ISS Securities Class Actions Services

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THE CRITICAL ABCs

of Financial Antitrust Litigation & Recovery Opportunities

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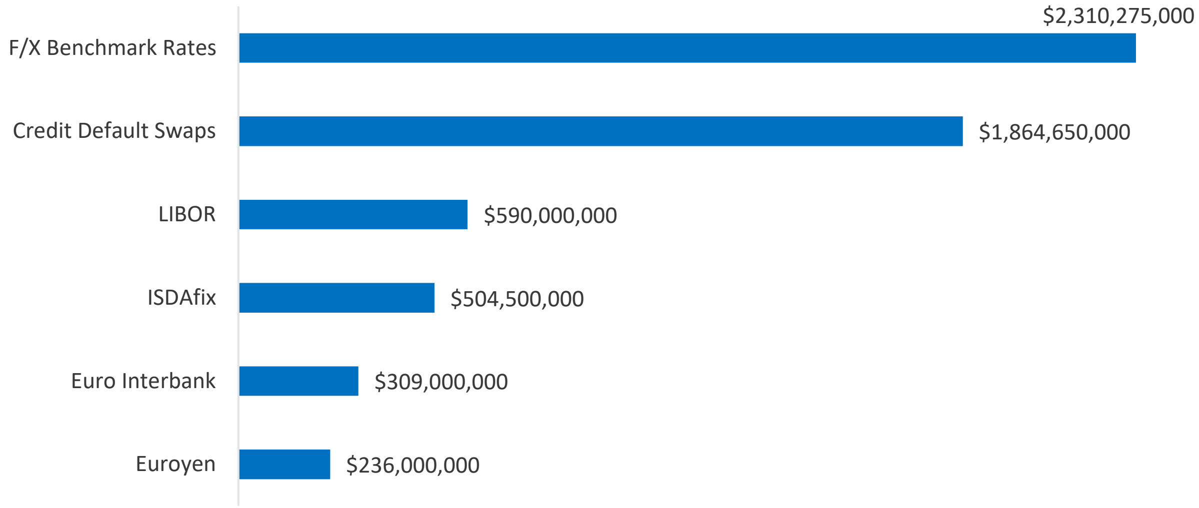
Investors have filed many lawsuits in recent years alleging that Wall Street banks and related entities have unlawfully colluded to rig financial and commodities markets to benefit themselves and harm investors. Filed primarily under federal antitrust laws, these cases continue to generate substantial settlements, over $5.8 billion to date, largely because of the banks' brazen behavior across such a wide array of financial markets. In addition to providing monetary recoveries to investors, these lawsuits also seek to curtail the banks from overcharging investors in the largest and most important financial markets.

Largest U.S.-Based Antitrust Settlements



Source: ISS Securities Class Action Services

Price-Fixing and Benchmark Manipulation Cases

There are two theories underlying financial antitrust cases brought under Section 1 of the Sherman Act, which prohibits coordinated action that unreasonably restrains trade. The first category consists of price-fixing and benchmark manipulation cases, which accuse banks of rigging the price of a financial product, commodity, or benchmark rate. Besides seeking to recover treble damages, plaintiffs in these cases are seeking to reform the benchmark system to (1) remove the incentive to cheat by basing lending rates on actual data or (2) if banks still need to have some influence over the rate, creating incentives for them to tell the truth.

The benchmarks at issue in these cases are generally average reported rates—for example, a short-term lending rate or prices for goods or commodities, like gold—that are based on data that the banks themselves report as part of a joint venture. The banks are supposed to report data that accurately reflects the rate or market price of the product or commodity. But according to the lawsuits, the banks instead colluded to report false data and manipulate the benchmarks, usually to increase their profits on positions they held in related financial instruments or commodities, often over a period of years. This type of lawsuit includes those alleging manipulation of LIBOR, short for the London InterBank Offered Rate, and similar benchmarks that are used to set payments on an estimated $350 trillion worth of complex financial instruments and rates on loans, including mortgages.

To prove market manipulation, plaintiffs in this first category of cases must show intent, so they search for evidence of unusual trading and discussions where traders write about their success in making money for their banks by manipulating the prices of instruments or commodities. That evidence has often come in the form of texts by conspiring traders in invitation-only chatrooms. As one Barclays forex trader texted in a 2009 exchange about keeping another trader from joining the conspiracy: “the less competition the better.” A small sampling of chatroom talk among LIBOR traders includes phrases like: “its [sic] just amazing how libor fixing can make you that much money.”

Even if they find evidence of market-rigging, plaintiffs must still establish which products, out of the many based on each benchmark, were sufficiently impacted by the manipulation to prove damages under the law. Plaintiffs must show that the misconduct harmed them in a sufficiently direct way and, to obtain class certification, they must establish sufficient commonality among the range of products for which claims are asserted. For example, purchasers of financial instruments paying interest tied to United States (“U.S.”) dollar LIBOR from 2007 to 2010 have so far generated $590 million in settlements with four defendant banks and continue against a dozen others.

Since the first LIBOR class action was filed in 2013, investors have brought lawsuits with varying degrees of success alleging manipulation of benchmarks such as Euribor (the euro-denominated equivalent of LIBOR), Yen LIBOR, the Euroyen Tokyo InterBank Offered Rate (TIBOR), Swiss LIBOR, and two Singapore benchmarks known as the Singapore InterBank Offered Rate (SIBOR) and the Singapore Swap Offer Rate (SOR). Other products susceptible to this kind of manipulation that are now the subject of antitrust lawsuits include: ISDAfix (interest rate swaps), foreign currency exchange, gold, silver, SSA Bonds (supranational, sub-sovereign, and agency bonds), U.S. Treasury bonds, the VIX volatility index, and Mexican government bonds. Plaintiffs in most of these cases have reached partial settlements with some defendants.

Market Structure Conspiracy Cases

The second set of cases are those alleging market structure conspiracies, in which banks acting as broker-dealers charge excessive fees for their services as middlemen between buyers and sellers of financial instruments. These cases involve conspiracies among the banks to boycott the introduction of innovative electronic trading platforms to replace what are largely over-the-counter financial markets.

The financial instruments that are typically featured in these cases are derivatives products, such as credit default swaps, interest rate swaps, and stock loans, by which funds use agents to lend shares in publicly traded companies to borrowers, who are typically hedge funds looking to short the stock.

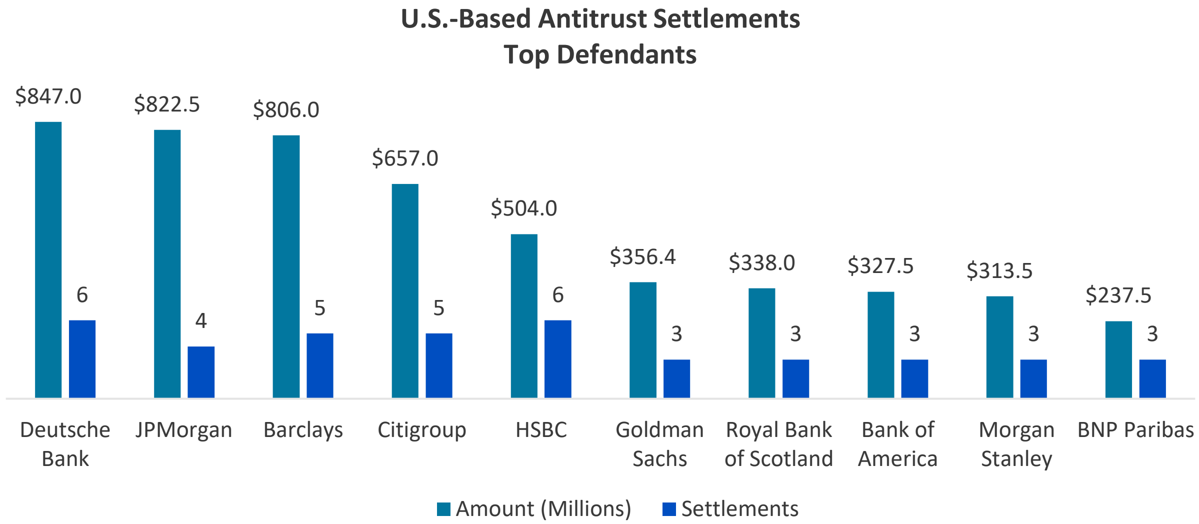
In these types of markets, the banks act as market-makers or dealers for any entity looking to buy or sell the product at issue, providing liquidity and profiting when selling the same financial instrument for a higher price than they paid. Companies tried to establish electronic trading platforms, which would have made these markets more transparent and competitive, but by the same token threatened to reduce or eliminate the banks’ highly profitable positions as middlemen. The banks actively blocked these efforts or bought the electronic trading platforms, preventing investors from trading products directly with one another in an exchange-like environment with transparent prices similar to U.S. stock markets.

Unlike electronic trading, the over-the-counter transactions with the banks use inefficient means, such as calling up another dealer or soliciting electronic quotes from a limited number of banks. Investors have few options as to counterparties and it is difficult to tell whether the price offered is good because there is little transparency. The market opacity and lack of competition means large profits for the banks, however. The lawsuits allege that the market-making banks boycotted these innovative platforms by starving them of liquidity – collectively refusing to use them, withholding critical services (such as clearing executed trades), threatening retaliation against customers who used them, or even acquiring them so they could shut them down. As a result, the banks were able to keep the markets inefficient and maintain their inflated profits at investors' expense.

It was the banks' collective agreement to boycott the platforms, not their individual refusals, that put them in violation of the Sherman Act's prohibition on conspiracies to restrain trade or commerce. The lawsuits allege that the boycotts clearly served no legitimate competitive purpose, but rather serve to thwart innovation and protect the banks' inflated profits at the expense of the plaintiff pension funds, investment funds, endowments, and hedge funds who are the consumers in these markets. Without the boycott, the lawsuits claim, investors could have traded on electronic exchanges, buying and selling at better prices. Some of the trading platforms that were boycotted are also participating as plaintiffs in these cases, along with investors.

The credit default swaps case settled in 2016 for $1.86 billion. The judge in the stock lending case denied defendants' motions to dismiss in September 2018 and has since approved a schedule for discovery and trial. Plaintiffs in the interest rate swaps, meanwhile, are awaiting the judge's decision on defendants' motions to dismiss.

As with the first type of cases, plaintiffs were able to use defendant banks' own colorful descriptions of the conspiracy against them. In the securities lending industry, which has operated like a secretive, private exchange, matchmaker banks are accused of taking on very little risk but retaining 65 percent of the revenues generated by stock loans. When two companies developed platforms that would offer centralized matching with price transparency, the broker-dealer banks threatened hedge funds who might have participated. They also told the two companies that they, the banks, would participate in platform trading but only if it was limited to broker-dealers, and not extended to borrowers and lenders.



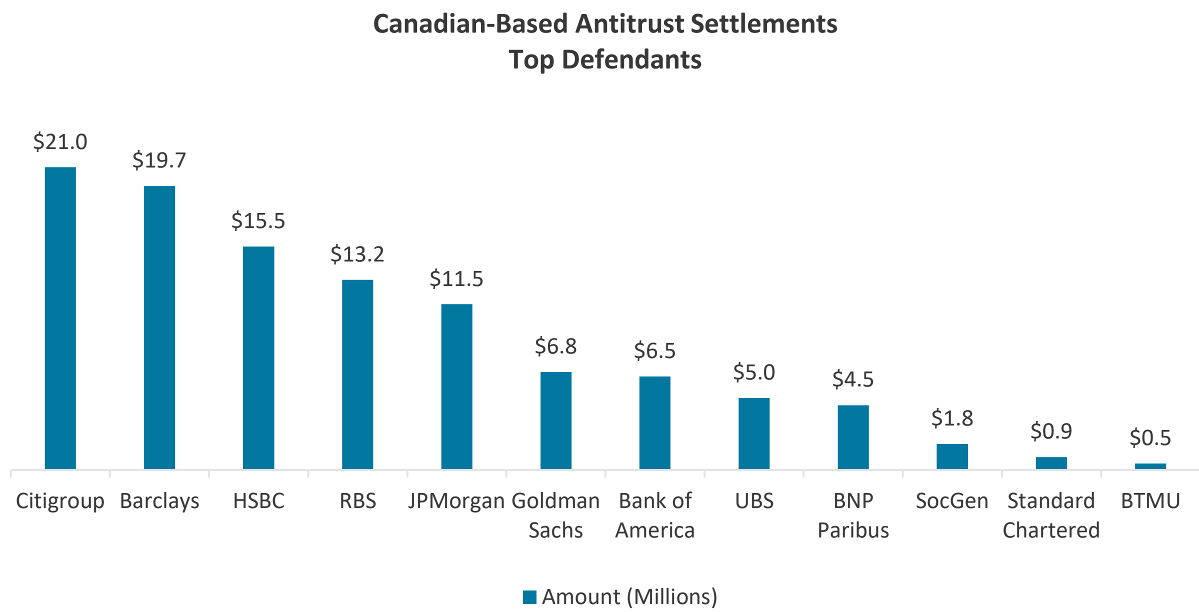
Source: ISS Securities Class Action Services

Recoveries for Non-U.S. Investors

Although the U.S. seems to be at the head of this trend of settlements resulting from securities-related antitrust actions, other countries are investigating the same mechanism and some countries have also reached settlements with defendants. U.S. cases have generally limited the class covered to persons who were either domiciled in the U.S. or transacted within the U.S. For example, for the Foreign Exchange Benchmark Rates settlement, which had a filing deadline of May 16, 2018, the class includes “All Persons who, during the Class Period entered into an foreign exchange ("FX") Instrument directly with a Defendant, a direct or indirect parent, subsidiary, or division of a Defendant, a Released Party, or co-conspirator where such Persons were either domiciled in the United States ("U.S.") or its territories or, if domiciled outside the United States or its territories, transacted FX Instruments in the United States or its territories.” As a result, claimants domiciled in another country that transacted on their own countries’ exchanges would be precluded from participating in the U.S. settlement. For those claimants, there is no way to recover from the price-fixing across international lines unless they investigate and pursue solutions for claimants in their own countries’ courts.

Canadian Settlements

In Canada, a Forex class action just recently settled before the courts in Ontario and Quebec that parallels the U.S. Foreign Exchange Benchmark Rates litigation. The class includes claimants physically located in Canada who may have suffered directly or indirectly from the fixing and manipulating of FX benchmark rates. Canada has followed suit to protect Canadian claimants by initiating and litigating the same underlying sets of facts against many of the same defendants, but for those persons specifically in Canada. The settlements involve many of the same defendant banks that were party to the U.S. FX case. Claimants in Canada must submit a claim by August 19, 2019 to be eligible for compensation.



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Additionally, several Australian law firms are investigating bringing similar actions to obtain compensation for Australian inhabitants who were affected by the same manipulative activity. While no pleadings have been filed to date, SCAS continues to monitor this interest by Australian law firms and will track any antitrust class actions filed in other jurisdictions besides the U.S. and Canada.

Claims Process for Institutional Investor Recoveries

The claims filing process for these antitrust cases can differ greatly from the normal securities class action claims filing process, which makes receiving compensation much more demanding. First, the required information for filing claims in these types of cases varies drastically from case to case. In a typical securities class action, claimants must file holdings positions and transactions related to a certain stock during a specified class period. The claims administrator provides the eligible security identifiers (IDs), thereby enabling the claims filing entity to pull this information by searching through their trading activity with the specific security ID(s). Antitrust cases, on the other hand, frequently involve derivative instruments that do not have standardized security IDs. These settlements often involve securities that are contracts held between persons and/or brokers, which are not even traded through an exchange, such as the forward contracts eligible for participation in the Euroyen-Based Derivatives settlement. These cases may also involve swaps, options, swaptions, steepeners, flatteners, inverse floaters, and snowballs, such as the ISDAfix Transactions settlement. Aside from needing a background in and knowledge of finance terms to understand the eligible securities, one can often be challenged with trying to identify the correct details to submit in a claim.

Adding to the complexity, many claim administrators provide a form template which requires providing distinct data points for different types of derivative instruments on separate tabs in their customized filing format. For Euribor, there are eight (8) different tabs with 12-17 different data points required for each specific type of instrument. For the U.S. Foreign Exchange Benchmark Rates settlement, there are five (5) different tabs with up to 18 specific data points to gather, depending on the instrument. Gathering and organizing this data is an enormous task, which is why most custodians have declined to file for their clients in these types of securities class actions.

Another factor that requires attention is the claim deadline. When the plaintiffs reach a settlement with at least one of the defendant banks, processes are put into place for administering claims for that specific settlement. As more defendant banks settle, more claim deadlines are set, or the original claim deadline is extended. Some administrators have carried over claims entered in the first claim submission for the first settlement without additional effort on the part of claimant. Other cases require that the claimant enter another claim form for each ensuing settlement without automatically carrying forward the claims submitted for the first settlement. Knowing when the claimant needs to submit claims again or submit additional claims for each ensuing settlement with a defendant bank (or banks) is key for maximizing recoveries for each and every claim.

Although these requirements might eventually be pared down and become more consistent between the different claim administrators, the current claims filing process is complex and burdensome for many organizations who lack a devoted team for this process. For this reason, it may be helpful to outsource this task to a claims-filing entity, where the firm can apply its expertise in examining and identifying the relevant points of data, formatting it correctly for processing by the claim administrator and submitting the claims by the original deadline and for any following deadlines that may ensue.

Conclusion

Financial antitrust litigation is important to investors because of the overall size of damages and furthermore, because it aims to deter what appears to be a long-standing tradition of collusive practices among Wall Street banks. Institutional investors have a major stake in keeping the costs of investing at competitive levels; returning funds to their beneficiaries that otherwise would be ill-gotten profits for the banks is one added service that should be a core staple in the offerings delivered.

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All data and charts contained within this paper are accurate as of January 1, 2019.