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Schwab, Investors Ask 2nd Circ. To Revive Libor Claims

By **Stewart Bishop**

Law360, New York (May 24, 2019, 7:51 PM EDT) -- Charles Schwab Corp. and investors in financial instruments tied to the London Interbank Offered Rate on Friday urged the Second Circuit to reinstate claims against a slew of banks over their alleged manipulation of the benchmark, arguing they have proper antitrust standing and that the litigation belongs in U.S. federal courts.

Schwab and the other investors are seeking to undo an order by U.S. District Judge Naomi Reice Buchwald that stripped claims from multidistrict litigation against the banks — including Barclays, JPMorgan Chase & Co. and over a dozen others — after finding the plaintiffs had not shown the alleged conspiracy took place in or was directed at the U.S.

Judge Buchwald further held that the investors lack antitrust standing because they are not "efficient enforcers" of antitrust laws here, in part because their claims are based on Libor-tied transactions with non-defendant third parties. The Second Circuit previously reversed the court's earlier conclusion that the plaintiffs had not experienced an antitrust injury, which is the second prong of the standing test.

During oral arguments before a three-judge Second Circuit panel, an attorney for Schwab, Eric Citron of Goldstein & Russell PC, asked the panel to follow the Seventh Circuit's lead in Loeb Industries Inc. v. Sumitomo Corp., a case involving market manipulation in the copper industry.

"Just like here, the plaintiffs in Loeb did not transact directly with the defendants, but they did hold contracts that incorporated the price benchmark that the defendants manipulated," Citron said.

He said that Loeb found such an injury to be proximate enough to come within the broader text of the Clayton Act.

Schwab and the investors contend there is a direct causal relationship between the banks' Libor price-fixing and the inflated prices paid by the investors, which is enough to establish antitrust standing even if they didn't deal directly with the banks.

An attorney for the banks, Neal Katyal of Hogan Lovells US LLP, countered that if that is the standard, it would allow anyone on the losing side of a Libor transaction to sue the banks, which could lead to disproportionate damages for the alleged offense.

“That kind of open-ended liability is something I don’t think the antitrust laws would countenance,” Katyal said.

Katyal focused the bulk of his argument on the issue of personal jurisdiction, saying Judge Buchwald correctly found that no suit-related conduct took place in the U.S. Kaytal said **there’s no evidence** anyone in the U.S. had a role in setting the banks’ Libor submissions, which took place entirely in the U.K.

Circuit Judge Gerard Lynch questioned why the allegation, that Libor-denominated financial products were sold in the U.S. by the very banks that rigged the benchmark, isn't sufficient at the pleading stage for jurisdiction.

“Why isn’t that going directly into the United States with your price-fixing widgets?” Judge Lynch asked.

Katyal argued that at most that suggests a worldwide conspiracy to fix prices, but not one expressly aimed at the U.S., as would be required to establish personal jurisdiction.

The panel reserved decision.

The MDL dates to 2011, stemming from numerous suits claiming that banks conspired for years to rig Libor, a key interest rate set daily in several currencies by the British Bankers’ Association based on submissions from a panel of major lenders.

The plaintiffs claim the banks low-balled their Libor submissions and thus paid lower interest rates to customers who bought Libor-tied products, as well as creating a false public image of financial stability in the wake of the financial crisis by claiming they could borrow for lower rates than they actually could.

In addition to Judge Lynch, Circuit Judges Debra Ann Livingston and Richard Sullivan sat on the Second Circuit panel.

Schwab and its funds are represented by Goldstein & Russell PC and Lieff Cabraser Heimann & Bernstein LLP.

Other investors are represented by Susman Godfrey LLP, Mithoff Law, Hausfield LLP, Cotchett Pitre & McCarthy LLP, Morris & Morris LLC, Weinstein Kitchenoff & Asher LLC, Kirby McInerney LLP, Lovell Stewart Halebian Jacobson LLP, Quinn Emanuel Urquhart & Sullivan LLP and Kellogg Hansen Todd Figel & Frederick PLLC.

The banks are represented by Hogan Lovells US LLP, Davis Polk & Wardwell LLP, Sullivan & Cromwell LLP, Boies Schiller Flexner LLP, Covington & Burling LLP, Cleary Gottlieb Steen & Hamilton LLP, Milbank Tweed Hadley & McCloy LLP, Cahill Gordon & Reindel LLP, Paul Weiss Rifkind Wharton & Garrison LLP, Locke Lord LLP, Simpson Thacher & Bartlett LLP, Katten Muchin Rosenman LLP, Sidley Austin LLP, WilmerHale, Clifford Chance US LLP, Gibson Dunn & Crutcher LLP, Hughes Hubbard & Reed LLP, Latham & Watkins LLP, Mayer Brown LLP and Ballard & Littlefield LLP.

The case is In Re: Libor-Based Financial Instruments Antitrust Litigation, case number 17-1569, in the U.S. Circuit Court for the Second Circuit.

--Additional reporting by Jon Hill. Editing by Amy Rowe.
