid Crisis*, WALL ST. J. (Apr. 16, 2008), http://online.wsj.com/article/SB120831164167818299.html.

[26] *Id.*

[27] Enrich & Colchester, *supra* note 12. According to Enrich and Colchester, this description of the LIBOR has popped up repeatedly in lawsuits regarding the rate's alleged manipulation. *Id.*

[28] The BBA represents over 200 banks. *Member List*, BBA, http://www.bba.org.uk/about-us/member-list (last visited Mar. 29, 2013) (including a list of members).

[29] Other rates include the EURIBOR, TIBOR and STIBOR, The European Union, Tokyo and Singapore's benchmark rates.

to the BBA and European Banking Federation ("EBF"), respectively. The BBA and EBF require that reporting banks use their subjective judgments in determining the submitted rates[30]; therefore, the accuracy of the LIBOR and EURIBOR, as a measure of interest rates, relies upon the accuracy of the subjective judgment of the individual reporting banks.[31] Derivatives traders are strictly prohibited from considering their own financial positions in exercising their subjective judgment.[32] Thomson Reuters, on behalf of the BBA and EBF, then collates the submissions, calculates the final benchmark rates,[33] and publishes the daily rates.

III. "This Is the Way You Pull Off Deals Like This"[34]

According to the United States Financial Stability Oversight Council ("FSOC")[35] and the United Kingdom's Financial Services Authority ("FSA"),[36] two regulatory bodies charged with investigating alleged market manipulation, as early as 2005 evidence surfaced that the major global financial and banking services company, Barclays Bank PLC ("Barclays"), was falsifying its reported EURIBOR rates, and, to a lesser extent, its LIBOR rates, at the request of its own derivatives traders and other banks.[37]

"[I]nterest rate swap traders . . . regularly requested that . . . Barclays' employee(s) responsible for determining and [setting] Barclays' daily LIBOR and EURIBOR [rates]" adjust the rates or submit specific rates in order to alter the daily published LIBOR or EURIBOR.[38] Barclays' traders also "coordinated with

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[30] Fin. Servs. Auth., *supra* note 23, at 6.

[31] *See id.* at 22–23.

[32] *Id.*

[33] *Id.* at 7. The highest and lowest rates are excluded in determining the final benchmark rates. *Id.*

[34] This is a comment made by one trader to another via instant message on March 19, 2007, after the final benchmark EURIBOR rates were published, indicating that the traders involved considered their strategy to manipulate the EURIBOR successful. Fin. Servs. Auth., *supra* note 23, at 22. In another broadly publicized exchange, a Barclays' derivatives trader told a trader from another bank with regard to a three-month dollar LIBOR, "duuuude . . . what's up with ur guys 34.5 3m fix . . . tell him to get it up." *Id.* at 20. Other traders made statements such as "We have an unbelievably large set on Monday (the IMM). We need a really low 3m fix, it could potentially cost a fortune. Would really appreciate any help." *Id.* at 12. "Noonish? Whos going to put my low fixings in? hehehe." *Id.* These are only a few of the many communications that reveal a long practice of rate-rigging among traders. *See also*, U.S. Commodity Futures Trading Comm'n, *Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, as Amended, Making Findings and Imposing Remedial Sanctions*, U.S. Commodity Futures Trading Comm'n (June 27, 2012), http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfbarclaysorder062712.pdf.

[35] The FSOC, established under The Dodd-Frank Wall Street Reform and Consumer Protection Act, monitors the stability of the United States' financial system. *Financial Stability Oversight Council*, U.S. Department Treasury, http://www.treasury.gov/initiatives/fsoc/Pages/default.aspx (last updated Oct. 22, 2012). The FSOC "is charged with identifying [threats] to the financial stability of the United States; promoting market discipline; and responding to emerging risks to the stability of the United States' financial system." *Id.*

[36] "The [FSA] is an independent non-governmental body [in the United Kingdom] given statutory powers by the Financial Services and Markets Act 2000." *Who Are We?*, Fin. Services Authority, http://www.fsa.gov.uk/about/who (last updated May 17, 2012). The FSA is "accountable to Treasury Ministers and, through them, [to] Parliament." *Id.* The FSA's job is to "provide full information for firms, consumers and others about our objectives, plans, policies and rules. . . ." *Id*.

[37] Fin. Servs. Auth., *supra* note 23, at 2.

[38] U.S. Commodity Futures Trading Comm'n, *supra* note 34, at 2–3.

traders at other banks" "in attempts to manipulate [rates]."[39] "Between January 2005 and June 2009, Barclays derivatives traders made a total of 257 requests to fix L[IBOR] and E[URIBOR] rates . . . ."[40]

In September 2007, depositors made a run on Northern Rock, a bank in the United Kingdom, making Northern Rock the first "casualty" in what became the global financial crisis of 2007–08.[41] Media news-sources worldwide speculated whether banks had adequate liquidity, focusing on the LIBOR and EURIBOR as the measurement of a bank's ability to borrow funds.[42] Media sources identified Barclays as having especially high LIBOR submissions at the beginning of the crisis, prompting market speculation that Barclays was at risk.[43] In an effort to deflect negative media attention, Barclays' senior treasury managers instructed their subordinates to reduce Barclays' LIBOR submissions, coining a phrase "head above the parapet" to describe Barclays' practice of altering the LIBOR to bring it relatively close to submissions by other banks.[44] Between September 2007 and May 2009, Barclays continued to manipulate its LIBOR submissions in an attempt to make Barclays look healthier and increase Barclays' ability to raise funds.[45]

By 2007, Barclays' scheme had begun to unravel. In November 2007, various Barclays' compliance officers contacted the FSA to express concern about the rates set by both Barclays and other banks.[46] By 2008, the Federal Reserve Bank of New York ("New York Fed") also received calls, including a call from a banking insider who told the Fed that, "I think the problem is that the market so desperately wants [the] libors down it's actually putting wrong rates in."[47] In April 2008, when a New York Fed official questioned a Barclays' employee about its reported rates, the employee admitted that Barclays had been manipulating rates in order to avoid the stigma of reporting rates either higher or lower than other reporting banks.[48] On April 16, 2008, the *Wall Street Journal* published an article that opened, "[o]ne of the most important barometers of the world's financial health could be sending false signals . . . . The growing suspicions about L[IBOR]'s veracity suggest that banks' troubles could be worse than they're willing to admit."[49]

According to a Bank of England memorandum, the BBA responded to the *Wall Street Journal* article "by sending a memo to banks reminding them to

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[39] *Id.*

[40] *Timeline: Libor-Fixing Scandal*, BBC NEWS (Feb. 6, 2013, 6:15 PM), http://www.bbc.co.uk/news/business-18671255; *see* FIN. SERVS. AUTH., *supra* note 23, at 11.

[41] *See The Bank That Failed*, THE ECONOMIST (Sept. 20, 2007), http://www.economist.com/node/9832838.

[42] FIN. SERVS. AUTH., *supra* note 23, at 3.

[43] Mark Gilbert, *Barclays Takes a Money Market Beating*, BLOOMBERG (Sept. 3, 2007), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a8uEKKBYY7As.

[44] U.S. COMMODITY FUTURES TRADING COMM'N, *supra* note 34, at 20.

[45] *See* FIN. SERVS. AUTH., *supra* note 23, at 3.

[46] U.S. COMMODITY FUTURES TRADING COMM'N, *supra* note 34, at 21–22.

[47] Transcript of Phone Call between Barclays Employee and Analyst in the Markets Group of the New York Fed (Oct. 24, 2008), *available at* http://www.newyorkfed.org/newsevents/news/markets/2012/libor/October_24_2008_transcript.pdf.

[48] U.S. COMMODITY FUTURES TRADING COMM'N, *supra* note 34, at 22.

[49] Mollenkamp, *supra* note 25.

'submit honest rates'" and launching what BBA executives referred to as a "charm offensive" for the benefit of its investors and journalists.[50] Other members of the BBA suggested that the BBA should no longer be responsible for the LIBOR.[51] At an April 25, 2008 meeting with officials at the Bank of England, Angela Knight, Chief Executive Officer of the BBA, argued that the LIBOR "had become too big for her organization to manage."[52] Despite Ms. Knight's concerns, regulators resisted taking a greater role in overseeing the LIBOR.[53] BBA member banks also resisted ceding control, BBA executives arguing with one another whether they should continue the "lucrative business" of managing the LIBOR.[54] In mid-May of 2008, the BBA held a meeting of the Foreign Exchange & Money Markets Committee, a panel charged with making decisions about the LIBOR, in which BBA officials agreed to deal with banks with artificially low LIBOR data, by "just picking up the phone . . . and hav[ing] a conversation behind closed doors."[55]

By May of 2008, the New York Fed had briefed United States Treasury Department senior officials regarding the suspected rate manipulation.[56] In early June of 2008, Timothy Geithner, then-head of the New York Fed, sent the Bank of England's governor, Sir Mervyn King, a list of recommendations regarding how to tackle the LIBOR's credibility issue.[57] Ms. Knight, upon learning of Mr. Geithner's proposals, emailed a top Bank of England official, Paul Tucker, informing him of the proposals and urging Mr. Tucker to join the New York Fed in developing oversight panels.[58] Mr. Tucker declined.[59]

Throughout the following months, regulators investigated Barclays' submissions in an attempt to address the LIBOR credibility issues.[60] Barclays continued to deny that it had falsified rate submissions. When the BBA issued a draft document to banks in November of 2008 regarding procedures for setting the LIBOR rates, and requiring audits of all submissions, Barclays refused to adapt its procedures.[61] As late as November 2009, Barclays had no specific system or controls in place relating to its LIBOR and EURIBOR submission process.[62] When BBA staffers pitched a plan to clean up the LIBOR to industry executives,

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[50] Enrich & Colchester, *supra* note 12.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *See New York Fed Responds to Congressional Request for Information on Barclays – LIBOR Matter*, FED. RESERVE BANK N.Y. (July 13, 2012), http://www.newyorkfed.org/newsevents/news/markets/2012/Barclays_LIBOR_Matter.html; *see also*, Samuel Chen & Matt Raskin, *Recent Concerns Regarding LIBOR's Credibility*, FED. RESERVE BANK N.Y. (May 20, 2008), *available at* http://www.newyorkfed.org/newsevents/news/markets/2012/libor/MarketSource_Report_May202008.pdf.

[57] Cheyenne Hopkins & Caroline Salas Gage, *Geithner Sent BOE's King Libor Revamp Recommendations in 2008*, BLOOMBERG (July 13, 2012, 6:43 AM), http://www.bloomberg.com/news/2012-07-13/geithner-proposed-libor-changes-in-2008-memo-to-bank-of-england.html.

[58] Enrich & Colchester, *supra* note 12.

[59] *Id.* The New York Fed later decided not to assist in cleaning up the LIBOR. *Id.*

[60] U.S. COMMODITY FUTURES TRADING COMM'N, *supra* note 34, at 22–25.

[61] FIN. SERVS. AUTH., *supra* note 23, at 32–35.

[62] *Id.*

staffers reported getting the impression that the banks, which paid most of the BBA's costs, wanted the LIBOR kept in-house where they could influence it.[63] Consequently, the BBA's plan was shelved.[64]

By the spring of 2012, United States' and the United Kingdom's investigators had uncovered substantial evidence that Barclays and several other unnamed banks[65] had tried to manipulate the LIBOR.[66] In June 2012, following an extensive investigation, Barclays finally admitted to misconduct.[67] The FSA imposed a £59.5 million ($92.8 million) penalty on Barclays.[68] On June 27, 2012, Barclays agreed to pay a $360 million fine to settle charges brought against it by the United States Department of Justice and the United States Commodity Futures Trading Commission ("CFTC").[69] On July 2, 2012, Barclays' chairman, Marcus Agius, Chief Executive Officer, Robert Diamond, and Chief Operating Officer, Jerry del Missier, resigned amid allegations of misconduct.[70]

IV. THE GATHERING STORM[71]

A. *Legal Actions and Government Investigations*

In July 2012, the United Kingdom's Serious Fraud Office[72] launched a criminal investigation into the LIBOR scandal, investigating a total of eighteen banks including Citigroup, Inc., Royal Bank of Scotland Group PLC, UBS AG,

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[63] Enrich & Colchester, *supra* note 12.

[64] *Id.*

[65] *The Rotten Heart of Finance*, *supra* note 22.

[66] *Id.*

[67] Press Release, Dep't of Justice, Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay $160 Million Penalty (June 27, 2012), http://www.justice.gov/opa/pr/2012/June/12-crm-815.html.

[68] Jill Treanor, *Barclays Fined £290m as Bid to Manipulate Interest is Exposed*, GUARDIAN, (June 27, 2012), http://www.guardian.co.uk/business/2012/jun/27/barclays-chief-bob-diamond-bonus-fine.

[69] Jenna Greene & Jan Wolfe, *Barclays Agrees to Pay $360 Million for Manipulating Interest Rates*, N.Y. L. J. (June 29, 2012), http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202561164644&Barclays_Agrees_to_Pay_360_Million_for_Manipulating_Interest_Rates&slreturn=20120715013406.

[70] Halah Touryalai, *Libor Cleanup: Barclays Names David Walker New Chairman*, FORBES (Aug. 9, 2012), http://www.forbes.com/sites/halahtouryalai/2012/08/09/libor-cleanup-work-barclays-names-david-walker-new-chairman. According to David Enrich and Dana Cimilluca, Barclays found notes of a phone call between senior Bank of England official, Paul Tucker, and Barclays' Robert Diamond. David Enrich & Dana Cimilluca, *Missteps Doomed Barclays' Leaders*, WALL ST. J. (July 16, 2012), http://online.wsj.com/article/SB10001424052702303612804577528852646272314.html. "According to Mr. Diamond's notes of the call . . . Mr. Tucker told Mr. Diamond that, 'it did not always need to be the case that [Barclays] appeared as high as [it has] recently." *Id.* "Mr. Diamond passed the notes along to [Jerry] del Missier" who, according to Barclays, "interpreted the . . . conversation as . . . instruction[s] to understate the bank's LIBOR submissions" and, according to Barclays "told deputies to do just that." *Id.* "Mr. Tucker has denied that this was his intended message." *Id*; Andrew Ross Sorkin, *Robert Diamond's Next Life*, THE NEW YORK TIMES (May 2, 2013), http://www.nytimes.com/2013/05/05/magazine/robert-diamonds-next-life.html?pagewanted=all.

[71] *The Gathering Storm* is the title of Winston Churchill's first volume in his six-volume history of World War II.

[72] Jill Treanor, *Serious Fraud Office Close to Criminal Charges over Libor Rigging Scandal*, GUARDIAN (July 30, 2012), http://www.guardian.co.uk/business/2012/jul/30/serious-fraud-office-libor-rigging.

ICAP PLC, Lloyds Banking Group PLC, and Deutsche Bank AG.[73] The CFTC and the Securities and Exchange Commission in the United States simultaneously conducted civil probes into banking activity regarding the LIBOR rigging.[74]

In June 2012, Barclays reached a settlement with investigators, and paid more than $450 million in fines.[75] In December 2012, UBS was fined $1.5 billion for LIBOR rigging.[76] It was fined an additional $14.5 million by Britian's financial regulators for exposing customers to unacceptable risk when UBS sold an AIG investment fund to customers.[77] The Royal Bank of Scotland was fined $610 million by US and UK authorities in February 2013.[78] European Union regulators continue to investigate other banks involved in the scandal, including Citigroup, reportedly J.P. Morgan Chase and Deutsche Bank, and various other European lenders.[79] The United States Department of Justice has already brought criminal charges against several individual traders and may bring more.[80]

Until March 29, 2013, it appeared that litigation arising out of the LIBOR scandal "ha[d] the potential to be the biggest single set of cases coming out of the financial crisis."[81] According to Advisen Ltd., a company that researches and analyzes underwriting, marketing, and buying commercial insurance, as of September 28, 2012, there were eighty-eight actions filed against twenty banks, including sixty-eight lawsuits and twenty regulatory investigations,[82] related to the

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[73] Greg Farrell & Lindsay Fortado, *Libor Criminal Probe in U.K. Starts as U.S. Readies Indictments*, BLOOMBERG (July 26, 2012, 2:16 AM), http://www.bloomberg.com/news/2012-07-26/libor-criminal-probe-in-u-k-starts-as-u-s-readies-indictments.html.

[74] *Id.*

[75] *Id.*

[76] Katharina Bart, Tom Miles & Aruan Viswanatha, *UBS Traders Charged, Bank Fined $1.5 billion in LIBOR Scandal*, REUTERS (Dec. 19, 2012, 6:49 PM), http://www.reuters.com/article/2012/12/19/us-ubs-libor-idUSBRE8BI00020121219.

[77] *UK Fines UBS $15 Million for Failings in AIG Fund Sale*, REUTERS (Feb. 12, 2013, 7:47 AM), http://www.reuters.com/article/2013/02/12/us-fsa-ubs-fine-idUSBRE91B0HW20130212.

[78] *Libor Scandal: RBS Fined £390m*, BBC NEWS (Feb. 6, 2013, 10:50 AM), http://www.bbc.co.uk/news/business-21348719.

[79] Aoife White, *EU Said to Push to Fine Banks Over Yen Libor and Euribor Rates*, BLOOMBERG LAW (Apr. 9, 2013 9:30 AM), http://www.bloomberg.com/news/2013-04-09/eu-said-to-push-to-fine-banks-over-yen-libor-and-euribor-rates.html.

[80] Lindsay Fortado, Phil Mattingly, & Silla Brush, *UBS Libor Traders Face U.S. Criminal Charges*, BLOOMBERG NEWS (Dec. 19, 2012), http://www.businessweek.com/news/2012-12-19/ubs-libor-fine-soars-as-traders-bribed-brokers-to-fix-libor-rate#p1.

[81] Roben Farzad, *Libor, The New Asbestos*, BLOOMBERG BUSINESSWEEK (Aug. 1, 2012), http://www.businessweek.com/articles/2012-08-01/libor-the-new-asbestos.

[82] Susanne Sclafane, *88 & Counting: Pension Fund Suits Next for Libor?*, ADVISEN FRONT PAGE NEWS, (Sept. 27, 2012), http://fpn.advisen.com/articles/article185324732116501O714.html. According to Advisen this includes: eleven claims or investigations against Barclays; nine claims or investigations against Citibank; eight claims or investigations against JP Morgan Chase Bank; seven claims or investigations each against Bank of America; Royal Bank of Scotland Group, UBS; six claims or investigations each against Credit Suisse Group AG, Deutsche Bank AG, HSBC; four claims or investigations against Lloyds Banking Group; three claims or investigations each against Westdeutsche Landesbank and Norinchukin Bank; two claims or investigations each against Bank of Tokyo Mitsubishi and Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A.; one suit or investigation each against BBA, Citizens Bank of Pennsylvania, Mizuho Financial Group, Portigon AG, Royal Bank of Canada, Societe Generale SA, and Sumitomo Mitsui Banking Corporation. *Id.* The BBA is tentatively listed as a defendant until actual banks are named in potential suits regarding LIBOR-related pension fund claims against member banks of the BBA. *Id.*

LIBOR scandal.[83] Judge Naomi Reice Buchwald, federal district judge for the Southern District of New York, consolidated the numerous antitrust suits filed against the LIBOR-rigging banks into one multi-district lawsuit.

Within that action, Judge Reice Buchwald divided the cases into four categories of suits: cases brought by (1) over-the-counter ("OTC") plaintiffs, (2) exchange-based plaintiffs, (3) bondholder plaintiffs, and (4) Charles Schwab plaintiffs.[84] The first three categories of cases involved class action suits, each with a single lead case.[85] The Schwab plaintiffs did not purport to represent a class and initiated three separate cases within the MDL.[86]

The OTC plaintiffs had purchased interest rate swaps directly from defendants in which the rate of return was tied to the LIBOR.[87] The exchange-based plaintiffs were various companies that traded futures contracts based on Eurodollar futures and options on exchanges that were allegedly harmed by the LIBOR manipulation.[88] Bondholder plaintiffs owned LIBOR-based bonds for which they received allegedly artificially depressed amounts of interest during the class period.[89] The Schwab plaintiffs alleged injuries based on the purchase and/or holding of LIBOR-based securities during the class period.[90]

Additional plaintiffs continue to file complaints. The Court, noting that "information relating to this case [will] continue indefinitely to come to light,"[91] on August 14, 2012 imposed a stay on all complaints not then subject to the defendants' motion to dismiss then before the Court.[92]

On March 29, 2013, the Court issued an Order on the motions to dismiss. The Court granted the defendants' motions to dismiss federal antitrust and RICO action claims, granted in part and denied in part plaintiffs' commodities manipulation claims, and dismissed with prejudice the Schwab plaintiffs Cartwright Act claim and exchange-based plaintiffs' state-law claims. The Court also declined to exercise supplemental jurisdiction over remaining state law claims.[93]

The Court's decision to dismiss the antitrust claims brought under the Sherman Act is significant because the Court, in essence, dismissed claims brought by three of the four plaintiff groups: holders of LIBOR linked bonds, mutual funds,

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[83] *Id.* This calculation represented the eighty-eight different combinations of lawsuits, investigations, and banks, not eighty-eight separate actions. *Id.*

[84] In re: LIBOR-based Financial Instruments Anti-Trust Litigation, No. 1:13-cv-01016-NRB (S.D.N.Y. March 29, 2013), *available at* http://online.wsj.com/public/resources/documents/libor032913.pdf (Judge Buchwald's memorandum and order dismissing the various plaintiffs' federal antitrust claim, RICO claim, and state-law claims, but finding that the exchange-based plaintiffs had adequately pleaded the CEA cause of action for manipulation of Eurodollar futures).

[85] *Id.*

[86] *Id.*

[87] *Id.* at 15.

[88] *Id.* at 19–20.

[89] *Id.* at 16–17.

[90] *Id.* at 21–23.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 3–4.

and over-the-counter securities.[94] The Court explained that, in order to recover on such a claim, a plaintiff must show that its losses stemmed from a defendant's anticompetitive conduct.[95] The Court reasoned that, although the plaintiffs' allegations "might suggest that defendants fixed prices and thereby harmed plaintiffs . . . the process of setting the LIBOR was never intended to be competitive. Rather, it was a cooperative endeavor . . . ."[96] The Court further clarified that, "it is not sufficient that plaintiffs paid higher prices because of defendants' collusion; that collusion must have been anticompetitive . . . the alleged collusion occurred in an area in which defendants never did and never were intended to compete."[97]

The Court's decision leaves only plaintiffs that traded LIBOR-linked contracts on the Chicago Mercantile Exchange that brought claims for violation of the Commodities Exchange Act. The Court held that defendants, by manipulating the price of the LIBOR, which was incorporated into the price of Eurodollar futures contracts, manipulated the price of contracts traded on the Chicago Mercantile Exchange, thus violating the Commodities Exchange Act.[98] The Court dismissed many of the commodities violation claims, however, finding that the plaintiffs had failed to bring claims within the statute of limitations.[99] The Court acknowledged that:

> [I]t might be unexpected that we are dismissing a substantial portion of plaintiffs' claims, given that several of the defendants here have already paid penalities to government regulatory agencies reaching into the billions of dollars. However, these results are not as incongruous as they might seem. Under the statutes invoked here, there are many requirements that private plaintiffs must satisfy, but which government agencies need not. The reason for these differing requirements is that the focuses of public enforcement and private enforcement, even of the same statutes, are not identical. The broad public interests behind the statutes invoked here, such as integrity of the markets and competition, are being addressed by ongoing governmental enforcement. While public enforcement is often supplemented by suits brought by private parties acting as 'private attorneys general,' those private actions which seek damages and attorney's fees must be examined closely to ensure that the plaintiffs who are suing are the ones properly entitled to recover and that the suit is, in fact, serving the public purposes of the law being invoked.[100]

As a result of this ruling, only a portion of the claimants that asserted commodities violations remain. Plaintiffs whose state law claims were dismissed without prejudice may attempt to pursue those claims in state court. Plaintiffs whose antitrust claims were dismissed must next decide whether or not to appeal the district court's decision to the Second Circuit.

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94 *Law of the Lend*, THE ECONOMIST (Apr. 6, 2013), http://www.economist.com/news/finance-and-economics/21575814-federal-judge-throws-out-much-not-all-rate-setting-case-law.

95 *In re: LIBOR-based Financial Instruments Anti-Trust Litigation*, No. 1:13-cv-01016-NRB at 27.

96 *Id.* at 31.

97 *Id.* at 33.

98 *Id.* at 5354.

99 *Id.* at 8687.

100 *Id.* at 159160.

> If the 2nd Circuit upholds Buchwald, the Libor litigation may end up resembling securities litigation over mortgage-backed securities. After federal courts narrowed the standing of lead plaintiffs, MBS class actions ended up being much smaller than investors' lawyers originally expected. The 2nd Circuit subsequently expanded standing for lead plaintiffs in MBS class actions, but in the meantime individual investors in mortgage-backed notes, including German banks that held tens of billions of dollars of MBS, brought their own suits in state and federal courts. We're still waiting to see how profitable those cases turn out to be.[101]

It is unclear what impact the Court's ruling will have on LIBOR claims pending in other courts, such as the case brought by Freddie Mac in the United States District Court for the Eastern District of Virginia against banks that allegedly manipulated the LIBOR and the British Bankers Association.[102] It is also unclear whether this case will be transferred to the Southern District of New York as part of the multi-district-litigation or whether, because Freddie Mac has alleged distinctive breach of contract actions against the defendant banks, it will be permitted to remain in Virginia on the "rocket docket."[103] What is clear is that the Court's opinion will affect future LIBOR litigation, especially where plaintiffs intend to allege or have already alleged antitrust claims. Moreover, the Court's opinion must come as a relief to banks concerned that entering into regulatory settlements could damage them in private antitrust litigation where they would be subject to triple damages.[104]

B. Director and Officer Liability[105]

As ongoing regulatory investigations seem likely to lead to individual criminal charges, there is a question as to whether the LIBOR scandal may impact director and officer ("D&O") liability insurance premiums. Already, several directors and officers suspected of playing a part in the scandal have either resigned or been fired.[106] Banks are setting aside monetary reserves for potential claims.[107]

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[101] Alison Frankel, *What Remains of LIBOR Litigation With Antitrust, RICO, Knocked Out?*, THOMSON REUTERS (April 1, 2013), http://newsandinsight.thomsonreuters.com/Legal/News/ViewNews.aspx?id=73325&terms=%40ReutersTopicCodes+CONTAINS+%27ANV%27

[102] *See* Kevin Lacroix, *Catching Up: Citigroup Bondholders Settlement; FDIC Failed Bank Litigation Update; Freddie Mac Libor Suit: and More*, THE D&O DIARY (March 25, 2013), http://www.dandodiary.com/2013/03/articles/securities-litigation/catching-up-citigroup-bondholders-settlement-fdic-failed-bank-litigation-update-freddie-mac-libor-suit-and-more/.

[103] *Id.* The "rocket docket" is so-called because the average case moves through the court, from date of filing to trial, in 11 months.

[104] *Id.*

[105] Analysts in the media have discussed potential errors and omissions ("E&O") liability much less than they have potential D&O liability. E&O claims could be filed on behalf of bank customers alleging that they were harmed by the bank's delivery of professional services. For example, a bank customer could claim that he suffered losses as a result of interest-rate rigging. *See* Judy Greenwald, *Libor Scandal May Bring More D&O, E&O Lawsuits*, BUS. INSURANCE (July 15, 2012, 6:00 AM), http://www.businessinsurance.com/article/20120715/NEWS07/307159969.

[106] Ambereen Choudhury & Liam Vaughan, *Diamond Quits as Pressure Mounts on Barclays over Libor*, BLOOMBERG (July 3, 2013 9:47 AM), http://www.bloomberg.com/news/2012-07-03/barclays-ceo-diamond-quits-after-record-libor-rigging-fine-1-.html.

[107] *Talks on Industry LIBOR Settlement Not Advanced: Deutsche Bank*, REUTERS, (Jan. 31, 2013 9:59AM),http://www.reuters.com/article/2013/01/31/us-deutschebank-q4-libor-

A carrier's exposure for a bank's D&O actions will depend upon what type of suit is filed against the bank: whether the claims filed are for antitrust violations, shareholder derivative suits, securities class actions, or fraud.[108] However, for now, members of the D&O insurance community do not agree on what the potential impact on insurers and the future of D&O liability will likely be. The regulatory fines and penalties are not likely to be covered under existing D&O insurance policies.[109] However, Catherine Thomas, director of analytics of A.M. Best Europe Rating Services, Ltd., stated that if the LIBOR manipulation causes customers to suffer losses, "then there is the potential for D&O and [professional indemnity] claims."[110] Ms. Thomas stated that, "[o]n the [personal injury] side, claims could come because customers are filing lawsuits because they believe they've been mis-sold products that were linked to the LIBOR rate."[111] While warning that it is too early to predict the outcome on D&O premiums, Ms. Thomas stated that the scandal could result in upward pressure on rates, and that brokers and underwriters will be vigilant regarding policy wording when they renegotiate policies in the future.[112]

Although plaintiffs have filed multiple antitrust suits against various banks involved in LIBOR manipulation, D&O carriers have experienced little exposure thus far.[113]

> The only defendants named so far in the antitrust lawsuits are corporate entities and no individuals have been named as defendants . . . . Individuals would have coverage if they were named in antitrust lawsuits, but there is no entity coverage under a public company D&O policy for antitrust claims. The antitrust claims by far are the biggest potential exposure for the company, but not for their insurance carriers.[114]

Shareholders have filed derivative lawsuits against Citibank and Bank of America on behalf of corporations.[115] These suits allege that the banks failed to take appropriate steps to protect the bank and its shareholders from LIBOR manipulation.[116] Although shareholder derivative suits can expose defendant corporations and their carriers to serious financial consequences, since only three of the banks embroiled in the LIBOR scandal are domiciled in the United States—Citibank, Bank of America, and JP Morgan Chase—the overall exposure for these

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idUSBRE90U0JD20130131.

[108] Katie Kuehner-Hebert, *Inside the Libor Scandal*, RISK AND INSURANCE (Sept. 4, 2012), http://www.riskandinsurance.com/story.jsp?storyId=533350650.

[109] Kevin LaCroix, *Follow-On Civil Litigation Emerges as LIBOR Scandal Continues to Unfold*, THE D&O DIARY (July 10, 2012), http://www.dandodiary.com/2012/07/articles/securities-litigation/followon-civil-litigation-emerges-as-libor-scandal-continues-to-unfold.

[110] Robert O'Connor, *Torus Expert: LIBOR Scandal a Threat to D&O Capacity, Premiums*, ADVISEN FRONT PAGE NEWS (Aug. 15, 2012), http://fpn.advisen.com/articles/article182154836-2009713555.html.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* (quoting Kevin LaCroix).

[115] *Id.*

[116] *Id.*

banks' carriers may be limited.[117]

Exposure for D&O carriers will likely arise from damages for securities class-action lawsuits, although in light of Judge Reice Buchwald's recent Order, it remains unclear whether class-action suits will have much traction.[118] Barclays, Credit Suisse, and Deutsche Bank each trade securities on United States securities exchanges and, theoretically, their carriers could face exposure.[119] However, given that the insurance industry cut back on insuring large banks prior to the financial crisis,[120] and Judge Buchwald's recent ruling, exposure for D&O carriers seems less likely. In light of these variables, D&O insurers may come out of the LIBOR imbroglio largely unscathed.[121]

V. THE FUTURE OF THE LIBOR

The United Kingdom has responded to the scandal by creating a new Financial Services Bill that will overhaul regulation of the United Kingdom's financial sector, a new Financial Conduct Authority ("FCA")[122] to oversee financial services and markets in the United Kingdom, and new regulatory authorities.[123] The old FSA has been abolished[124] and has been replaced by the Bank of England Prudential Regulation Authority[125] and the new FCA.[126] Martin Wheatley, the managing director of the FSA and Chief Executive Officer-designate of the new FCA, which is tasked with regulating financial services firms delivering products to consumers, established an independent review of the LIBOR, and generated a report of his findings.[127]

Mr. Wheatley officially unveiled the United Kingdom government's plan to overhaul the LIBOR rate in his report, *The Wheatley Review of LIBOR: Final Report*, in September 2012.[128] The report recommends a "substantial package of reforms" the purpose of which is to "provide[] a credible blueprint for the restoration of trust in LIBOR."[129] The report, among other things, summarizes Mr. Wheatley's findings in a ten-point plan for a comprehensive reform of the

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117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 *FSA Finalizes Proposals for the Regulation and Supervision of Benchmarks*, FINANCIAL CONDUCT AUTHORITY (Mar. 25, 2013), http://www.fca.org.uk/news/press-releases/fsa-finalises-proposals-for-the-regulation-and-supervision-of-benchmarks-.

123 Jaclyn Jaeger, *UK Regulator Finalizes LIBOR Reform*, COMPLIANCE WEEK, (Mar. 27, 2013), http://www.complianceweek.com/uk-regulator-finalizes-libor-reform/article/286246/.

124 *Financial Services Bill is Unveiled by Osbourne*, BBC NEWS (Jan. 27, 2012), http://www.bbc.co.uk/news/business-16759437; *see also*, FINANCIAL CONDUCT AUTHORITY, http://www.fsa.gov.uk/.

125 Bank of England Prudential Regulation Authority, http://www.bankofengland.co.uk/pra/Pages/default.aspx.

126 *See* FINANCIAL CONDUCT AUTHORITY, *supra* note 125.

127 MARTIN WHEATLEY, THE WHEATLEY REVIEW OF LIBOR: FINAL REPORT 3 (2012), *available at* http://cdn.hm-treasury.gov.uk/wheatley_review_libor_finalreport_280912.pdf.

128 *Id.*

129 *Id.*

LIBOR.[130] The plan focuses on creating a stronger regulatory regime to oversee the LIBOR, and institutional reform, which includes transferring responsibility for the LIBOR from the BBA to a new administrative body, the FCA.[131] The report recommends waiting three months before publishing the LIBOR submissions in order to help prevent rate manipulation.[132] The plan emphasizes the need for the new administration to create a code of conduct for rate submitters with specific guidelines requiring that submissions be corroborated by verifiable trade data and subject to formal approval.[133] The report further recommends criminal penalties for bankers who break the law.[134] Mr. Wheatley stopped short of urging banks to scrap the LIBOR, stating that getting rid of the LIBOR would cause damage to the many borrowers whose existing contracts rely on the LIBOR rate.[135]

Regulators in the United States are equally interested in the future of the LIBOR. Gary Gensler, Chairman of the CFTC, has questioned the continued relative stability of the LIBOR to the European Parliament.[136] "Despite a long and painful recovery, sometimes replacement is the better choice when a hip or a knee . . . or even a benchmark rate . . . has worn out," Gensler said.[137]

VI. CONCLUSION

While it is too early to predict the LIBOR's future, it is clear that big changes regarding the LIBOR's regulation are in the offing: the system by which the LIBOR is set and governed will undoubtedly be overhauled, and regulators will be keeping a much closer eye on market manipulation for years to come.

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[130] *Id.* at 8–9.
[131] *Id.* at 8.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.* at 7.
[136] Charles Riley, *Commission: Reform, but Don't Kill, Libor*, CNN MONEY (Sept. 28, 2012), http://money.cnn.com/2012/09/28/investing/libor-reform/index.html.
[137] *Id.*