ANTITRUST EFFICIENT ENFORCER AND THE FINANCIAL PRODUCTS BENCHMARK MANIPULATION LITIGATION

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I. INTRODUCTION

To have standing in a civil antitrust action under the Clayton Act,[1] plaintiffs must meet a more demanding standard than the constitutional case or controversy requirement; plaintiffs must also establish antitrust injury and that they are an efficient enforcer.[2] But what is an efficient

[1] 15 U.S.C. § 15(a) (2012).
[2] Gelboim v. Bank of Am. Corp., 823 F.3d 759, 770 (2d Cir. 2016) (citing Port Dock & Stone Corp. v. Oldcastle, NE., Inc., 507 F.3d 117, 121 (2d Cir. 2007); Associated Gen. Contractors of Cal., Inc. v. Cal. St. Council of Carpenters, 459

enforcer? This question has confounded civil antitrust litigation for decades. Unfortunately, the answer to this question continues to elude. Compounding the problem, the recent financial products benchmark antitrust litigation attempts to apply a rule primarily designed for non-financial product vertical chains of distribution to benchmark manipulation cases where the direct purchaser is less likely to incur damages. This paper attempts to clarify the efficient enforcer rule and to argue that it is not applicable to antitrust benchmark manipulation cases.

The case law addressing the efficient enforcer rule is discussed in § II below. Generally, the efficient enforcer rule asks the question, "does an indirect purchaser who purchases goods or services from a middleman, who purchased from defendants who are allegedly engaging in antitrust violations, have standing to sue defendants in a civil antitrust action?" Specifically, the efficient enforcer rule addresses the problems of duplicative recovery and complex apportionment of damages in cases involving indirect purchasers and balancing these concerns with the concern that denying recovery would allow those who violated antitrust laws to retain illegal profits. The problems of duplicative recovery or complex apportionment are particularly apparent in cases where the alleged antitrust violation caused a price increase which is passed-on by a middleman to indirect purchasers in the typical vertical chain of distribution. Unfortunately, as applied by some courts, the efficient enforcer rule has been conflated with antitrust injury issues, sometimes morphed into a no indirect purchaser rule and virtually ignores the deterrence concerns regarding antitrust violators keeping illegal profits.

Recently, there have been numerous cases addressing antitrust violations due to defendants' manipulation of financial products benchmarks. This paper examines three of these financial product benchmark cases: *In re LIBOR-Based Financial Instruments Antitrust Litigation (LIBOR)*;[3] *In re Foreign Exchange Antitrust Litigation*

U.S. 519, 534 n.31 (1983)). *See* Derek M. Gillis, *Pharmaceutical Manufacturer Liability - Pharmaceutical Manufacturers Cannot Use Pass-on Defense in Antitrust Suits Brought by Pharmacies — Clayworth* v. *Pfizer, Inc., 233 P.3d 1066, (Cal. 2010)*, 7 J. HEALTH & BIOMED. L. 373, 378 n.25 (2011) (citing LOUIS ALTMAN & MALLA POLLACK, CALLMAN ON UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES § 4.49 (4th ed. 2010) (citing Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1448 (11th Cir. 1991)).

[3] *In re* LIBOR-Based Fin. Instruments Antitrust Litig., No. 11-mdl-2262, 2016 WL 7378980 (S.D.N.Y. Dec. 20, 2016).

(*FOREX*);[4] and *Alaska Electrical Pension Fund v. Bank of America Corp* (*ISDAfix*).[5] As discussed in § III below, financial products benchmarks provide a mechanism to set prices, or components of prices, for certain financial products. In financial products benchmark cases there is no pass-on, nor are we dealing with a typical vertical chain of distribution. More to the point, the manipulation of the financial products benchmarks does not produce the likelihood of duplicative damages or complex apportionment. Most courts addressing the issue of efficient enforcer in financial products benchmark cases recognized this fact. However, we still are seeing confusion regarding the efficient enforcer rule in these cases.

II. WHAT IS AN EFFICIENT ENFORCER?

The efficient enforcer rule is derived from civil antitrust cases attempting to decide what class of plaintiffs have standing to proceed with their action.[6] As indicated above, indirect purchasers in the typical vertical chain of distribution where the increased cartel price was passed-on through the vertical chain of distribution created a problem of duplicative recovery and complex apportionment. The Supreme Court's efficient enforcer opinions address duplicative recovery, complex apportionment of damages, and balancing these

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[4] *In re* Foreign Exchange Antitrust Litig., 74 F. Supp. 3d 581 (S.D.N.Y. Jan. 28, 2015).

[5] Alaska Electrical Pension Fund v. Bank of America Corp., 175 F. Supp. 3d 44 (S.D.N.Y. 2016). Additional cases include: *In re* London Silver Fixing, Ltd., Antitrust Litig., Nos. 14-md-2573, 14-mc-2573, 2018 WL 3585277 at *12–17 (S.D.N.Y. July 25, 2018) (while plaintiffs were efficient enforcers regarding defendant banks involved in the Silver Fix benchmark, *In re* London Silver Fixing, Ltd., Antitrust Litig., 213 F. Supp. 3d 530, 552–57 (S.D.N.Y. Oct. 3, 2016), plaintiffs were not efficient enforcers regarding defendants who were non-fixing banks due to plaintiffs being umbrella purchasers vis-à-vis non-fixing banks, which diminishes the directness of the injury, more direct victims were available, damages would be more speculative regarding the non-fixing banks and the probability of duplicative recover and apportionment problems). A similar distinction between fixing banks and non-fixing banks was found in *In re* Commodity Exch., Inc., Gold Futures and Options Trading Litig. Nos. 14-md-2548, 14-mc-2548, 2018 WL 3585276 at *5–9 (S.D.N.Y. July 25, 2018) (plaintiffs failed to state an antitrust claim vis-à-vis non-fixing banks), and *In re* Commodity Exch., Inc., Gold Futures and Options Trading Litig., 213 F. Supp. 3d 631, 652–60 (S.D.N.Y. Oct. 3, 2016) (some plaintiffs are efficient enforcers vis-à-vis fixing banks).

[6] Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 813–40 (1977).

considerations with concerns regarding allowing defendants to keep illegal profits.[7] In determining whether there is a danger of duplicative recovery or complex apportionment, the Supreme Court has articulated factors to consider including causation, the existence of more direct victims, the highly speculative nature of the damages sought, and the risk of duplicative damages.[8]

As summarized below, the Supreme Court factors for determining if there is a potential for duplicative recovery or complex apportionment for the efficient enforcer analysis has been conflated by appellate courts with another standing requirement; antitrust injury. Further, in some jurisdictions, an oversimplified "no indirect purchaser" rule[9] has been articulated. The result is confused analysis and the danger of false negatives for civil antitrust cases. The solution to this problem is to apply the efficient enforcer factors to the Supreme Court's articulated efficient enforcer considerations; duplicative recovery, complex apportionment of damages, and balancing these considerations with concerns regarding allowing defendants to keep illegal profits.

A. *Supreme Court Decisions on Efficient Enforcement*

The first Supreme Court decision to pronounce the principle of "efficient enforcement" was the 1968 decision of *Hanover Shoe, Inc. v. United Shoe Mach. Corp.* (*Hanover*).[10] In *Hanover*, a manufacturer of shoes alleged a Sherman § 2, monopolization, violation against United Shoe Machinery Corporation (United) a manufacturer and distributor of shoe manufacturing machinery. In a related antitrust case, *United Shoe Mach. Corp. v. United States* (*United*),[11] the Supreme Court affirmed a judgment against United for monopolization based, in part, on a rental rather than sale policy for the shoe machinery. Relying on the Supreme Court's finding of monopolization in *United*, *Hanover* claimed it had been damaged in an amount reflecting the difference it paid in rental rather than the purchase of the equipment.

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[7] Cargill, Inc. v. Monfort of Colo., 479 U.S. 104 (1986); *Associated Gen*., 459 U.S. 519; Blue Shield of Va. v. McCready, 457 U.S. 465 (1982); Ill. Brick Co. v. Ill., 431 U.S. 720 (1977); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

[8] *Associated Gen.*, 459 U.S. at 532–35.

[9] One who has not purchased directly from the alleged antitrust violator(s).

[10] *Hanover*, 392 U.S. at 481.

[11] United Shoe Mach. Corp. v. United States, 347 U.S. 521 (1954); 15 U.S.C. § 2 (2012).

United argued that Hanover was not damaged because Hanover passed-on the additional costs to its customers. The Court rejected this "pass-on" defense articulating an early "efficient enforcer" rule:

> In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to their customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price-fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them.[12]

This articulation of efficient enforcement rejected a defensive "pass-on" argument in a typical vertical chain of distribution because it would allow those who violated antitrust laws to retain illegal profits. Additionally, the Court expressed concern about the difficulty in pass-on cases to determine, "in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales . . . [t]reble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories."[13]

The next time the Supreme Court specifically addressed efficient enforcement in antitrust litigation was in *Illinois Brick Co. v. Illinois* (*Illinois Brick*).[14] In *Illinois Brick*, petitioners, the manufacturers and

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[12] *Hanover*, 392 U.S. at 494. The Court in *Hanover* also discussed an exception to the no pass-on defense where cases involved a cost-plus contract. *Id.* The cost-plus exception is not addressed in this paper.

[13] *Id*. at 493. While the concern that defendants in antitrust actions may be allowed to keep their ill-gotten gains remains, the Court seems to have abandoned its concern about over-complicated antitrust proceedings with evidence of complex economic theories. Since the 1968 decision in *Hanover*, the Court has embraced economic theory as a necessary evidentiary component of antitrust litigation, particularly in its rulings holding that most per se antitrust violations should now apply a rule of reason analysis which requires complex economic theory evidence and increases the costs of antitrust litigation. This application of economic theory in antitrust litigation along with advances in technology allowing for such calculations brings in to question the *Hanover* Court's concerns regarding massive evidence and complicated theories.

[14] *Illinois Brick*, 431 U.S. 720.

distributors of concrete blocks, were accused of inflating prices through a cartel,[15] a Sherman § 1 violation.[16] Masonry contractors who purchased the concrete blocks from petitioners at the inflated prices passed-on the price increase in their bids to general contractors, who incorporated the masonry contractors' bids in their bids to respondent owners, in this case the State of Illinois and local governmental entities. [17] Accordingly, the price increases were passed-on to respondents, indirect purchasers twice removed.

Referencing *Hanover Shoe,* the Court phrased the issue as follows:

> Having decided that in general a pass-on theory may not be used defensively by an antitrust violator against a direct purchaser plaintiff, we must now decide whether that theory may be used offensively by an indirect purchaser plaintiff against an alleged violator.[18]

The Court held that the pass-on theory in a typical vertical chain of distribution could not be used offensively in the case before the Court due to a concern of duplicative recovery.[19]

> The principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and out-put decisions "in the real economic world rather than an economist's hypothetical model," and of the costs to the judicial system and the *efficient enforcement* of the antitrust laws of attempting to reconstruct those decisions in the courtroom . . . we understand *Hanover Shoe* as resting on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.[20]

Here, the Court deemphasized the *Hanover* Court's concern that allowing "pass-on" would result in defendants keeping their ill-gotten gains and, instead, focused on the concern about the difficulties in

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[15] *Id.*
[16] 15 U.S.C. § 1 (2012).
[17] Thus, taxpayer money was used to pay the cartel's inflated prices.
[18] *Illinois Brick*, 431 U.S. at 726.
[19] *Id.* at 730–31.
[20] *Id.* at 731–32, 734–35 (emphasis added).

apply economic theory and duplicative recovery.[21]

The Court again discussed efficient enforcement in *Blue Shield of Va. v. McCready*[22] (*Blue Shield*) which was not a pass-on case in a typical vertical chain of distribution. In *Blue Shield*, respondent was an employee insured through her employer under a health care plan that paid for psychotherapy performed by psychiatrists but not psychologists. Petitioners were the insurance provider and a psychiatrists' professional association. Respondent alleged an antitrust conspiracy and claimed damages for refusal to reimburse for psychologist services she received. In allowing the claim, the Court held:

> The policies identified in *Hawaii*[23] and *Illinois Brick* plainly offer no support for petitioners here. Both cases focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws. But permitting respondent to proceed in the circumstances of this case offers not the slightest possibility of a duplicative exaction from petitioners. McCready has paid her psychologist's bills; her injury consists of Blue Shield's failure to pay her. Her psychologist can link no claim of injury to himself arising from his treatment of McCready; he has been fully paid for his service and has not been injured by Blue Shield's refusal to reimburse her for the cost of his services. And whatever the adverse effect of Blue Shield's actions on McCready's employer, who purchased the plan, it is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits.[24]

In *Blue Shield* the Court then went on to address the specific issue of remoteness:

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[21] Which is ironic considering the current reliance by courts on complex economic theory in civil antitrust cases.

[22] *Blue Shield*, 457 U.S. 465.

[23] Haw. v. Standard Oil Co. of Cal., 405 U.S. 251, 262–64 (1972). The Supreme Court held that the state of Hawaii could sue for damages the state incurred due to the antitrust violation as could the citizens of the state of Hawaii, but to allow the state of Hawaii to sue for damages to its general economy would amount to duplicative damages already reflected in the damages sought by the state and its citizens. There is no further discussion relating to efficient enforcers.

[24] *Blue Shield*, 457 U.S. at 474–75.

> [I]ndeed, the unrestrictive language of [Clayton Act § 4], and the avowed breadth of the congressional purpose, cautions us not to cabin § 4 in ways that will defeat its broad remedial objective. But the potency of the remedy implies the need for some care in its application. In the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant § 4 standing, the courts are thus forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of "proximate cause." . . . The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely "the type of loss that the claimed violations . . . would be likely to cause."[25]

Here, the issue of remoteness is addressed in the context of antitrust injury rather than efficient enforcer. However, as discussed below, lower courts will confuse the remoteness factor as an efficient enforcer factor in later decisions attempting to apply the efficient enforcer rule.

In *Associated General Contractors of California v. California State Council of Carpenters*, (*Associated Gen.*)[26] the Supreme Court was again called upon to opine regarding efficient enforcement and antitrust injury, but not in a pass-on case involving a typical vertical chain of distribution. Respondent Unions alleged that petitioner, an employers' association, coerced certain third parties to enter into business relationships with nonunion firms, in violation of the antitrust laws. In interpreting the damage provision for a private right of action under Clayton § 4,[27] the Court noted the legislative history of the Sherman Act with specific reference to its common law background.[28]

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[25] *Id.* at 477, 479 (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977), quoting Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125 (1969)).

[26] Associated Gen. Contractors of Cal., Inc. v. Cal. St. Council of Carpenters, 459 U.S. 519, 538–44 (1983).

[27] 15 U.S.C. § 15 (2012).

[28] *Associated Gen.*, 459 U.S. at 530. The Court's historical analysis is questionable. The Court states that at the time of the enactment of Sherman the legislature was primarily concerned with the protection of consumers. The Court further cites to Senator Sherman, for whom the Sherman Act was named, for the proposition that the Sherman Act merely "applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."

This common law background and the concern about interpreting antitrust statutes too broadly, informed the Court in its decision evaluating the "plaintiff's harm" (antitrust injury), "the alleged wrongdoing by the defendants," (antitrust conduct) and the "relationship between them" (efficient enforcement).[29] The Court then addressed the issue of remoteness as applied to foreseeability, proximate cause and directness of injury:

> Thus in 1910 the Court of Appeals for the Third Circuit held as a matter of law that neither a creditor nor a stockholder of a corporation that was injured by a violation of the antitrust laws

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Id. at 531. While Senator Sherman may have intended his act to codify common law for the protection of consumers at the federal level, what we got from Congress was something quite different. While there is not an extensive legislative history for the Sherman Act, a brief perusal of the Congressional record reveals that the final Sherman Act, which came to the floor after revisions in the Judiciary Committee, did not reflect Senator Sherman's original bill and, indeed, Senator Sherman was quite disappointed in the result fearing it had been significantly watered down. The section of the Congressional Record cited by the Court in *Associated Gen.* came before the Judiciary Committee's revisions to Senator Sherman's bill. Despite this historical record, many scholars and courts have used statements from the debate over Senator Sherman's bill – which Congress did not pass – to infer Congress's legislative intent in passing the Judiciary Committee's bill. Most historians attribute the language of the Sherman Act to Senator Hoar, who was on the Judiciary Committee which put forth the final version of the Sherman Act, which passed. Regarding the Sherman Act, Senator Hoar stated, "The great thing that this bill does . . . is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce." 21 CONG. REC. 3152 (Apr. 8, 1890) (statement of Senator Hoar). The common law principles of England related to regrating, engrossing, and forestalling which were denounced by Adam Smith in the Wealth of Nations and repealed in England . . . twice! First regarding statutes on regrating, engrossing, and forestalling in 1772 and the second time in 1844 to address the continued application by courts of "common law" relating to regrating, engrossing, and forestalling by utterly abolishing the common-law crimes of forestalling, engrossing, and regrating. Forestalling, Regrating, etc. Act 1844, 7 & 8 Vict. c. 24 (U.K.). This occurred a mere six years before the United States enacted the Sherman Act in 1890. Interestingly, nothing in the historical record evidence the economic efficiency advocated by courts today as the "intent" of Congress in passing the Sherman Act and I dare say if one were to bring a Sherman antitrust claim today based upon the common law of regrating, engrossing, or forestalling the claim would be dismissed. Further, the historical record indicates that Senator Sherman's original bill included the word "consumer" which was omitted in the final bill that passed. 19 CONG. REC. 8483 (Sept. 11, 1888). Now what are we to make of that?

[29] *Associated Gen.*, 459 U.S. at 535.

> could recover treble damages under § 7. The court explained that the plaintiff's injury as a stockholder was "indirect, remote, and consequential."[30]

Here, a typical damage analysis is applied where damages may be proximately caused by the conduct but are not recoverable because the damages are too remote undermining foreseeability. The Court then continued its discussion on the remoteness or indirectness of respondent's claim in the context of antitrust injury:

> In this case, however, the Union was neither a consumer nor a competitor in the market in which trade was restrained. It is not clear whether the Union's interests would be served or disserved by enhanced competition in the market. As a general matter, a union's primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals.[31]

This part of the Court's opinion relates to antitrust injury, the type of injury antitrust laws are intended to address. Indeed, the Court specifically cites antitrust injury cases, such as *Brunswick*, not efficient enforcement cases.[32] However, the Court goes on to discuss efficient enforcement cases starting with *Hanover*.[33] The Court's opinion notes that the concerns articulated in the efficient enforcement cases are the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other. [34] In *Associated Gen*., the efficient enforcer factors of indirectness of the injury or remoteness goes to the issues of duplicative and complex apportionment of damages not antitrust injury issues.[35]

However, confusion arises when the Court included a catch-all paragraph that seems to mix efficient enforcer factors with antitrust

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[30] *Id.* at 533–34 (citing Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910)).
[31] *Id.* at 539.
[32] *See id.* at 538.
[33] *See id.* at 543–45.
[34] *Id.* at 541–45.
[35] *Id.* at 543–44.

injury factors by stating that other factors, including "*the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury [remoteness], the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged [antitrust violation]*" should be considered.[36] While the Court's *Associated Gen.* opinion is less than clear on the application of factors to consider for antitrust efficient enforcer as distinct from antitrust injury, the *Associated Gen.* opinion does support the distinct specific efficient enforcer concerns regarding duplicative recovery and complex apportionment of damages.

Finally, in *Cargill, Inc. v. Monfort of Colo*., (*Cargill*), respondent, the fifth largest U.S. beef packer, brought an action to enjoin the merger of petitioner, the second largest U.S. beef packer with the third largest U.S. beef packer. [37] This was a price squeeze case where respondent alleged it would be harmed by the price-cost squeeze resulting in lost profits.[38] Again, not a pass-on case involving a typical vertical chain of distribution. The district court and court of appeals considered the price-cost squeeze predatory pricing. The Supreme Court disagreed.

The Court held that in antitrust merger cases, "a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'"[39] This is an antitrust injury analysis.[40] According to the Court, this case presented vigorous competition, not predatory pricing. However, the Court also noted that Clayton §16 (injunction) did not pose the threat of duplicative recovery so the standing requirements were different. In effect, the efficient enforcer rule did not apply in a case where only an injunction was sought.[41]

Taken together, this creates an efficient enforcer rule that one is

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[36] *Id.* at 545. A person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act, *Id.* at 545–46, which is the antitrust injury standard articulated in Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 485–89 (1977). It does not appear to be an efficient enforcer statement as the efficient enforcer recognizes that there may be antitrust injury but no standing because of the complexity or duplicative recovery issues. Jay L. Himes, *When Caught with Your Hand in the Cookie Jar . . . Argue Standing*, 41 RUTGERS L.J. 187, 202–03 (2009).

[37] Cargill, Inc. v. Monfort of Colo., 479 U.S. 104 (1986).

[38] *Id.* at 104.

[39] *Id.* at 113 (citing to *Brunswick*, 429 U.S. 477 at 489).

[40] *See Brunswick*, 429 U.S. 477, 485–89.

[41] *Cargill*, 479 U.S. at 111 n.6.

not an efficient enforcer in antitrust cases where there is substantial risk of duplicative recovery or the probability of complex apportionment of damages. The problems of duplicative recovery or complex apportionment of damages are particularly apparent in pass-on cases involving multiple victims in a typical vertical chain of distribution. Factors to consider in evaluating the risk of duplicative recovery or complex apportionment are:

(1) causation;
(2) direct victims;
(3) highly speculative damages; and
(4) risk of duplicative damages.[42]

As efficient enforcement is concerned with duplicative recovery and complex apportionment, causation should focus on whether more remote plaintiffs increase the probability of duplicative recovery or complex apportionment.[43] The direct victims factor is nothing more than one way to solve the above causation problem for efficient enforcement.[44] The speculative nature of plaintiff's damages has efficient enforcement application but in the context of complex apportionment, a particular problem in pass-on cases in the typical vertical chain of distribution. Additionally, complex apportionment, if misapplied, may lead to duplicative damages. Duplicative damages is an efficient enforcer not an antitrust injury factor. Generally speaking, cases that do not involve a pass-on in a typical vertical chain of distribution are less likely to involve efficient enforcer problems.[45]

While the efficient enforcer rule may be applicable in cases that do not involve pass-on claims in a typical vertical chain of distribution, in such cases highly speculative damages and the fact that the plaintiff is not a consumer nor competitor may be particularly relevant for efficient enforcer analysis.[46] Finally, the duplicative recovery or complex apportionment considerations need to be balanced with concerns regarding allowing defendants to keep illegal profits.[47]

Rather dealing with the difficulties of whether there is a problem of duplicative recovery or complex apportionment, some appellate courts have conflated antitrust injury and efficient enforcer factors or taken a reductionist approach that indirect victims are not efficient

[42] *Associated Gen*., 459 U.S. at 540–45.
[43] Illinois Brick Co. v. Illinois, 431 U.S. 720, 738–39 (1977).
[44] *See Id.* at 731–35.
[45] *See, e.g.,* Blue Shield of Va. v. McCready, 457 U.S. 465 (1982).
[46] *See, e.g., Associated Gen.*, 459 U.S. 519.
[47] *See* Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

enforcers. As discussed below, there is a lack of clarity in appellate decisions. Courts should focus on an efficient enforcer rule limited to the analysis of duplicative recovery and complex apportionment balanced with concerns regarding allowing defendants to keep illegal profits.

B. *Appellate Court Decisions Applying the Efficient Enforcer Rule*

The Federal Appellate courts have not been consistent in their application of the Supreme Court's efficient enforcer rule. The problem is one of conflating antitrust injury factors with efficient enforcer factors rather than the efficient enforcer focus on duplicative recovery and complex apportionment. The First, Third, Fourth and Ninth Circuits apply a conflated antitrust injury/efficient enforcer antitrust standing test while the Second, Fifth, Sixth, Seventh, Tenth, Eleventh and D.C. Circuits apply a two-prong standing test with antitrust injury being the first prong and efficient enforcer the second prong. Unfortunately, even in the two-prong standing analysis, efficient enforcer factors are not, necessarily, tied to duplicative recovery or complex apportionment. Additionally, there is a dearth of analysis on concerns regarding allowing defendants to keep illegal profits.

1. *The Conflated Antitrust Injury/Efficient Enforcer Antitrust Standing Test*

The conflated antitrust injury/efficient enforcer antitrust standing test applies the *Associated Gen.* factors without regard to the distinct analysis required for antitrust injury and efficient enforcer. The result in these cases is often a lack of clarity and false negatives in civil antitrust cases.

a. *The First Circuit*

The First Circuit articulates a test for antitrust standing where antitrust injury and efficient enforcer factors are conflated.[48] These factors are stated as follows:

(1) the causal connection between the alleged antitrust violation and harm to the plaintiff;
(2) an improper motive;

[48] Sullivan v. Tagliabue, 25 F.3d 43, 46 (1st Cir. 1994).

(3) the nature of the plaintiff's alleged injury and whether the injury was of a type that Congress sought to redress with the antitrust laws;
(4) the directness with which the alleged market restraint caused the asserted injury;
(5) the speculative nature of the damages; and
(6) the risk of duplicative recovery or complex apportionment of damages.[49]

The First Circuit has only given detailed analysis regarding factors (3), (4) and (5). Factor (3) is the antitrust injury factor which is balanced with the other five specified standing factors.[50]

Regarding factor (4), directness, a simple "but-for" analysis is not sufficient in cases where another party has the direct injury and the plaintiff's injury is more removed from defendant's conduct and possibly caused by intervening acts.[51] While this may go to duplicative recovery or complex apportionment if both the direct and indirect parties are damaged, it is articulated as an injury (proximate cause/foreseeability) problem given the expressed concern regarding intervening acts.

The First Circuit has also given some guidance on factor (5), the speculative nature of the damages. Here, the more assumptions which must be made regarding positive economic factors, while at the same time ignoring negative economic factors, the more likely the damages will be speculative. For example, in *Sullivan*, plaintiff's evidence of damage required assuming that plaintiff could have obtained capital through a public sale of stock (which defendant prevented) while ignoring the facts of plaintiff's high level of indebtedness causing bankruptcy and inability to obtain private financing through other means.

b. *The Third Circuit*

The Third Circuit articulates antitrust standing factors in a similar fashion to that of the First Circuit, but it articulates five factors:

(1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring

[49] *Id at 46*.
[50] *Id.*
[51] *See id.* at 51–52.

> standing;
> (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress;
> (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims;
> (4) the existence of more direct victims of the alleged antitrust violations; and
> (5) the potential for duplicative recovery or complex apportionment of damages.[52]

The first, second, and third factors have been applied by the Third Circuit without regard to duplicative damages and complex apportionment. Addressing the first factor, a conspiracy by defendants aimed at preventing plaintiff from competing in the market satisfies the causal connection/defendant intent factor.[53] The second factor is an antitrust injury analysis under *Brunswick*.[54] The third factor of directness goes to the issue of speculation in that the more removed plaintiff's damages are from defendant's conduct, the more speculative the damages.[55]

The fourth factor addresses plaintiff's directness/indirectness similar to the first factor in the Second Circuit efficient enforcer analysis. Here, once again the court looks to see if plaintiff's harm is first in line or more removed from defendant's conduct. In this regard, the absence of harm caused by a "pass-on" from the direct victim may be relevant.[56] The Third Circuit has explained the fourth factor in terms of an absolute bar for indirect victims in lost profits cases:

> "Even commentators who advocate for indirect purchaser standing and a lost profits measure of damages admit that their position is currently precluded by Supreme Court case law. As Professor Harrison concedes in his article arguing for indirect purchaser standing and a lost profits measure of damages, '[t]he *Illinois Brick* decision seems absolutely to foreclose the possibility of indirect-purchaser standing in price enhancement suits,' even if the indirect purchaser plaintiffs seek lost profits as opposed to overcharge damages. Harrison also

[52] Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 274 (3d Cir. 1999).
[53] *Id.*
[54] *Id.* at 274–75
[55] *Id.* at 275.
[56] *Id.*

acknowledges that:

> the legal precedents and policy arguments relied on by the [*Hanover Shoe*] Court in rejecting the pass-on defense do not support even the theoretical appropriateness of the lost profits measure. In addition, the Court hinted that it was actually rejecting the very notion that damages should be apportioned among various layers of buyers and sellers . . . [T]o the extent that the apportionment process has been rejected by the Court, it would be inappropriate to infer that the lost profits measure has received even implicit approval."[57]

Accordingly, when the plaintiff purchases from a middleman who passes on price enhancements from the defendant, the plaintiff is not an efficient enforcer due to complex apportionment. However, "[t]he 'control exception' to *Illinois Brick* 'might' permit an indirect purchaser to sue an initial seller when the initial seller 'own[s] or control [s]' the direct purchaser."[58]

As for the fifth factor of duplicative recovery or complex apportionment of damages, the Third Circuit has stated that here the concern is with potential plaintiffs not a party to the action before the court suing for the same injury as may be the case where the antitrust defendant overcharges the middleman who pass-on some or all of the overcharge to plaintiff.[59]

Additionally, the more remote the plaintiff, the more speculative and complex the calculation for damages.[60] If, however, the facts and circumstances indicate that the middleman would only be claiming lost profits due to a decrease in volume and the downstream plaintiff is seeking damages based upon overcharge, the injuries would not be the same and *Illinois Brick* would not apply as in the case where the middleman is challenging a resale price maintenance requirement from the upstream defendant while the downstream plaintiff has a claim for price overcharge.[61]

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[57] Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 424 F.3d 363, 375 (3rd Cir. 2005).
[58] *Id.* at 371 (citing to Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 n. 16 (1977)).
[59] *Id.* at 376–77; Warren Gen. Hosp. v. Amgen Inc., 643 F.3d 77, 85–86 (3rd Cir. 2011).
[60] *Warren Gen. Hosp.*, 643 F.3d at 86.
[61] *Howard Hess Dental Labs.*, 424 F.3d at 376–77.

c. *The Fourth Circuit*

In the Fourth Circuit, antitrust standing is analyzed by taking into consideration: the risk of duplicative recovery; the extent to which the claim is based upon speculative, abstract, or impractical measures of damages; the causal connection between the alleged violation and the harm suffered; and the relationship of the injury alleged to the forms of injury about which Congress was concerned.[62] Unfortunately, the Fourth Circuit does not provide the analysis to determine how this test would be applied.

d. *The Ninth Circuit*

In the Ninth Circuit, courts apply a five-factor antitrust standing test:

(1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust laws were intended to forestall;
(2) the directness of the injury;
(3) the speculative measure of the harm;
(4) the risk of duplicative recovery; and
(5) the complexity in apportioning damages.[63]

The first factor is the antitrust injury factor under *Brunswick*. The second, third, fourth and fifth factors are efficient enforcer factors. The second factor is the indirect purchaser factor which, according to the Ninth Circuit, limits the standing of indirect purchasers under *Illinois Brick*.[64] Regarding the third factor, the speculative measure of the harm, such as claims of intervening factors, will not make damages speculative when plaintiffs allege that rigging, such as bid rigging, controlled prices in the relevant market.[65] This should be clarified as a duplicative and/or complex apportionment issue. As for the fifth factor of complex apportionment, this "comes into play when multiple classes or layers of claimants seek, or might seek, compensation."[66]

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[62] Pocahontas Supreme Coal Co., Inc. v. Bethlehem Steel Corp., 828 F.2d 211, 219 (4th Cir. 1987).
[63] Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987 (9th Cir. 2000); Edgar Swift, *Standing by Your Man Ray: Troubles with Antitrust Standing in Art Authentication Cases*, 37 COLUM. J.L. & ARTS 247, 263 (2014).
[64] Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1048–49 (9th Cir. 2008); *Knevelbaard Dairies*, 232 F.3d at 991.
[65] *Knevelbaard Dairies*, 232 F.3d at 991.
[66] *Id*. at 992.

2. *The Two-Prong Standing Test*

As with the conflated antitrust injury/efficient enforcer antitrust standing test, the two-prong standing test applies the *Associated Gen*. factors without regard to the distinct analysis required for efficient enforcer with a focus on duplicative recovery or complex apportionment and balancing these problems with concerns regarding allowing defendants to keep illegal profits.

a. *The Second Circuit*

The Second Circuit has extensively dealt with the efficient enforcer rule. The Second Circuit treats antitrust standing as a two-prong test: First, plaintiff must establish an antitrust injury under *Brunswick* and second, plaintiff must be an efficient enforcer.[67] If plaintiff cannot establish the first prong, antitrust injury, the case may be dismissed without consideration of the efficient enforcer prong.[68] However, even if a plaintiff establishes antitrust injury a court may find a lack of standing if it is determined that plaintiff is not an efficient enforcer.[69]

In addressing the second standing prong, the efficient enforcer, the Second Circuit considers four factors:

(1) the directness or indirectness of the asserted injury;
(2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement;
(3) the speculative nature of the alleged injury; and the difficulty of identifying damages; and
(4) apportioning them among direct and indirect victims to

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[67] Gatt Commc'ns Inc. v. PMC Assoc., LLC, 711 F.3d 68, 76 (2d Cir. 2013); Siti-Sites.com, Inc. v. Verizon Commc'ns, Inc., 428 F. App'x 100, 102 (2d Cir. 2011); *In re* DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 688 (2d Cir. 2009); Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121–122 (2d Cir. 2007); Paycom Billing Servs. Inc. v. Mastercard Int'l, Inc., 467 F.3d 283, 290–91 (2d Cir. 2006); Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 437–38 (2d Cir. 2005); Balaklaw v. Lovell, 14 F.3d 793, 797, n.9 (2d Cir. 1994); Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 66 (2d Cir. 1988).

[68] G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762, 766–67 (2d Cir. 1995).

[69] *Mastercard Int'l*, 467 F.3d at 290–91; *Daniel*, 428 F.3d at 443–44; *Men's Int'l Prof'l Tennis Council*, 857 F.2d at 66.

avoid duplicative recoveries.[70]

Factors (1)-(3) appear to be antitrust injury factors. The efficient enforcer factor is clearly factor (4). If we are to consider factors (1)-(3) as efficient enforcer factors, separate and distinct from antitrust injury, then factors (1)-(3) should only be considered in the context of duplicative damages and complex apportionment. Unfortunately, they are not.

The Second Circuit has observed that the weight to be given the various factors will necessarily vary with the circumstances of particular cases as the Supreme Court has given little guidance regarding the weight to be given to each factor.[71] That said, the dearth of guidance persists at the appellate court level as well.

i. The Directness or Indirectness of the Asserted Injury

Generally, directness in antitrust law is a proximate cause analysis.[72] Directness in the antitrust context means close in the chain of causation.[73] In discussing the direct/indirect injury factor, the Second Circuit has held that this factor has not been met when the allegations involve an offensive pass-on theory.[74] According to *Illinois Brick*, the concerns regarding offensive pass-on for purposes of efficient enforcement are duplicative damages and complex apportionment. These concerns are particularly apparent in offensive pass-on cases.

Further, in vertical chain of distribution cases involving the sale of non-financial products, facts may indicate numerous intervening market variables which may have affected pricing outside of defendants' conduct. Such facts may break the chain of causation as

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[70] *Gatt Commc'ns*, 711 F.3d at 78; *In re DDAVP*, 585 F.3d at 688; *Port Dock & Stone Corp*, 507 F.3d at 121–22; *Mastercard Int'l*, 467 F.3d at 290–91; *Daniel,* 428 F.3d at 443–44; *Men's Int'l Prof'l Tennis Council*, 857 F.2d at 66; Alaska Elec. Pension Fund v. Bank of Am. Corp., 175 F.Supp.3d 44, 60 (S.D.N.Y. 2016).

[71] *Daniel*, 428 F.3d at 443 (citing generally to Sullivan v. Tagliabue, 25 F.3d 43, 46 (1st Cir. 1994); *See also Gatt*, 711 F.3d at 78, *and Paycom*, 467 F.3d at 291.

[72] Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 412 (2d Cir. 2014); *In re* Credit Default Swaps Antitrust Litig., No. 13md2476 (DLC), 2014 WL 4379112, at *8 (S.D. N.Y. Sept. 4, 2014).

[73] *Gatt*, 711 F.3d at 78 (quoting Int'l Bus. Machs. Corp. v. Platform Solutions, Inc., 658 F. Supp. 2d 603, 611 (S.D.N.Y. 2009)); *Credit Default Swaps*, 2014 WL 4379112, at *8 (quoting *Gatt*, 711 F.3d at 78).

[74] *See e.g., Paycom* 467 F.3d at 291–92.

well as inject speculation into the analysis.[75]

Additionally, where the facts indicate plaintiff's antitrust injury is derived from plaintiff's refusal to continue abiding to a price-fixing agreement the plaintiff is an indirect victim particularly compared to victims who had to pay the higher prices due to the conspiracy.[76] The reasoning here is more in line with *Brunswick*'s antitrust injury analysis. It has absolutely nothing to do with duplicative recovery or complex apportionment.

ii. The Existence of an Identifiable Class of Persons Whose Self-Interest Would Normally Motivate Them to Vindicate the Public Interest in Antitrust Enforcement

In addressing the second factor, the Second Circuit decisions indicate this factor goes more to the antitrust injury question rather than efficient enforcer. That said, the Second Circuit has shown a reluctance to find an efficient enforcer where the plaintiff's main complaint is that defendants would not admit plaintiff to their "you too can charge supra-competitive prices" club. In such situations, plaintiff has "no natural economic self-interest in reducing . . . cost[s] . . . to consumers."[77]

A person most motivated by self-interest in the proper, pro-competitive/pro-consumer sense, is the question to be answered not is this the person most motivated by self-interest.[78] Accordingly, "[i]nferiority to other potential plaintiffs can be relevant, but it is not dispositive."[79] Plaintiffs, who are competitors and suffer lost profits and plaintiffs, who are consumers and suffer the payment of higher prices may both meet this factor depending on the circumstances of each case.[80]

Direct injury, under the first factor, may also be evidence of the second factor as direct injury victims may have more economic incentive than down-stream victims. Still, courts must consider if such

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[75] Reading Industries, Inc. v. Kennecott Copper Corp. Eyeglasses, 631 F.2d 10, 13–14 (2d Cir. 1980).
[76] *Gatt*, 711 F.3d at 78–79.
[77] *Daniel*, 428 F.3d at 443–44 (2d Cir. 2005).
[78] *In re* DDAVP Direct Purchaser Antitrust Litigation, 585 F.3d 677, 688–89 (2d Cir. 2009) (citing to Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc., 467 F.3d 283, 291 (2d Cir. 2006).
[79] *DDAVP*, 585 F.3d at 689 (citing to Andrx Pharms., Inc. v. Biovail Corp., Int'l, 256 F.3d 799, 816 (D.C. Cir. 2001)).
[80] *DDAVP*, 585 F.3d at 689.

plaintiffs may lack the incentive or the ability to seek relief. In this regard, it is possible that the second factor may go to the efficient enforcer issue of duplicative damages as a plaintiff with more economic incentive may capture more of the antitrust injury than indirect plaintiffs. Additionally, a direct plaintiff may not have to address a skewed cost/benefit analysis of complex apportionment litigation as apportionment may increase the cost of litigation reducing the motivation to litigate. However, the mere fact that such potential plaintiffs have not sued is not dispositive of such lack of incentive or inability as it may also be evidence of a lack of merit regarding the antitrust allegations.[81]

iii. The Speculative Nature of the Alleged Injury

Critical to the speculative factor is the Supreme Court's admonition that [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.[82] Still, a civil antitrust plaintiff must bear some burden of reducing speculation. Economic evidence such as modeling, data and analysis may be sufficient.[83] Additionally, evidence from relevant regulators may also reduce speculation.[84] However, allegations of lost profits based upon historical earnings and nothing more may be speculative particularly where plaintiff's alleged lost profits is based upon historical profits earned as part of an anticompetitive scheme.[85]

As with the previous two factors discussed above, the Second Circuit's opinions regarding the speculative factor is expressed in terms more in line with antitrust injury than in terms of the duplicative recover and complex apportionment in an efficient enforcer analysis. Once again, speculative damages should be addressed in terms of

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[81] *Gatt*, 711 F.3d at 79.
[82] *DDAVP*, 585 F.3d at 689 (citing Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265 (1946)).
[83] *In re* Credit Default Swaps Antitrust Litig., No. 13md2476 (DLC), 2014 WL 4379112, at *9 (S.D.N.Y. Sept. 4, 2014).
[84] *Id.*
[85] *Compare Gatt*, 711 F.3d at 79 *with* Alaska Elec. Pension Fund v. Bank of America Corp., 175 F. Supp. 3d 44 (S.D.N.Y. 2017) (finding damages not too speculative in a case involving price-fixing the ISDA fix benchmark in a manner that reduced income flows to plaintiffs).

concerns regarding duplicative damages [86] and complex apportionment,[87] but it is not.

iv. The Difficulty of Identifying Damages and Apportioning Them Among Direct and Indirect Victims to Avoid Duplicative Recoveries

Finally, the Second Circuit has examined the nature of the recovery sought to determine if there will be duplicative recoveries. For example, lost profit damages due to reduced volume and overcharges are different in nature and do not pose the threat of duplicative damages.[88] However, lost profits claimed by one plaintiff competitor may be the same claimed by another competitor with no way of determining which competitor would have successfully captured the market share represented by the claimed lost profits.[89] This causes a complex apportionment problem. Similarly, in the overcharge situation there is a risk of duplicative recovery with indirect plaintiffs under the offensive pass-on situation in a vertical chain of distribution.

If we extrapolate the Second Circuit's efficient enforcer factors as applied to the Supreme Court's stated goal of efficient enforcement, avoidance of duplicative damages and complex apportionment, it appears that the directness factor, speculative factor and duplicative factor are interrelated. Indirect purchasers with speculative damages are more likely to have to rely on complex economic theories of apportionment, which may also increase the risk of duplicative damages.

b. *The Fifth Circuit*

The Fifth Circuit also applies a two-prong standing test:

(1) Antitrust injury under *Brunswick*; and
(2) An efficient enforcer test.[90]

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[86] For example, one may be able to present evidence that the more speculative the damages, the greater chance there will be for duplication.
[87] Here, the example could be evidence of the lack of reliability of complex apportionment due to the speculative nature of the model used. This could also increase the probability of duplication of damages.
[88] *DDAVP*, 585 F.3d at 689; *Credit Default Swaps*, 2014 WL 4379112, at *9.
[89] *Gatt*, 711 F.3d at 79.
[90] *See* Sanger Ins. Agency v. HUB Int'l., Ltd., 802 F.3d 732, 737 (5th Cir. 2015), *and* Norris v. Hearst Tr., 500 F.3d 454, 465 (5th Cir. 2007).

As for the efficient enforcer test, the Fifth Circuit applies three factors:

> (1) whether the plaintiff's injuries or their causal link to the defendant are speculative;
> (2) whether other parties have been more directly harmed; and
> (3) whether allowing this plaintiff to sue would risk multiple lawsuits, duplicative recoveries, or complex damage apportionment.[91]

We don't have case law that clarifies the Fifth Circuit's application of these factors, but one wonders why have factors (1) and (2) as separate factors when they should be considered in relation to factor (3).

c. *The Sixth Circuit*

The Sixth Circuit also applies the two-prong antitrust standing test[92] with the efficient enforcer prong containing four factors:

> (1) the nature of the [claimant's] injury;
> (2) the tenuous and speculative character of the relationship between the alleged antitrust violation and the [claimant's] alleged injury;
> (3) the potential for duplicative recovery or complex apportionment of damages; and
> (4) the existence of more direct victims of the alleged conspiracy.[93]

As with the Fifth Circuit, we don't have case law that clarifies the Sixth Circuit's application of these factors.

d. *The Seventh Circuit*

Similarly, the Seventh Circuit applies the two-prong antitrust standing test.[94] However, the Seventh Circuit again conflates antitrust

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[91] *Norris*, 500 F.3d at 465.
[92] NicSand, Inc. v. 3M Co., 507 F.3d 442, 449 (6th Cir. 2007).
[93] *Id*.
[94] Fisher v. Aurora Health Care, Inc., 558 F. App'x 653, 655 (7th Cir. 2014); Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 395–96 (7th Cir. 1993); *In re* Indus. Gas Antitrust Litig., 681 F.2d 514, 519 (7th Cir. 1982).

injury and efficient enforcer factors. The efficient enforcer factors include:

(1) the causal connection between the alleged antitrust violation and the harm to the plaintiff;
(2) improper motive;
(3) whether the injury was of a type that Congress sought to redress with the antitrust laws;
(4) the directness between the injury and the market restraint;
(5) the speculative nature of the damages; and
(6) the risk of duplicate recoveries or complex damages apportionment.[95]

Factors one, two, and three appear to be relevant to the antitrust injury prong.[96] The fourth, fifth, and sixth factors incorporate efficient enforcer language. In addressing the fourth factor, the direct/indirect factor has been articulated by the Seventh Circuit as granting standing only to consumers or competitors who suffer immediate injuries.[97] The Seventh Circuit also appears to enhance the efficient enforcer standard to the "most" efficient enforcer but with little analysis to differentiate this standard.[98] Further, an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement[99] has been required for this factor, provided that it is not likely to leave a significant antitrust violation undetected or unremedied.[100] (This is a balancing test involving the need to balance the interests of deterrence of antitrust violations through private antitrust enforcement and avoidance of excessive treble

[95] *Fisher*, 558 F. App'x at 655; Kochert v. Greater Lafayette Health Servs. Inc., 463 F.3d 710, 718 (7th Cir. 2006).
[96] *See Kochert*, 463 F.3d at 719.
[97] *Kochert*, 463 F.3d at 718–19; Serfecz v. Jewel Food Stores, 67 F.3d 591, 598 (7th Cir. 1995); *Indus. Gas*, 681 F.2d at 520.
[98] *Fisher*, 558 F. App'x at 655 (7th Cir. 2014); *Kochert*, 463 F.3d at 718. For a critique of the "most" efficient enforcer *see* Jonathan M. Jacobson and Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-O-Mat, 66 ANTITRUST L.J. 273, 296–99 (1998) (pointing out some courts hold that competitors are the most efficient enforcer while other courts hold that consumers are the most efficient enforcer).
[99] *Kochert*, 463 F.3d at 718 (citing to *Serfecz*, 67 F.3d at 598); *Fisher*, 558 F. App'x at 655.
[100] *Kochert*, 463 F.3d at 719 (citing to Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 542 (1982)).

damages litigation).[101] Factors five and six are not clearly defined, however, factor six is the efficient enforcer standard, yet it is unclear how factors four and five address duplicative recovery or complex apportionment.

e. *The Tenth Circuit*

In the Tenth Circuit, antitrust injury is treated as a threshold requirement similar to the Second Circuit.[102] Efficient enforcer factors include the directness or remoteness of the injury suffered by the plaintiff, which, in turn, depends on the existence of other more directly-injured possible plaintiffs.[103] Here, the directly injured requirement relates to an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement.[104] As with other circuits, this "self-interest" requirement has been met when the plaintiff is a competitor or a consumer.[105] This analysis does little to clarify how to apply the directness standard or the motivation standard to duplicative recovery or complex apportionment.

f. *The Eleventh Circuit*

The Eleventh Circuit also follows a two-prong approach with antitrust injury as the first prong and efficient enforcer as the second prong.[106] As for efficient enforcer,[107] the factors include:

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[101] *Fisher*, 558 F. App'x at 655; *See Kochert*, 463 F.3d at 718–19.
[102] Abraham v. Intermountain Health Care Inc., 461 F.3d 1249, 1267 (10th Cir. 2006).
[103] *Id.* at 1268 (citing *Associated Gen.*, 459 U.S. at 542; Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1451 (11th Cir. 1991)).
[104] *Id.* (citing *Associated Gen.*, 459 U.S. at 542).
[105] *Id*.
[106] Duty Free Americas, Inc. v. Estee Lauder Cos., Inc., 797 F.3d 1248, 1272 (11th Cir. 2015); Sunbeam Television Corp. v. Nielsen Media Research, Inc., 711 F.3d 1264, 1271 (11th Cir. 2013); Palmyra Park Hosp. Inc. v. Phoebe Putney Mem'l Hosp., 604 F.3d 1291, 1299 (11th Cir. 2010); Fla. Seed Co. v. Monsanto Co., 105 F.3d 1372, 1374 (11th Cir. 1997); *Todorov*, 921 F.2d at 1449; Mun. Utils. v. Ala. Power Co., 934 F.2d 1493, 1499 (11th Cir. 1991).
[107] The court notes that a plaintiff seeking an injunction under § 16 of the Clayton Act differs from § 4 treble damages because § 16 only requires a showing of "threatened" loss or damage while § 4 requires a showing of injury to "business or property." *Todorov*, 921 F.2d at 1452. Additionally, the efficient enforcer requirements are less stringent for the equitable remedy of an injunction because the risk of duplicative recovery or the danger of complex apportionment is not

(1) the directness or indirectness of the asserted injury;
(2) the remoteness of the injury;
(3) whether other potential plaintiffs were better suited to vindicate the harm;
(4) whether the damages were highly speculative;
(5) the extent which the apportionment of damages was highly complex and would risk duplicative recoveries; and
(6) whether the plaintiff would be able to efficiently and effectively enforce the judgment.[108]

These factors are often entwined and other factors may be considered for the efficient enforcer prong.[109] For example, factors one, two and four may be combined rather than analyzed separately in situations where plaintiff claims injury due to defendants monopolist position in the market.[110] As with the Second Circuit, a plaintiff whose main complaint seems to be denial of access to a group charging supra-competitive prices will not be an efficient enforcer.[111] However, competitors and consumers may be direct plaintiffs and, thus, efficient enforcers.[112]

g. *The D.C. Circuit*

The D.C Circuit applies a two-prong antitrust standing test. The efficient enforcer factors include:

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relevant. *Id.* at 1452; *See Duty Free Americas*, 797 F.3d at 1272–73 (11th Cir. 2015); *Palmyra Park Hosp*., 604 F.3d at 1299–1300; *see also* Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 Harv. L. Rev. 1717, 1719 (1990).

[108] *Sunbeam Television*, 711 F.3d at 1271; *Palmyra Park Hosp*., 604 F.3d at 1299; *Todorov*, 921 F.2d at 1451–52. *See also Ala. Power Co*., 934 F.2d 1493, 1500 (11th Cir.1991) (addressing the first factor of direct/indirect plaintiff).

[109] *Sunbeam Television*, 711 F.3d at 1271–72; *Palmyra Park Hosp.*, 604 F.3d at 1299; Todorov, 921 F.2d at 1452.

[110] *See, e.g., Sunbeam Television*, 711 F.3d at 1272–73 (holding that plaintiff must establish that a party was "willing and able to supply a superior product but for [defendant's] exclusionary conduct" or else plaintiff will not be an efficient enforcer due to indirectness, remoteness and speculation (citing to Meijer, Inc. v. Biovail, Corp., 533 F.3d 857 (D.C. Cir. 2008))).

[111] *Todorov*, 921 F.2d at 1454; *see also* Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 443–44 (2d Cir. 2005).

[112] Fla. Seed Co. v. Monsanto Co., 105 F.3d 1372, 1374 (11th Cir. 1997); *Ala. Power Co*., 934 F.2d at 1500.

(1) The speculative nature of the damages;
(2) the existence of more appropriate plaintiff; and
(3) the duplicative recovery and complex apportionment of damages.[113]

With regard to the first factor, plaintiff must establish that its damages were not shown to be attributable to other causes.[114] As for the second factor, standing is less likely as "layers of superior plaintiffs increase."[115] While this could go to duplicative recovery and complex apportionment, case law makes this less than clear. The third factor considers "the risk of multiple recoveries and the difficulty of apportionment of damages."[116] Thus, the first and second factors again go more to antitrust injury. Granted, the first and second factors could go to the efficient enforcer issues of duplicative recovery and complex apportionment, but the D.C. Circuit conflates the first and second factor with a general damage analysis while the third factor is clearly the efficient enforcer factor.

C. *The Efficient Enforcer Rule as it Stands Today*

The efficient enforcer rule remains confused, in part, because it mixes antitrust injury considerations with the efficient enforcer considerations of duplicative recovery and complex apportionment. This lack of clarity is exacerbated by the probability that the efficient enforcer rule is applied in a manner that reflects judicial philosophy regarding antitrust law rather than any economic theory it purports to reflect.[117]

The concerns addressed by the efficient enforcer rule are duplicative recovery and complex apportionment.[118] Accordingly, the

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[113] Andrx Pharmaceuticals, Inc. v. Biovail Corp. Intern., 256 F.3d 799, 815–17 (D.C. Cir. 2001).
[114] *Id*. at 815.
[115] *Id*. at 816.
[116] *Id*. at 817.
[117] Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1449 (11th Cir. 1991) (citing Local Beauty Supply, Inc. v. Lamaur Inc., 787 F.2d 1197, 1201 (7th Cir.1986), regarding confused nature of efficient enforcer); Jeffrey L. Harrison, *The Law and Economics of (Functional) Antitrust Standing in the United States and the European Union*, 26 FLA. J. INT'L L. 271, 276 (2014) (regarding more reflective judicial philosophy).
[118] Associated Gen. Contractors of Cal. v. California State Council of Carpenters, 459 U.S. 519, 543–45 (1983); Blue Shield of Va. v. McCready, 457 U.S. 465, 474–75 (1982) (regarding duplicative recovery); Illinois Brick Co. v. Illinois, 431 U.S.

Associated Gen. factors repeatedly referenced should be applied in a manner that ascertains if there is a probability of duplicative recovery or complex apportionment.[119] Further, the efficient enforcer concerns must be balanced with the concern of defendants keeping illegal profits.

III. RECENT EFFICIENT ENFORCER FINANCIAL PRODUCTS BENCHMARK DECISIONS

As indicated by the case law analysis above, the efficient enforcer rule is concerned with duplicative recovery or complex apportionment; problems particularly apparent in offensive pass-on cases involving a vertical chain of distribution. The cases involving financial products benchmark manipulation, such as *LIBOR*, *FOREX*, and *ISDAfix* are not pass-on cases in a typical vertical chain of distribution. As explained in more detail below, the financial products in question have their price, in part, tied to a benchmark which fluctuates daily. The damages to each plaintiff in these cases is unique to that plaintiff depending upon the manipulation that occurred during the time-period that the plaintiff held the financial product. Overcharges are due to benchmark manipulation not middleman pass-on. Accordingly, there is no pass-on in a vertical chain of distribution and no probability for duplicative recovery nor complex apportionment. However, there is a problem with allowing defendants to keep illegal profits.

A. *LIBOR*

1. *What is LIBOR?*

LIBOR is a benchmark that, in essence, estimates the cost of money one bank would pay to borrow unsecured funding from another

720, 730–31 (1977); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 493 (1968). *See* Hovenkamp, *supra* note 105, at 1718.

[119] In articulating an economist's view of an optimal efficient enforcer rule, one commentator opined: "The rule emerges that an "efficient enforcer" is a plaintiff who has low information costs in investigating alleged antitrust violations, who is genuinely injured by defendants' anticompetitive conduct, whose damages are easy for courts to calculate and who will not recover damages that another plaintiff also will recover." Edgar Swift, *Standing by Your Man Ray: Troubles With Antitrust Standing in Art Authentication Cases*, 37 COLUM. J.L. & ARTS 247, 267 (2014).

bank.[120] The British Bankers Association, which administered LIBOR from its inception and through the relevant time period,[121] requested participating banks to submit data in response to this 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 am?"[122] The rates were calculated by data submitted by ten panels of participating banks, one panel for ten major currencies, for fifteen different time periods on overnight loans up to twelve month loans.[123] The data provided by participating banks on a specific panel was then "trimmed" with the highest and lowest 25% rates eliminated and the median rates used.[124]

2. *Allegations of Manipulation in LIBOR*

Plaintiffs in the LIBOR case purchased financial instruments that were priced based upon a negotiated amount plus or minus the 3-month U.S. Dollar LIBOR rate. There were four classes of plaintiffs in the LIBOR case with the distinction being the type of financial instruments they purchased. The first class of plaintiffs were the over-the-counter (OTC) plaintiffs who allegedly purchased OTC LIBOR based financial products directly from defendants.[125] The OTC

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[120] *See generally* Alvin L. Arnold, *Financing: Understanding Libor*, 44 NO. 6 MORTGAGE & REAL EST. EXECUTIVES REP. 6 (2008); Sharon E. Foster, *LIBOR Manipulation and Antitrust Allegations*, 11 DEPAUL BUS. & COM. L.J. 291, 296–7 (2013); Letter from U.K. Fin. Servs. Auth., Final Notice to Barclays Bank PLC, at 5–7 (June 27, 2012) [hereinafter Final Notice to Barclays], available at http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf; BANK OF ENG., TRENDS IN LENDING 14 (2012), available at http://www.bankofengland.co.uk/publications/Documents/other/monetary/trendsJuly12.pdf; *The Basics, BBALIBOR*, http://www.bbalibor.com/bbalibor-explained/the-basics (last visited Oct. 12, 2018).

[121] Foster, *supra* note 118, at 296; Martin Wheatley, The Wheatley Review of LIBOR: Final Report 35 (HM Treasury, U.K., Sept. 28, 2012), available at http://cdn.hm-treasury.gov.uk/wheatley_review_libor_finalreport_280912.pdf, at 5.

[122] Foster, *supra* note 118 at 296; The Basics, *supra* note 118.

[123] Foster, *supra* note 118, at 296; *The Basics*, *supra* note 118; *see* Arnold, *supra* note 118, at 6 *and* Final Notice to Barclays, *supra* note 118, at 6.

[124] Foster, *supra* note 118, at 296–97; Final Notice to Barclays, *supra* note 118, at 7; *The Basics*, *supra* note 118. *See also* Arnold, *supra* note 118, at 6.

[125] Mem. of Law in Supp. of Defs.' Mot. to Dismiss Pls.' Antitrust Claims at 5, *In re* LIBOR-Based Fin. Instruments Antitrust Litig., No. 1:11-md-2262NRB, 2012 WL 12528837 (S.D.N.Y. Jun. 29, 2012) (The OTC Plaintiffs allege that they purchased from Defendants during the Class Period various financial instruments that paid interest indexed to USD LIBOR. OTC Compl. ¶ 34).

plaintiffs were held to be direct purchasers and, thus, efficient enforcers.[126]

The second class of plaintiffs were dubbed the "Exchange-Based" plaintiffs. The Exchange Based plaintiffs allegedly traded Eurodollar futures and options contracts tied to LIBOR.[127] Eurodollar futures contracts are calculated by reference to the interest rates offered on Eurodollar time deposits.[128] The price reflects the 3-month U.S. Dollar LIBOR interest rate anticipated on the settlement date of the contract. The prices for Eurodollar futures contracts are expressed in denominations of 100. From that 100 figure, the estimated 3-month U.S. Dollar LIBOR rate on the settlement date is subtracted resulting in the purchase price. For example, a Eurodollar futures price of $96.00 reflects an estimated settlement interest rate of 4%. If an investor buys 1 Eurodollar futures contract at $96.00 and price rises to $96.02, this corresponds to a lower implied settlement of LIBOR at 3.98%. The buyer of the futures contract will have made $50.00. One basis point, 0.01, is equal to $25.00 per contract, therefore a move of 0.02 equals a change of $50.00 per contract.[129]

The underlying asset for Eurodollar options contracts are Eurodollar futures.[130] Options are basically divided into call options, a right to buy at a specified price, or put options, a right to sell at a specified price.[131] Usually, holders of Eurodollar call options benefit if interest rates fall and holders of Eurodollar put options benefit if interest rates rise.[132] Borrowers wishing to hedge against interest rates rising may do so by buying a put option while lenders wishing to hedge interest rate drops or lock in a floor for interest rates may do so by

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[126] *In re* LIBOR-Based Financial Instruments Antitrust Litigation, No. 11 MDL 2262(NRB), 2016 WL 7378980, at app. (S.D.N.Y. Dec. 20, 2016).

[127] Mem. of Law in Supp. of Defs.' Mot. to Dismiss Pls.' Antitrust Claims at 5, *In re* LIBOR-Based Fin. Instruments Antitrust Litig., No. 1:11-md-2262NRB, 2012 WL 12528837 (S.D.N.Y. Jun. 29, 2012) (citing to Exch. Compl. ¶¶ 20–26 and 221.)

[128] *See generally* Dan Blystone, *Trading Eurodollar Futures: An Introduction*, INVESTOPEDIA (Apr. 6, 2018, 6:05 PM), http://www.investopedia.com/articles/active-trading/012214/introduction-trading-eurodollar-futures.asp [https://perma.cc/9TER-TPP8] (explaining how Eurodollar futures are calculated).

[129] *Id*.

[130] Ian Cooper, *The Mechanics of Interest Rate Options*, *in* MANAGEMENT OF INTEREST RATE RISK 179, (Boris Antl ed. 1988).

[131] S. Wade Hansen, *Options Basics: Puts and Calls*, FORBES (Aug. 24, 2006, 10:00 AM), http://www.forbes.com/2006/08/23/investools-options-ge-in_wh_0823investools_inl.html.

[132] Cooper, *supra* note 128 at, 179.

buying call options.[133] Generally, options provide the right, but not the obligation, to buy or sell a specified amount of security, at a specified price within a specified time frame.[134] Because the underlying asset are Eurodollar futures contracts, pricing tracks this market.[135]

The third class of plaintiffs were the *Gelboim* plaintiffs who owned debt securities[136] that paid interest tied to U.S. dollar ("USD") LIBOR.[137] The *Gelboim* plaintiffs did not claim to have purchased or sold debt securities from defendants nor receive interest rate payments from defendants.[138] The debt securities were allegedly issued by General Electric Capital Corporation and the State of Israel.[139]

The amount of money an owner of a debt security expects to receive from the investment ("yield")[140] includes the current fair market value (face value plus interest rate), the nominal value based upon the annual interest paid or the total of coupons and the maturity rate taking into account face value and future cash flows based upon interest rates.[141] Generally, the value of the debt security will increase or decrease based upon interest rates.[142]

The fourth and final class of plaintiffs were the Schwab plaintiffs who purchased fixed and floating rate notes from Defendants, their

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[133] *Id*.

[134] *Morningstar Investing Glossary, Option*, MORNINGSTAR, http://www.morningstar.com/InvGlossary/option_definition_what_is.aspx (last visited Oct. 31, 2018).

[135] Cooper, *supra* note 128, at 181.

[136] "A debt security refers to money borrowed that must be repaid that has a fixed amount, a maturity date(s), and usually a specific rate of interest . . . . Examples of debt securities are treasury bills, bonds and commercial paper. The borrower pays interest for the use of the money and pays the principal amount on a specified date." *Morningstar Investing Glossary, Debt Securities*, MORNINGSTAR, http://www.morningstar.com/InvGlossary/debt_securities_definition_what_is.aspx (last visited Nov. 20, 2018).

[137] Mem. of Law in Supp. of Defs.' Mot. to Dismiss Pls.' Antitrust Claims at 5, *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, (S.D.N.Y. Feb. 28, 2018) (11 MD 2262), 2012 WL 12528837, at *8 (citing Gelboim Compl. ¶ 1).

[138] *Id*.

[139] *Id*. (citing Gelboim Compl. ¶¶ 15–16).

[140] *Yield on Debt Securities and Other Investment Instruments*, FINANCIALIZED, http://www.financialized.com/Investing/yield-on-debt-securities-and-investment-instruments (last visited Oct. 31, 2018).

[141] *Id.*

[142] *Id*. (explaining as with all financial instruments, there are several factors that may affect the value of a debt security including interest rate, the state of the economy, the features of a bond issue, the issuer (government or corporations), risks (such as default) and tax considerations).

subsidiaries and affiliates, and from unrelated third parties.[143] To the extent plaintiffs purchased these notes from defendants they are direct purchasers and are efficient enforcers by any standard.[144] To the extent the plaintiffs purchased these notes from subsidiaries or affiliates of defendants, if the defendants controlled these affiliates or subsidiaries plaintiffs may still be considered direct purchasers.[145] However, purchases of these notes by plaintiffs from unrelated third parties would create an indirect purchaser, efficient enforcer issue.

Fixed rate notes have a fixed interest rate for the entire term of the note. While this fixed rate reduces risk based upon interest rates going down,[146] they are risky if interest rates go up resulting in reduced income flows relative to income flows from notes paying the higher interest rates.

A floating-rate notes typically make quarterly payments that rise or fall with interest rates. The interest rates are tied to a benchmark such as LIBOR.[147] These notes are often investments in a corporation's debt. Along with brokers, some corporations sell their floater notes

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[143] Mem. of Law in Supp. of Defs.' Mot. to Dismiss Pls.' Antitrust Claims at 6, *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, (S.D.N.Y. Feb. 28, 2018) (11 MD 2262), 2012 WL 12528837, at *8.

[144] *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 11 MDL 2262, 2016 WL 7378980 (S.D.N.Y. Aug. 14, 2018).

[145] Hovenkamp, *supra* note 106, at 1719 (first citing dicta in Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 n. 16 (1977), and *In re* Chicken Antitrust Litig. Am. Poultry, 669 F.2d 228, 239 (5th Cir. Unit B 1982); Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 326 (9th Cir. 1980) (explaining some courts, moreover, have held that Illinois Brick will not bar an indirect-purchaser action if the violator owned or somehow controlled the dealer); then citing California v. ARC America Corp., 109 S. Ct. 1661 (1989) (explaining another exception to the efficient enforcer indirect purchaser rule is when plaintiffs are seeking an injunction); then citing Arizona v. Shamrock Foods Co., 729 F.2d 1208 (9th Cir. 1984), *cert. denied*, 469 U.S. 1197 (1985); Fontana Aviation Inc. v. Cessna Aircraft Co., 617 F.2d 478 (7th Cir. 1980); *In re* Mid-Atlantic Toyota Antitrust Litig., 516 F. Supp. 1287, 1295 (D. Md.), *modified on other grounds*, 541 F. Supp. 62 (D. Md. 1981) *aff'd sub nom.* Pennsylvania v. Mid-Atlantic Toyota Distribs., Inc., 704 F.2d 125 (4th Cir. 1983) (explaining that additionally, some courts have held that a conspiracy involving the seller and direct purchaser may provide an exception for an indirect purchaser). The control, injunction and conspiracy exceptions are beyond the scope of this paper.

[146] *Fixed-Rate Bonds*, INVESTOPEDIA, http://www.investopedia.com/terms/f/fixedrate-bond.asp (last visited Oct. 31, 2018).

[147] *Floating-Rate Securities*, PROJECT: INVESTED, http://www.investinginbonds.com/learnmore.asp?catid=9&subcatid=52&id=275 (last visited Oct. 31, 2018).

directly to investors.[148]

3. *The Second Circuit's LIBOR Decision in* Gelboim *and on Remand in* LIBOR

The issue on appeal in *Gelboim* was whether plaintiffs established an antitrust injury. Efficient enforcement was not before the court; however, it was discussed in dicta.[149] It is important to keep in mind that the *Gelboim* case does not involve the typical indirect-purchaser in an overcharge case nor was it a case involving a pass-on in a vertical chain of distribution.[150] The indirect plaintiffs in *Gelboim* were seeking damages caused by the artificial suppression of the LIBOR benchmark rate which reduced their interest income flows. Accordingly, the application of the *Illinois Brick* decision precluding recovery by indirect purchasers for overcharges is inapplicable.[151] Indeed, all the authorities cited by the Second Circuit dealt with pass-on overcharges in a typical vertical chain of distribution scenario[152] which is distinguishable from a financial product benchmark case. Considering the detailed efficient enforcer factor discussion in the *Gelboim* decision and the court's remarks that there are features of this case that make it like no other[153] this section discusses the court's concerns regarding efficient enforcer in the context of the *Gelboim* unique facts.

While the Second Circuit in *Gelboim* held that the pleadings were sufficient to establish antitrust injury, the court expressed, in *dicta*, concern regarding the second standing prong in the Second Circuit of efficient enforcer.[154] The efficient enforcer factors articulated in the *Gelboim* opinion are slightly different from previous Second Circuit efficient enforcer decisions although they do reflect the similar concerns. In *Gelboim* the efficient enforcer factors were articulated as:

> (1) the "directness or indirectness of the asserted injury," which

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[148] Constance Gustke, *Floating-Rate Securities: Timely but Risky*, BANKRATE (Mar. 4, 2014), http://www.bankrate.com/finance/investing/floating-rate-securities.aspx.
[149] Gelboim v. Bank of Am. Corp., 823 F.3d 759, 778 (2d Cir. 2016).
[150] *Id*. at 764.
[151] *See* Howard Hess Dental Labs. Inc. v. Dentsply Intern., Inc., 424 F.3d 363, 373–374 (3d Cir. 2005) (citing Jeffrey L. Harrison, *The Lost Profits Measure of Damages in Price Enhancement Cases*, 64 MINN. L. REV. 751, 753, 777 (1980)).
[152] Gelboim, 823 F.3d at 772–75.
[153] *Id*. at 777.
[154] *Id*. at 772, 777–80.

> requires evaluation of the "chain of causation" linking appellants' asserted injury and the Banks' alleged price-fixing; (2) the "existence of more direct victims of the alleged conspiracy"; (3) the extent to which appellants' damages claim is "highly speculative"; and (4) the importance of avoiding "either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other."[155]

Although the court in *Gelboim* addressed all four efficient enforcer factors, it seems most concerned with the first factor, directness or indirectness of the asserted injury, in terms of the umbrella effect of a cartel (which is a remoteness concern), over-deterrence, and the fourth factor of duplicative damages.

a. *The "Directness or Indirectness of the Asserted Injury," Which Requires Evaluation of the "Chain of Causation" Linking Appellants' Asserted Injury and the Banks' Alleged Price-Fixing*

In addressing the direct/indirect factor, the courts in *Gelboim* and *LIBOR* discuss concerns about the umbrella theory in terms of intervening market factors causing plaintiffs' injuries breaking the chain of causation and concerns about ruinous liability for defendants. As discussed below, the umbrella theory regarding conduct by non-cartel entities and the ripple effect is not applicable in *Gelboim* and *LIBOR*. Further, concerns about ruinous liability seems to turn the balance of not allowing defendants to keep illegal profits on its head. Ruinous liability is a collateral consequence concerns not proper for efficient enforcer analysis nor is it proper under the rule of law.

i. Umbrella Theory

For the direct/indirect factor the *Gelboim* court expressed concern regarding the linkage between indirect appellants' injury and the appellees' alleged price-fixing in the relevant market.[156] The indirect appellants' injury is artificially high settlement prices of Eurodollar futures contracts and reduced interest income on debt securities which

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[155] *Id*. at 778; *In re* LIBOR-Based Financial Instruments Antitrust Litigation, 2016 WL 7378980 (S.D.N.Y. Aug. 14, 2018).
[156] *Gelboim*, 823 F.3d at 772, 777–780.

they held.[157] The main concern was that some appellants did not deal directly with the appellees.[158]

Most cases express a concern about indirect purchasers in the context of indirect purchasers asserting an overcharge due to pass-on in a vertical chain of distribution in the offensive context. That is not the case under the *Gelboim* facts. Rather, the court discusses "umbrella" standing concerns articulated in a Third Circuit district court opinion in terms of indirect purchasers.[159] The umbrella scenario involves increased speculation of damages where plaintiffs' injuries are the result of defendants' conduct causing a competitor/non-cartel member to react in a similar fashion (usually raising prices) or where plaintiffs' injuries are a result of the ripple effect through the economy because of defendants' conduct.[160] Neither scenario occurred in the *LIBOR* case.

In discussing the umbrella scenario, the court in *Gelboim* cites *In re Processed Egg Products. Antitrust Litigation*[161] which cites to *Mid–West Paper Products Co. v. Continental Group, Inc.,*[162] where the court found that plaintiffs purchasing from a non-conspirator lacked standing to recover relying on *Illinois Brick*.[163] *In re Processed Egg Products Antitrust Litigation.* and *Mid–West Paper Products Co. v. Continental Group, Inc*. both involved plaintiffs' injuries that were the result of defendants' conduct causing a competitor/non-cartel member to raise prices. Both cases involved the complex apportionment factors in a pass-on, vertical chain of distribution.[164] While plaintiffs' in *Gelboim* in some cases did purchase indirectly from non-cartel

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[157] *Id*. at 768.
[158] *Id*. at 778.
[159] *Id.* at 778 (citing *In re* Processed Egg Prods. Antitrust Litig., No. 08-MD-2002, 2015 WL 5544524, at *14 (E.D. Pa. Sept. 18, 2015), *overruled by In re* Processed Egg Prods. Antitrust Litig., 312 F.R.D. 124 (E.D. Pa. Sept. 10, 2015)).
[160] William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1465–67 (1985).
[161] *Gelboim*, 823 F.3d at 778 (2d Cir. 2016) (citing *In re* Processed Egg Prods. Antitrust Litig., No. 08-MD-2002, 2015 WL 5544524, at *14 (E.D. Pa. 2015), *overruled by In re* Processed Egg Prods. Antitrust Litig., 312 F.R.D. 124 (E.D. Pa. Sept. 10, 2015)).
[162] *In re* Processed Egg Prods. Antitrust Litig., No. 08-MD-2002, 2015 WL 5544524 (E.D. Pa. 2015) (citing Mid-West Paper Prods. Co. v. Cont'l Grp., Inc., 596 F.2d 573 (3d Cir. 1979)), *overruled by In re* Processed Egg Prods. Antitrust Litig., 312 F.R.D. 124 (E.D. Pa. Sept. 10, 2015).
[163] Mid-West Paper Prod. Co. v. Cont'l Grp., 596 F.2d 573 (3d Cir. 1979).
[164] *In re* Processed Egg Prods. Antitrust Litig., 312 F.R.D. 124, 143–44 (E.D. Pa. 2015) (citing Mid-West Paper Prods. Co. v. Cont'l Grp. Inc., 596 F.2d 573, 584 (3d Cir. 1979)).

members, their damages were not caused by non-cartel members overcharge to plaintiffs'. Rather, plaintiffs' damages were caused by defendants' manipulation of the LIBOR benchmark which effected price regardless of what price non-cartel members charged plaintiffs.

Additionally, the court cites to a law review article by William H. Page, *The Scope of Liability for Antitrust Violations*[165] (*Page*) which discusses monopolistic overcharge in price-fixing cases and output restrictions outside of the financial products context. Specifically, regarding the umbrella scenario *Page* asserts:

> When a cartel controls less than the entire market, the competitive nonmembers will increase output until their marginal cost equals the cartel price. Thus, their output reduces the market power of the cartel by increasing the elasticity of the cartel's residual demand function. At the same time, they will recover an 'overcharge' from their consumers by selling at the cartel price. This has been termed the umbrella effect of a cartel.[166]

According to the above analysis, the antitrust injury comes from the overcharge by nonmember competitors.[167] It is not even a pass-on and, thus, even more remote than the pass-on situation but certainly causally connected to cartel pricing.[168] Again, as mentioned above, in *Gelboim* the damages were caused by defendants' (alleged cartel members) benchmark manipulation conduct which has, by the benchmark's intended purpose, a direct impact on what the market charges. In essence, there is no independent pricing decision by competitive nonmembers.

Additional umbrella effects discussed by *Page* include:

> As cartel members reduce their output, they will minimize their variable costs by reducing their purchases of raw materials, laying off employees, and so forth. These actions will certainly cause harm to the suppliers and employees of the cartel members. Do these harms constitute antitrust injury? The issue is troublesome because these harms are unquestionably caused

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[165] Gelboim, 823 F.3d at 778 (2d Cir. 2016) (citing William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1465–74 (1985)).
[166] Page, *supra* note 159, at 1465.
[167] *Id.* at 1465–67.
[168] *Id*. at 1467.

> by the output restriction and therefore meet the standard of proportional variation. On the other hand, the injury to suppliers and employees is offset by cost savings to members of the cartel . . . to allow suppliers and employees to recover would represent overdeterrence.[169]

The above example is the ripple effect aspect of the umbrella scenario. Again, this has nothing to do with the facts in *Gelboim*.

The *Gelboim* court discusses a split in authority on the umbrella theory[170] citing *U.S. Gypsum Co. v. Indiana Gas Co.*[171] and *In re Beef Industry Antitrust Litigation*[172] opposing the umbrella theory and *Mid-West Paper Products. Co. v. Continental Group Inc.*[173] taking a more favorable view of the umbrella theory. In *U.S. Gypsum* the court discussed the umbrella theory concept of overcharges paid by indirect purchasers, finding no efficient enforcer problem as there was no risk of duplicative recovery. In *In re Beef Industry Antitrust Litigation* plaintiffs, cattlemen, ranchers, and feeders, alleged that defendants, retail food chains, a wholesale grocer, the retail chains' national trade association, and a beef industry price reporting publication, combined to fix artificially low prices for beef purchased from slaughterhouses and meat packers. This, in turn, reduced the prices which the plaintiffs received in selling their cattle to the packers and slaughterhouses. Under the umbrella scenario, this was a case of ripple effect in the economy. The court in *In re Beef Industry Antitrust Litigation* rejected defendants' argument that damages would be too complex to ascertain as a matter of law in a summary judgment proceeding. The court specifically rejected the umbrella theory.[174] The pro-umbrella scenario case cited by the *Gelboim* court, *Mid-West Paper Products Co. v. Continental Group. Inc*., involved supermarket and retail grocery store plaintiffs alleging that defendants, manufacture of consumer bags, were price fixing. This was a pass-on case under the ripple effect scenario.[175]

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[169] *Id*. at 1467.
[170] *Gelboim*, 823 F.3d at 778–79.
[171] *Id*. at 778 (citing U.S. Gypsum Co. v. Ind. Gas Co., 350 F.3d 623, 627 (7th Cir. 2003)).
[172] *Id*. (citing *In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1171 (5th Cir. 1979)).
[173] *Id*. at 778–79 (citing Mid-West Paper Prods. Co. v. Cont'l Grp. Inc., 596 F.2d 573, 580–87 (3d Cir. 1979)).
[174] *In re Beef*, 600 F.2d at 1166.
[175] *Mid-West Paper Prods. Co.*, 596 F.2d at 580–83.

The umbrella theory is not relevant to the *Gelboim* case. The critical distinction being the fact that there is no intervening cause or persons between plaintiffs' damages and defendants' conduct. LIBOR is an interest rate benchmark that is hardwired into the investment products purchased by plaintiffs. When defendants fixed the relevant LIBOR rate artificially low plaintiffs were damaged. Plaintiffs are not alleging an injury from defendants' competitor/non-cartel members. The injuries are a direct result of defendants' conduct, not some remote, unanticipated conduct by third parties[176] nor are plaintiffs' injuries merely the ripple effects of some remote antitrust conduct. Granted, the ripple effects to the economy by defendants' alleged conduct is vast and could include a pensioner who gets reduced income by defendants' conduct resulting in an inability to help a child or grandchild with college tuition resulting in reduced income for that child or grandchild. But that is not what we are dealing with here.[177]

The court in *LIBOR* applied the umbrella scenario as incorrectly articulated by the appellate court in *Gelboim*:

> Plaintiffs who purchased products from non-defendants but allege that defendants' actions raised their prices are called "umbrella purchasers." Some courts reject standing of umbrella purchasers because "'significant intervening causative factors,' most notably, the 'independent pricing decisions of non-conspiring_retailers,'" attenuate the causal connection between the violation and the injury. In such circumstances, "the defendants secured no illegal benefit at [the plaintiffs'] expense," . . . Although "[t]he antitrust laws do not require a plaintiff to have purchased directly from a defendant in order to have antitrust standing," . . . In this case, we are persuaded to draw a line between plaintiffs who transacted directly with defendants and those who did not. A plaintiff and a third party could, and did, easily incorporate LIBOR into a financial transaction without any action by

[176] *See, e.g.,* Garabet v. Autonomous Techs. Corp., 116 F. Supp. 2d 1159 (C.D. Cal. 2000).

[177] It is doubtful that the Second Circuit's citation to this article including this scenario is an indication that the umbrella effect concern in *Gelboim* is broader than the indirect purchaser concern. The rest of the article focuses on different antitrust injuries, such as lost profits as being different from overcharges and how the former may not be the type of injury antitrust laws were intended to prevent and harm to efficiency through conduct such as predatory pricing and boycotts which is irrelevant in the context of the *Gelboim* case. *See* Page, *supra* note 159, at 1470–79.

> defendants whatsoever. Their independent decision to do so breaks the chain of causation between defendants' actions and a plaintiff's injury . . . plaintiffs who did not purchase directly from defendants continue to face the same hurdle: they made their own decisions to incorporate LIBOR into their transactions, over which defendants had no control, in which defendants had no input, and from which defendants did not profit . . . the Bondholder plaintiffs lack antitrust standing, and their antitrust claims are dismissed.[178]

This analysis is not an overcharge by nonmember competitor nor a ripple effect umbrella analysis. Rather, it assumes, incorrectly, that plaintiffs had a choice, and the bargaining power to affect that choice, regarding what benchmark to select as part of the price equation. The economic reality was that LIBOR benchmarks controlled approximately 75% of the global market for interest rate financial products during the relevant time period.[179] Further, as a practical matter, some benchmark had to be used to estimate price.

Financial markets are immense and complex rendering a traditional concept of price meaningless for many of these markets.[180] Rather than gathering all the data and digesting it for purposes of computing a particular price, such as interest rates a, decisional theory approach is applied where a sample of data is utilized to arrive at an estimate of an average price. These sampling summaries are price benchmarks. [181] Price benchmarks, such as LIBOR, became a mechanism to control prices once they become legally integrated in a contract as a pricing mechanism.[182]

In financial markets, actual price, what the underlying asset sold for, is irrelevant in most instances because the legal price reference in contracts for purposes of buying, selling and setting price are

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[178] *In re* LIBOR-Based Fin. Instruments Antitrust Litig., 2016 WL 7378980 at *15–16 (S.D.N.Y. Dec. 20, 2016) (citation omitted); *See In re* Platinum and Palladium Antitrust Litig., 2017 WL 1169626 at *21–22 (S.D.N.Y. Mar. 28, 2017) (finding plaintiffs were not an efficient enforcer under the umbrella theory).

[179] Foster, *supra* note 119, at 298.

[180] Andrew Verstein, *Benchmark Manipulation*, 56 B.C. L. REV. 215, 217 (2015).

[181] *Id.* at 225.

[182] *Proposal for a Regulation of the European Parliament and of the Council on Indices used as Benchmarks in Financial Instruments and Financial Contracts* at 2, COM (2013) 641 final (Sept. 18, 2013) (benchmarks control price); *Id.* at 11 (pricing in many contracts and for financial instruments are based on benchmarks); Verstein, *supra* note 179, at 217.

benchmarks.[183] Benchmarks are critical for a properly functioning market.[184] Leading benchmarks, such as LIBOR, were used as a matter of course not as a matter of choice.[185]

ii. *Collateral Consequences*

In discussing the first efficient enforcer factor, causation, the court in *Gelboim* opined:

> Requiring the Banks to pay treble damages to every plaintiff who ended up on the wrong side of an independent LIBOR-denominated derivative swap would, if appellants allegations were proved at trial, not only bankrupt 16 of the world's most important financial institutions, but also vastly extend the potential scope of antitrust liability in myriad markets where derivative instruments have proliferated.[186]

The court in *LIBOR* followed this rationale:

> "[P]ermitting recovery in such a transaction 'could subject antitrust violators to potentially ruinous liabilities, well in excess of their illegally-earned profits.'"[187]

Although articulated as a causation factor, it is difficult to discern what, if anything, bankrupting 16 of the world's most important financial institutions or ruinous liabilities has to do with causation.

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[183] Verstein, *supra* note 179, at 260.

[184] *Id*. at 226, 231; Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Orders Five Banks to Pay Over $1.4 Billion in Penalties for Attempted Manipulation of Foreign Exchange Benchmark Rates (Nov. 12, 2014), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7056-14 ("Aitan Goelman, the CFTC's Director of Enforcement, stated: 'The setting of a benchmark rate is not simply another opportunity for banks to earn a profit. Countless individuals and companies around the world rely on these rates to settle financial contracts, and this reliance is premised on faith in the fundamental integrity of these benchmarks. The market only works if people have confidence that the process of setting these benchmarks is fair, not corrupted by manipulation by some of the biggest banks in the world.'").

[185] *See* Verstein, *supra* note 179, at 224–25, 236.

[186] Gelboim v. Bank of Am. Corp., 823 F.3d 759, 779 (2d Cir. 2016).

[187] *In re* LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MDL 2262 NRB, 2016 WL 7378980 at *15 (S.D.N.Y. Dec. 20, 2016) (citing Mid-West Paper Prods. Co. v. Cont'l Grp., Inc., 596 F.2d 573, 586 (3d Cir. 1979)).

Rather, it appears that the court is concerned with the collateral consequences of an antitrust verdict against defendants.[188]

Efficient enforcer factors focus on duplicative recovery and complex apportionment.[189] The court's opinion regarding collateral consequences attempts to tie in the "directness or indirectness of the asserted injury" and "vastly extend the potential scope of antitrust liability."[190] This rational is dubious at best. The bankruptcy of 16 of the world's most important financial institutions or ruinous liability has nothing to do with duplicative recovery or complex apportionment which is what indirectness is supposed to address.[191] Further, would courts find that the bankruptcy of a non-systemic financial institution causes the same concern and analysis? If so, proof of potential bankruptcy would effectively bar civil antitrust actions against defendants. If not, this is a serious rule of law problem as it causes disparate treatment.[192]

b. *The "Existence of More Direct Victims of the Alleged Conspiracy"*

Here, the *Gelboim* court again focuses on the direct/indirect purchaser problem. The court seems to conclude that appellants, consumers, who were not direct purchasers are injured in the same manner as consumers who may be direct purchasers:

> Implicit in the inquiry is recognition that not every victim of an antitrust violation needs to be compensated under the antitrust

[188] Generally, collateral consequences have been understood in terms of repercussions to individuals from a criminal conviction. Sharon E. Foster, *Too Big to Prosecute: Collateral Consequences, Systematic Institutions and the Rule of Law*, 34 REV. BANKING & FIN. L. 655, 662 (2015). As used here, it includes repercussions to systemic financial service institutions due to civil actions.
[189] Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 543–45 (1983); Blue Shield of Va. v. McCready, 457 U.S. 465, 474–75 (1982); Ill. Brick Co. v. Illinois, 431 U.S. 720, 730–35 (1977); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 493 (1968).
[190] *Gelboim*, 823 F.3d at 778–79.
[191] *Id.* at 779.
[192] Sharon E. Foster, *Too Big to Prosecute: Collateral Consequences, Systemic Institutions and the Rule of Law*, 34 REV. BANKING & FIN. L. 655, 674–85 (2015). As a practical matter, allowing the civil antitrust action in these cases have not resulted in bankruptcies; rather, it has resulted in settlement providing the plaintiffs with some restitution. Gregory Scopino, *Expanding the Reach of the Commodity Exchange Act's Antitrust Considerations*, 45 HOFSTRA L. REV. 573, 670 tbl.12 (2016) (a useful table of settlements in antitrust benchmark cases).

> laws in order for the antitrust laws to be efficiently enforced. Moreover, one peculiar feature of this case is that remote victims (who acquired LIBOR-based instruments from any of thousands of non-defendant banks) would be injured to the same extent and in the same way as direct customers of the Banks. The bondholders, for example, purchased their bonds from other sources. Crediting the allegations of the complaints, an artificial depression in LIBOR would injure anyone who bought bank debt pegged to LIBOR from any bank anywhere. So, in this case directness may have diminished weight.[193]

The court in *LIBOR* agreed with this conclusion:

> The Second Circuit expressly recognized that even though "appellants allege status as consumers," in this case "directness may have diminished weight" because "one peculiar feature of this case is that remote victims (who acquired LIBOR-based instruments from any of thousands of non-defendant banks) would be injured to the same extent and in the same way as direct customers of the Banks."[194]

While this may be true as both will incur income flow loss due to suppressed LIBOR rates, it ignores the rationale behind the efficient enforcer rule which is to avoid duplicative damages or complex apportionment. Under the facts in the *LIBOR* case, each consumer has his or her own, unique damages depending upon the financial instruments bought, the quantity held and the time period. In short, there is no overlapping ownership of the same financial instrument so there is no duplicative recovery nor complex apportionment.

c. *The Extent to Which Appellants' Damages Claim is "Highly Speculative"*

The *Gelboim* court expresses concern that the damages in *LIBOR* may prove to be highly speculative.[195] The "speculative" aspect of the calculation is how much the defendants manipulated LIBOR for the time period in question. The typical financial instrument invested in for income flow from the interest rate would provide the interest

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[193] *Gelboim*, 823 F.3d at 779.
[194] *Id.*; *see also In re* LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MDL 2262 NRB, 2016 WL 7378980 at *17 (S.D.N.Y. Dec. 20, 2016).
[195] *Gelboim*, 823 F.3d at 779–80.

income determined as of a specified settlement date. For example, an investor investing in debt instruments may have quarterly settlement dates specified for March, 31st, June 30th, September 30th and December 31st. These interest rates may be influenced by many market factors including market manipulation. But this "speculation" is present for both direct and indirect purchasers.[196] It is not a duplicative recovery nor complex apportionment problem. Accordingly, it is not an efficient enforcer issue; rather, it is a problem of proof.

The court in *LIBOR* agreed that this element was a problem of proof issue regarding non-negotiated transactions such as the bondholder plaintiffs.[197] As for swapholders, the court in *LIBOR* stated:

> [S]wapholders are in a position similar to bondholders. Plaintiffs who entered into swaps before the suppression period may recover for suppressed payments relative to but-for LIBOR. And plaintiffs who entered into swaps during the suppression period may recover for any super-suppressed payments, netted against any less-suppressed payments.[198]

Regarding the Exchange-Based plaintiffs, the *LIBOR* court found:

> The mathematical relationship between LIBOR and the settlement price of Eurodollar futures contracts does not address the relationship, if any, between LIBOR and the trading price of Eurodollar futures contracts (that is, the price at which Eurodollar futures contracts were bought and sold prior to settlement). The trading price reflects the market's prediction for what the price will be at settlement, which could be years away—not what LIBOR is at the present moment.
> . . .
> The only Exchange-Based plaintiffs with a non-speculative theory are those who, before the suppression period started, shorted contracts that were held to settlement during the suppression period.[199]

Here, speculative damages are, again, as a problem of proof not, as the

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[196] *See* Jay L. Himes, *When Caught with Your Hand in the Cookie Jar . . . Argue Standing*, 41 RUTGERS L.J. 187, 203–04 (2009).
[197] *In re* LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MDL 2262 NRB, 2016 WL 7378980 at *19 (S.D.N.Y. Dec. 20, 2016).
[198] *Id.* at *20.
[199] *Id.* at *21, *23.

court seems to indicate, an efficient enforcer problem as there is no discussion of duplicative recovery or the probability of complex apportionment of damages due to potential multiple victims in a vertical chain of distribution.

d. *The Importance of Avoiding "Either the Risk of Duplicate Recoveries on the One Hand, or the Danger of Complex Apportionment of Damages on the Other"*

The main concern in the *Gelboim* court's opinion under the heading of "Duplicative Recovery and Complex Damage Apportionment" seems to be governmental and regulatory investigations which may seek damages, fines, injunction or disgorgement and the numerous suits relating to the alleged LIBOR manipulation. The question here is – are the damages sought duplicative of the damages, fines, injunction or disgorgement sought by governments or others in numerous suits? If there is duplication, there would be a need to apportion, which is the complication the efficient enforcer is intended to avoid. Further, if there is such duplication it is doubtful appellants suit is needed to vindicate the Sherman Act. [200]

As of 2015, approximately $9 billion in fines worldwide have been assessed.[201] However, it appears most, if not all of the fines collected do not go to victims. For example, section 12(b) of Barclays Department of Justice (DOJ) Plea Agreement states, "*In light of the availability of civil causes of action, which potentially provide for a recovery of a multiple of actual damages, the Recommended Sentence does not provide for a restitution order for the offense charged in the Information*." [202]

The DOJ and Securities Exchange Commission (SEC) have indicated the fines go to the U.S. Treasury.[203] Additionally, in the United Kingdom, fines collected from financial service institutions go

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[200] *Gelboim*, 823 F.3d at 780.
[201] Jonathan Stempel, *Big Banks Lose as U.S. Appeals Court Revives Libor Lawsuits*, 22 NO. 2 WESTLAW J. BANK & LENDER LIABILITY 8 (June 13, 2016).
[202] Plea Agreement at 10, United States of America v. Barclays, PLC, No. 3:15CR77 (D. Conn. May 19, 2015), *available at* https://www.justice.gov/file/440481/download.
[203] Lynn Stuart Parramore, *When Giant Banks Pay Fines, Where Does the Money Go? Does It Stop Crime?*, ALTERNET (October 8, 2013, 11:23 AM), http://www.alternet.org/economy/bank-fines-and-crime.

to the treasury.[204]

Addressing this fourth factor, the court in *LIBOR* held:

> Under this factor courts are traditionally concerned with the prospect of different groups of plaintiffs attempting to recover for the same exact injury, id., which plaintiffs do not do here.[205]
> . . .
> Clearly, the Second Circuit in Gelboim *was* concerned with the scope of government recovery, as "the ramified consequences are beyond conception." 823 F.3d at 780. As of now, there has been no showing that certain plaintiffs have been made whole through the receipt of restitution payments made to governments; if such a showing is made in the future, we will take the steps necessary to avoid duplicative recovery. Moreover, defendants suggest no substitute avenue of recovery for plaintiffs who transacted with a panel-bank defendant that is not under government investigation.[206]

Thus, the court in *LIBOR* did not see a problem with duplicative recovery or complex apportionment absent evidence that plaintiffs received restitution payments.

B. *FOREX*

1. What is FOREX?

The *FOREX* case involved the manipulation of foreign exchange (*FX*) benchmark rates.[207] FX benchmark rates are used to price certain foreign exchange financial transactions including foreign exchange

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[204] Richard Anderson, *Bank Fines Go to Good Causes After Rule Change*, BBC NEWS, (December 11, 2013), http://www.bbc.com/news/business-25214567.
[205] *In re* LIBOR-Based Fin. Instruments Antitrust Litig., No. 11 MDL 2262 NRB, 2016 WL 7378980, at *23 (S.D.N.Y. Dec. 20, 2016) (citation omitted).
[206] *Id.*
[207] *In re* Foreign Exch. Benchmark Rates Antitrust Litig., 74 F.Supp.3d 581, 585 (S.D.N.Y. 2015) [hereinafter *FOREX*].

swaps,[208] cross currency swaps,[209] spot transactions,[210] futures,[211] options,[212] forwards[213] and other derivatives.[214] In general, FX benchmark rates are set based upon actual trades (bids and offers during the "fix period" (a one minute window).[215] The benchmark rate is determined by calculating the bid-offer spread based upon the fix period information and calculating a median which determines the rate.[216]

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[208] "[S]waps involve the sale or purchase of a currency on one date and the offsetting purchase or sale . . . on a future date . . . ." MARC LEVINSON, GUIDE TO FINANCIAL MARKETS 16 (4th ed. 2005).

[209] "Currency swaps are an essential financial instrument utilized by banks, multinational corporations and institutional investors." Nick K. Lioudis, *Currency Swap Basics*, INVESTOPEDIA (Apr. 3, 2018, 9:00 AM), https://www.investopedia.com/articles/forex/11/introduction-currency-swaps.asp. "A currency swap . . . involves the exchange of interest and sometimes of principal in one currency for the same in another currency." *Currency Swap*, INVESTOPEDIA, https://www.investopedia.com/terms/c/currencyswap.asp.

[210] The spot *FOREX* market is a global wholesale financial market where currencies are traded in pairs such as the Euro/U.S. Dollar. *See* Press Release, *FCA Fines Five Banks £ 1.1 Billion for FX Failings and Announces Industry-wide Remediation Programme*, FIN. CONDUCT AUTH., (Dec. 11, 2014), http://www.fca.org.uk/news/fca-fines-five-banks-for-fx-failings. Currencies for immediate delivery, within two days or less after the trade is agreed, are traded on the spot market. For example, a tourist's purchase of foreign currency or a firm's decision immediately to convert the receipts from an export sale are spot market transactions. *See* LEVINSON, *supra* note 206, at 15.

[211] The Forex futures market allows the lock in of an exchange rate at a set future date through a futures contract. A futures contract for foreign currency, in effect, guarantees an exchange rate, thus reducing currency fluctuation risks. *See* LEVINSON, *supra* note 206, at 15–16.

[212] The Forex options market give the option holder the right, but not the obligation, to buy ("call") or sell ("put") a specified amount of foreign currency or foreign-currency futures at a specified price (the "strike rate") during a certain period of time. *See* FIN. CONDUCT AUTH., FINAL NOTICE TO BARCLAYS BANK PLC (May 20, 2015), https://www.fca.org.uk/publication/final-notices/barclays-bank-plc-may-15.pdf. The buyer of an option pays the seller a premium for the right to buy at the strike rate. Like futures contracts, options are not traded on organized exchanges. *See* LEVINSON, *supra* note 205, at 16. Option contracts are leveraged, meaning that investors can make large bets on exchange rate fluctuations with relatively little money upfront. *Id*. at 18.

[213] Forward contracts are similar to future contracts but are between a dealer and the dealer's customer and are more flexible in the length of time. *See* LEVINSON, *supra* note 205 at 16.

[214] JPMorgan Chase Bank, N.A., CFTC No. 15-04, 2014 WL 6068387, at 2 (Nov. 11, 2014).

[215] *Id.* at 4.

[216] *Id.*

2. Allegations of Manipulation

The manipulation involved FX traders at defendant banks coordinating information by disclosing confidential customer information, altering trading positions and agreeing on trading strategies to manipulate the FX benchmark rates to their mutual advantage:[217]

> For example, in one of the chat rooms, if a trader determined that he had fix orders in the opposite direction to the chat room group's overall net fixing position approaching the fixing window, that trader may have transacted before the fix period with traders outside the private chat room, a practice known by market participants as "netting off," rather than transact with other traders within the chat room. In certain cases, the goal of this trading strategy was to maintain the volume of orders held by chat room members in the direction favored by the majority of the private chat room members and limit orders being executed in the opposite direction during the fix window.[218]

FOREX involved plaintiffs who transacted FX spot and outright forward transactions priced at or by the fix directly with some of the defendants.[219] It was alleged by plaintiffs that defendants manipulated the FX benchmark rates through the use of one of three strategies:

> • "Front running" or "trading ahead"—Defendants traded their own proprietary positions before executing their customers' large market-moving trades so that Defendants could take positions to their benefit and "to the detriment of the customer."
> • "Banging the close"—Because the calculation of the Fix does not weight the trades by amount traded and takes into account only the number of trades in any currency pair, traders conspired to impact the Fix by engaging in more trades. To this end, traders broke up larger orders into smaller amounts and

[217] *Id.* at 2.
[218] *Id.* at 6–7.
[219] *In re* Foreign Exch. Benchmark Rates Antitrust Litig., 74 F.Supp.3d 581, 586 (S.D.N.Y. 2015).

> concentrated the trades in the minutes before and after the Fixing Window to affect the Fix.
> • "Painting the screen"—Defendants' traders placed fake orders with other Defendants to create the illusion of trading activity in a given direction to move rates prior to the Fixing Window. These trades were not actually executed.[220]

3. The District Court's Decision in FOREX

In holding that plaintiffs were efficient enforcers under the *Associated Gen*. standards, the *FOREX* court noted that the manipulation of the FX benchmark rates in *FOREX* was distinguishable from the *Gelboim*/ *LIBOR* case:

> *Gelboim's* analysis of the efficient enforcer factors may be particularly salient here because the plaintiffs in *Gelboim* and in this case both allege that large banks manipulated benchmark rates that affected the prices of financial instruments. As explained below, because of the factual differences between the two cases, the efficient enforcer analysis here is less challenging than in *Gelboim*.[221]

The primary difference was the fact that the *FOREX* plaintiffs either dealt directly with defendants[222] or had the same effect as if they dealt directly with defendants due to defendants control of market share.[223] Additionally, unlike *LIBOR*, in the *FOREX* case the whole price (bid and offer) was manipulated rather than a component of the price as in *LIBOR*.[224] Thus, the court found that the risk of duplicative recovery and complex apportionment did not exist. However, this appears to be a distinction without a difference as both *LIBOR* and *FOREX* involved price manipulation through benchmark manipulation that did not create duplicative recovery or complex apportionment.

C. *ISDAfix*

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[220] *Id*. at 587–88.
[221] *In re* Foreign Exch. Benchmark Rates Antitrust Litig., 13 Civ. 7789, 2016 WL 5108131, at *7 (S.D.N.Y. Sept. 20, 2016).
[222] *Id.* (as to OTC Plaintiffs).
[223] *Id.* at *9 (as to Exchange Class Plaintiffs, market share was indicated to be over 90%).
[224] *Id.* at *8.

1. *What is the ISDAfix?*

The ISDAfix is an interest rate benchmark, issued in several currencies, used to price interest rate swaps.[225] For example, one party may hold a financial instrument with a fixed interest rate while another party holds a financial instrument with a floating interest rate. These parties may enter into an agreement to swap fixed/floating interest rates.[226] A "swaption," is an option to enter into an interest rate swap at a specified rate on some set future date.[227] The ISDAfix is the benchmark used to price these interest rate swaps.

USD ISDAfix rates and spreads are U.S. Dollar-denominated swaps for various maturity dates. The 11:00 a.m. USD rate is used for cash settlement of swaps and swaptions.[228] The USD ISDAfix rate was set by a process that began at 11:00 am Eastern Time by capturing swap rates and spreads from U.S. based Swap Brokers.[229] ICAP Plc, responsible for compiling ISDAfix benchmark rates data during the relevant time period, would circulate to a panel of banks and financial institutions (collectively "banks") a set of reference points generated using the captured data and data reflecting executed trades and executable bids and offers at 11:00 am for US Treasury securities.[230] ICAP requested the banks to submit the midpoint of where it would offer and bid a swap to a dealer.[231] Banks could accept the reference rate provided at 11:02 a.m., submit a different value, or take no action. Thomson Reuters would then average the submissions resulting in the USD ISDAfix.[232]

2. *Allegations of Manipulation*

In *ISDAfix* examples of manipulation included manipulating the data used to determine the rate. The captured data could be manipulated by executing as many transactions as possible for the 11:00 data capture in a manner to move the data up or down depending

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[225] *See* Alaska Elec. Pension Fund v. Bank of Am. Corp., 175 F. Supp. 3d 44, 51 (S.D.N.Y. 2016); *See also* Goldman Sachs Group, Inc., CFTC No. 17-03, 2016 WL 7429257 at *1 (2016).
[226] *Alaska*, 175 F. Supp. 3d at 50.
[227] *Id.*
[228] *Goldman Sachs*, 2016 WL 7429257 at *1.
[229] *Id.* at *2; *Alaska*, 175 F. Supp. 3d at 51.
[230] *Alaska*, 175 F. Supp. 3d at 51; *Goldman Sachs*, 2016 WL 7429257, at *2.
[231] *Alaska*, 175 F. Supp. 3d at 51; *Goldman Sachs*, 2016 WL 7429257, at *2.
[232] *Alaska*, 175 F. Supp. 3d at 51; *Goldman Sachs*, 2016 WL 7429257, at *2.

on the direction sought.[233] This method of manipulation, also known as "banging the close" required banks to share information regarding their trading positions.[234] Additionally, false data would be provided or "rubber-stamping" data provided by ICAP rather than submitting data.[235]

3. *District Court's Decision in ISDAfix*

In *ISDAfix* plaintiffs directly transacted with some of the defendants involved in the conspiracy.[236] However, in addressing the efficient enforcer factors used in the Second Circuit, the court did not emphasize the direct/indirect factor. Rather, the court held:

> Defendants focus their argument on that factor, arguing that there is another class of antitrust plaintiffs that would be more "efficient enforcers"— [the second factor – "the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement."] namely, non-defendant banks that participated in the inter-dealer market. (citation omitted). But . . . the Court has no reason to believe that the non-defendant banks suffered any financial injury at all from Defendants' manipulation of that market, and therefore cannot conclude that those banks could serve as a more "efficient enforcers" than Plaintiffs. In any event, the other three factors all favor the conclusion that Plaintiffs are "efficient enforcers": Plaintiffs have alleged that they were directly harmed by Defendants' anticompetitive conduct by having to pay higher prices (or earning lower profits) from instruments tied to ISDAfix ["(1) the directness or indirectness of the asserted injury], there is nothing particularly speculative about the injury alleged [(3) the speculativeness of the alleged injury], and the damages at issue are tied to particular transactions and contracts, obviating the danger of duplicative recovery [(4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries].[237]

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[233] *Alaska*, 175 F. Supp. 3d at 51; *Goldman Sachs*, 2016 WL 7429257, at *2–3.
[234] *Alaska*, 175 F. Supp. 3d at 51; *Goldman Sachs*, 2016 WL 7429257, at *10–*11.
[235] *Alaska*, 175 F. Supp. 3d at 55; *Goldman Sachs*, 2016 WL 7429257, at *11–*12.
[236] *Alaska*, 175 F. Supp. 3d at 60–61.
[237] Alaska, 175 F. Supp. 3d at 60; *see also* Alaska Elec. Pension Fund v. Bank of Am. Corp., 306 F. Supp. 3d 610, 622–24 (S.D.N.Y. 2018) (where the court denied

Thus, the court in *ISDAfix* appears to be addressing a "most efficient enforcer" defense rather than an indirect purchaser defense. The court found insufficient evidence for the "most efficient enforcer" defense which is troubling as it does not exclude this defense. To date, only the Seventh Circuit has adopted such an approach. The court in *ISDAfix* does address efficient enforcer issues of duplicative recovery and complex apportionment, finding the risk of neither. This part of the opinion is important as the same logic that the damages at issue are tied to particular transactions is also applicable for the *LIBOR* and *FOREX* cases. However, the court also applies antitrust injury and general damage considerations, such as speculative damages without regard to duplicative recovery or complex apportionment. This may perpetuate the confusion of conflating antitrust injury and the efficient enforcer rule.

IV. CONCLUSION

The efficient enforcer rule in civil antitrust litigation is a standing requirement that denies standing for plaintiffs whose claims pose the probability of duplicative recovery or complex apportionment. Several factors have been articulated by the Supreme Court for consideration of the efficient enforcer rule. However, some of those factors have been conflated with another antitrust standing rule requiring an antitrust injury. This has led to confusion in the application of the efficient enforcer rule and the probability of false negatives in civil antitrust enforcement.

Courts need to focus on the application of the efficient enforcer factors as they apply to duplicative recovery and complex apportionment. These efficient enforcer issues are most likely a problem in pass-on cases in the typical vertical chain of distribution. The financial products benchmark cases do not involve a pass-on in a typical vertical chain of distribution. While these financial products benchmark cases do pose problems in calculating damages they do not pose a threat of duplicative recovery or complex apportionment. Accordingly, the efficient enforcer concerns are not present. Finally, courts should not neglect the important balancing factor in efficient enforcer cases; that those who violate the antitrust laws should not

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another motion to dismiss addressing the efficient enforcer issue as regards non-interdealer vanilla swaps); *see also In re* Interest Rate Swaps Antitrust Litig., 261 F. Supp. 3d 430, 490–95 (S.D.N.Y. 2017) (where the court found plaintiffs to be efficient enforcers relying, in part, on *Alaska*, 175 F. Supp. 3d at 44).

retain the fruits of their illegality.