

**Sherman Act Unilateral Conduct Committee E-Bulletin**  
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The Unilateral Conduct Committee's monthly E-Bulletin is intended to offer the antitrust community updates and information on the latest developments relating to monopolization law and policy. If you have any comments or suggestions on the E-Bulletin, please e-mail [Patricia Brink](#), [Daniel Streeter](#), and our new co-editors below.

**EDITORS' NOTE**

After three years as co-editor, [Tanya Dunne](#) is passing the torch to a number of new volunteers to assist [Patricia Brink](#) and [Daniel Streeter](#): [Henry Thaggert](#), [Matthew Bachrack](#), [Stephanie Hallouët](#), [Maria \(Maggie\) Dimoscato](#), and [Kara Gorycki](#). We welcome everyone to the team and thank our volunteers for assisting the UC committee in bringing summaries of recent UC cases and developments to the attention of our members.

**U.S. DECISIONS**

**CREDIT BUREAUS LOSE MOTION TO DISMISS ATTEMPTED MONPOLIZATION AND CONSPIRACY TO MONOPOLIZE CLAIMS RESULTING FROM JOINT VENTURE**

*Fair Isaac Corporation v. Equifax Inc.*, 2008 WL 623120 (D. Mass. Mar. 4, 2008). Defendants Equifax Inc., Equifax Information Services LLC, Experian Information Solutions Inc., Trans Union, LLC (collectively, the Credit Bureaus) market and distribute credit scores that quantify an individual consumer's financial creditworthiness. Credit scores are based on data reported to the Credit Bureaus by lenders (such as banks and credit card companies) regarding consumers' lending and repayment history. The Credit Bureaus are the only providers of such data in the United States. Credit scores are calculated using an algorithm taking into account the Credit Bureaus aggregated credit data on a given individual. While each Credit Bureau has used algorithms developed in-house, they have also used algorithms developed by third parties such as the plaintiffs. 2008 WL 623120 at \*1-2.

The plaintiffs, Fair Isaac Corporation and its subsidiary, myFICO Consumer Services, Inc. (collectively, Fair Isaac), developed the dominant credit score FICO® Classic and variations on this algorithm specific to each Credit Bureau's aggregated data set. Fair Isaac does not typically sell credit scores directly to lenders or other customers, as it does not have direct access to the Credit Bureaus' aggregated data sets. Rather, Fair Isaac licenses its algorithms to the Credit Bureaus, which, in turn, pay a royalty for each Fair Isaac credit score sold. The Credit Bureaus usually sell Fair Isaac scores as part of a bundle that includes the cost of the credit score, the aggregated data, and the processing fee. Pursuant to certain agreements with the Credit Bureaus, however, at times Fair Isaac sells bundles directly to lenders and consumers – effectively acting as a reseller of credit reports.

The Credit Bureaus formed a joint venture – VantageScore – to develop a competing credit-scoring algorithm. The Credit Bureaus allegedly sold VantageScore's credit scores at a cost significantly lower than Fair Isaac's credit scores. Fair Isaac alleged that the Credit Bureaus' agreement to enter into the joint venture had the "purpose and effect of extending the Credit Bureaus' collective market power in the aggregated credit data market into the credit scoring market." *Id.* at \*3. This alleged anticompetitive agreement was intended to eliminate competition and monopolize the credit scoring market. Plaintiffs further alleged that the joint venture would facilitate the exchange of competitively sensitive information and allow the Credit Bureaus to raise prices and decrease innovation without any offsetting pro-competitive benefits. *Id.*

The plaintiffs alleged, *inter alia*, that the defendants violated Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. The defendants filed a motion for partial judgment on the pleadings or

alternatively partial summary judgment on the antitrust claims. After conducting an oral hearing, the court denied the defendants' motion in its entirety. *Id.*

On the attempted monopolization claim, the court found that Fair Isaac had adequately pled that the Credit Bureaus had a dangerous probability of success of monopolizing the credit scoring market. Although the Credit Bureaus argued that Fair Isaac's claim must fail because Fair Isaac had failed to allege the defendants' market share in the credit scoring market, the court noted that market share was not the only test to determine whether a party had a dangerous probability of achieving monopoly power. Here, the Credit Bureaus controlled the aggregated credit data needed to calculate credit scores, and they also controlled the pricing of credit score sales. As such, the court held that these factors could create a dangerous probability that the Credit Bureaus could "install VantageScore as a monopoly in the credit scoring market if they agree to take anticompetitive measures such as manipulating the prices of credit scores and denying Fair Isaac access to aggregated credit data." *Id.* at \*8.

On the conspiracy to monopolize claim, the court held that Fair Isaac had stated a plausible claim under *Twombly*. As with its Section 1 claim, Fair Isaac alleged that the Credit Bureaus conspired to monopolize the credit scoring market by manipulating the prices of credit scores and denying Fair Isaac access to aggregated credit data. On the basis of these claims, the court also held that the complaint adequately alleged antitrust injury sufficient to survive a motion to dismiss. *Id.*

#### **ATTEMPTED MONOPOLIZATION COUNTERCLAIMS BASED ON PATENT FRAUD AND SHAM LITIGATION SUFFICIENTLY PLED UNDER TWOMBLY**

***Hear-Wear Technologies, LLC v. Oticon, Inc.*, 551 F. Supp. 2d 1272 (N.D.Okla. Mar. 6, 2008).** Plaintiff Hear-Wear Technologies, LLC sued defendants Oticon, Inc. (and others), manufacturers of hearing aid products, for willfully and deliberately infringing certain of Hear-Wear's hearing aid patents. In response, defendants filed certain counterclaims, two of which alleged attempted monopolization by Hear-Wear under Section 2 of the Sherman Act and the equivalent state law. Hear-Wear moved to dismiss Oticon's antitrust counterclaims on the grounds that under *Twombly* they were not supported by plausible allegations. The court disagreed and denied Hear-Wear's motion to dismiss.

Oticon counterclaimed that Hear-Wear was attempting to monopolize the markets by wrongfully enforcing two of its patents, which Oticon contends were obtained by fraud on the USPTO and by engaging in this sham litigation. Oticon defined the relevant market as all hearing aids sold with an electronic receiver intended for shallow or deep insertion including hearing aids combining behind-the-ear components with receiver-in-the-ear components (known as BTE/RITE hearing aids). Oticon also identified reasonable alternatives and discussed cross elasticity of demand. Oticon noted the market shares of the players, the high barriers to entry and claimed that if Hear-Wear was successful in this lawsuit, it "will achieve a monopoly of essentially 100% of the BTE/RITE market in the United States." *Id.* at 1275. Although Oticon did not explicitly identify the affected consumer base or list the differences between BTE/RITE hearing aids and other devices, the court found that "a lack of clarity and thoroughness [was] not necessary determinative" because inferences could be drawn from Oticon's definition of the relevant market. *Id.* at 1280-81. As a result, the court held that Oticon's antitrust counterclaims contained sufficient facts to state a facially plausible claim.

#### **FOREIGN RUBBER CHEMICAL PRODUCER RECEIVES LEAVE TO AMEND COMPLAINT ALLEGING CONSPIRACY AND ATTEMPTED MONOPOLIZATION BASED ON EXCLUSIONARY CONDUCT AND CUSTOMER THREATS**

***Korea Kumho Petrochemical v. Flexsys America LP*, 2008 WL 686834 (N.D.Cal. Mar. 11, 2008).** Plaintiff Korea Kumho Petrochemical Co. (Kumho) manufactures and sells chemicals, including 6PPD (a rubber chemical). In its second amended complaint, Kumho alleged that defendants Flexsys America L.P., Flexsys N.V., Akzo Nobel Chemical Int'l B.V., and Akzo Nobel Chemicals, Inc.

conspired to restrain trade in violation of Section 1 of the Sherman Act, conspired to monopolize and attempted to monopolize under Section 2, as well as violations of state law. Defendants filed a motion to dismiss the complaint. The court dismissed the antitrust allegations with leave for Kuhmo to amend its complaint, except for the claim of antitrust injury resulting from the defendants' alleged refusal to supply 4-ADPA. 2008 WL 686834, at \*10.

Regarding the period prior to October 2001, the court held that Kuhmo had failed to establish standing to assert antitrust injury. During that time, the 6PPD production facilities in South Korea had belonged to the Kuhmo-Monsanto (KMI) joint venture, and as such Kuhmo was not a competitor in the 6PPD market. Kuhmo asserted that it had standing nonetheless during that time because it suffered antitrust injury as a result of the defendants' prolonged bad faith negotiations with Kuhmo regarding the dissolution of the KMI joint venture. Kuhmo alleged these prolonged negotiations were for the sole purpose of delaying Kuhmo's entry into the 6PPD market in the United States, i.e., Kuhmo was a potential entrant that would have entered the market earlier but for the defendants' exclusionary conduct. Relying on *Andrx Pharmaceuticals, Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 806 (D.C.Cir. 2001), the court noted that for standing purposes, a potential competitor must demonstrate "its intention to enter the market and its preparedness to do so." As Kuhmo had not adequately alleged facts demonstrating its preparedness to enter the U.S. market before October 2001, the court held that Kuhmo had failed to satisfy the required antitrust pleading requirements, but granted Kuhmo leave to further amend its complaint. (Under *Andrx*, indicia of preparedness to enter include: (i) adequate background and experience in the field; (ii) sufficient financial capability; and (iii) taking actual and affirmative steps toward entry.) 2008 WL 686834, at \*3-4.

Regarding the period from October 2001 onwards (i.e., when Kuhmo owned the 6PPD production plant and was importing 6PPD into the United States), the defendants claimed that Kuhmo's allegations of antitrust injury based on the defendants' refusal to supply 4-ADPA to Kuhmo were too conclusory to be cognizable under the antitrust laws. (Although not addressed in the decision, 4-ADPA appears to be an input required to produce 6PPD.) Although Kuhmo alleged the defendants refused to supply Kuhmo with this input and also pressured others not to supply Kuhmo, Kuhmo nonetheless was able to source this input from a third party and was able to continue to produce and sell 6PPD. Accordingly, the court held that Kuhmo had not adequately alleged antitrust injury based on the defendants' supply restrictions. Having already identified this shortcoming to Kuhmo, the court dismissed this claim without leave to amend. *Id.* at \*5-6.

Kuhmo also alleged that the defendants threatened Kuhmo's customers by stating, among other things, that these customers should not do business with Kuhmo because it was sourcing from a third party. The defendants argued that these allegations failed to establish any antitrust claims because the communications: (i) were patent-related and protected under *Noerr-Pennington*; and (ii) had not been sufficiently alleged as part of a conspiracy in violation of Sections 1 and 2. In addition, defendants argued that Kuhmo had not adequately alleged attempted monopolization by showing Flexsys had a dangerous probability of achieving monopoly power. *Id.* at \*9.

On the first point, the court held that *Noerr-Pennington* immunity did not require the dismissal of Kuhmo's antitrust claims based on the defendants' communications with Kuhmo's customers as some of the alleged communications were not patent-related (and therefore were not covered by *Noerr-Pennington*). On the second point, the court held that the conspiracy counts relating to 2005 or later failed to meet the *Twombly* plausibility standard as the factual allegations of conspiracy in the complaint pre-dated 2002, whereas the threats to customers took place in 2005 or later. The court also held that Kuhmo had failed to sufficiently allege under *Twombly* that Flexsys had market dominance or a dangerous probability of achieving monopoly power. In its complaint, Kuhmo had provided factual allegations supporting the opposite conclusion (i.e., that "Flexsys' attempts to raise prices . . . failed because buyers sought out the lowest cost 4-ADPA and 6PPD regardless of source. Flexsys continued to face eroding prices and new competition from manufacturers based off-shore.") *Id.* at \*9. In holding that Kuhmo had failed to establish the dangerous probability element, the court also

noted that a drop in Kuhmo's sales was, by itself, not sufficient to establish a Sherman Act violation. *Id.*

As a side note, the court denied the defendants' claim that the FTAIA barred subject matter jurisdiction over Kuhmo's claims (assuming Kuhmo could adequately allege antitrust injury) as Kuhmo had alleged that the defendants specifically intended their actions to interfere with Kuhmo's ability to import 6PPD into the United States (i.e., there was a direct, substantial, and reasonably foreseeable effect on import commerce, and that effect would give rise to the plaintiff's injuries). The court also held that Kuhmo had failed to plead sufficient facts supporting its claims against the Akzo defendants.

### **CALIFORNIA COURT DISMISSES MONOPSONY CLAIMS AGAINST SUPPLIER OF TRUCK CONNECTION EQUIPMENT, ALLOWING WALKER PROCESS CLAIMS TO PROCEED**

***White Mule Company v. ATC Leasing Company LLC*, 540 F. Supp. 2d 869 (N.D. Ohio 2008).** Plaintiffs White Mule Company and its owners sued defendants ATC Leasing Company LLC and its affiliated corporations alleging violations of Section 2 of the Sherman Act and *Walker Process* claims in the markets for (i) delivery of new class six, seven, and eight trucks from manufacturers to customers in North America (i.e., truck delivery market); and (ii) design and manufacture of saddles, decking booms, and other connection devices used in the truck delivery market (i.e., connection devices market).

White Mule manufactures connecting devices such as saddles, decking booms, and parts for breaking units, and sells these to truck delivery companies. To compete in the truck delivery market, a truck delivery company must have connecting devices as it allows a lead vehicle to transport multiple trucks. ATC transports trucks across North America and controls at least 79% of the truck delivery market. As a result, ATC is the primary purchaser of White Mule's connection devices. ATC only purchased these products from White Mule as alternative suppliers had not matched up with White Mule's products in terms of quality or price.

White Mule alleged that ATC, in an effort to monopolize the truck delivery market, obtained invalid patents on connection devices and used those patents illegally to exercise and maintain monopsony and monopoly power in the connection devices market. According to White Mule, ATC used the fraudulently obtained connection device patents to drive truck delivery competitors and potential competitors from the market by controlling the supply of these required devices to its competitors. ATC allegedly told White Mule's customers (i.e., ATC's competitors and potential competitors in the truck delivery market) that ATC had obtained a TRO enjoining White Mule from manufacturing and selling these connection devices and that ATC would ultimately prevail on the merits. ATC also sent White Mule a cease and desist letter, and pressured White Mule to enter into an exclusive contract with ATC to supply only ATC with connection devices. ATC threatened to sue White Mule for patent infringement and stated that it would stop purchasing connection devices from White Mule unless White Mule agreed to the exclusive contract. White Mule refused and filed suit instead. ATC then moved to dismiss the antitrust claims, among others. The court granted ATC's motion to dismiss regarding the antitrust claims other than those alleging *Walker Process* attempted monopolization of the connection devices market.

**Monopolization in the truck delivery market.** White Mule alleged a *Walker Process* claim for monopolization in the truck delivery market and that ATC leveraged its monopsony power in the connecting devices market to maintain a monopoly in the truck delivery market. The court found that White Mule's allegations described a *Walker Process* claim in the connection devices market to which the patents applied, but not the downstream truck delivery market. To do so, "ATC would have had to have threatened patent enforcement against its competitors or its competitors' customers." *Id.* at 887. The court also determined that White Mule was not a proper plaintiff as none of White Mule's injuries directly related to attempted monopolization of the truck delivery market and there

were more direct victims, such as ATC's competitors. Without antitrust injury, White Mule had no standing to bring these monopolization claims. The court applied the same analysis when denying White Mule's leveraging claim.

**Monopsony in the connection devices market.** White Mule alleged that ATC possessed monopsony power as the primary buyer in the connection devices market and that ATC used this power to harm upstream market participants. The court noted that, in contrast to a monopoly claim, the direct victims of monopsony are not competitors and customers, but competitors and suppliers. *Id.* at 888. The court found that, although the existence of monopsony power may be supported by the facts of the case, White Mule must also have shown that it was injured by ATC's alleged violation of antitrust law. The court noted that White Mule might generally have shown that ATC abused its monopsony power by "1) under-purchasing inputs, leading to a decrease in demand and a reduction in the amount a monopsonist has to pay for the input or 2) over-purchasing inputs, which raises rivals costs or causes 'buyer-side competitors to exit the market or permanently shrink their capacity.'" *Id.* at 888-89 (citing *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L.J. 669, 669 (2005)). The court went on to note that, a monopsonist may illegally affect things other than price, such as by coercing a supplier not to purchase from a competitor. The court noted however, that in non-price cases such as this one, the alleged victims are usually competitors who have lost access to their suppliers. Here, White Mule alleges it was injured through lost sales to ATC as a result of refusing to give in to demands that White Mule sell only to ATC and the loss of proceeds from an expected sale of White Mule. The court determined that these are not antitrust injuries, but rather "would be the results of any hard bargaining effort on ATC's part to get an exclusive contract from the predominant supplier of connecting devices." *Id.* at 889. The court also rejected White Mule's *Walker Process* allegations in regard to ATC's alleged monopsony, reasoning that efforts to enforce patents "simply do not correlate with monopsony violations of Sherman Act § 2." *Id.* at 890.

**Monopolization in the connection devices market.** White Mule also asserted monopolization claims in regard to the connection devices market, stating claims for attempted monopolization, a *Walker Process* claim and a claim that ATC leveraged its monopsony power to obtain a monopoly. The court determined that White Mule failed to allege facts sufficient to support the argument that ATC attempted to monopolize this market by coercing White Mule to sell only to ATC because, as alleged, White Mule and ATC do not actually compete in the market for connection devices. The court did, however, uphold White Mule's *Walker Process* claim, finding that White Mule properly alleged that ATC used fraudulently obtained patents to "exclude or control manufacturers of the products" in the connection devices market. The court reasoned that, in this situation, White Mule had standing to assert the claim as a customer (and not a competitor) of ATC because White Mule alleges that ATC is abusing fraudulent patents in a market in which both ATC and White Mule participate. *Id.* at 892.

## **U.S. ANTITRUST ENFORCEMENT AGENCIES**

On March 31, William E. Kovacic assumed the role of Chairman of the Federal Trade Commission. Kovacic succeeds prior Chairman Deborah Platt Majoras. Additional information is available [here](#).

Additional U.S. updates will appear in the next e-bulletin.

## **EUROPEAN DECISIONS**

### **EC ADVOCATE GENERAL RULES THAT NON-PROFIT SPORT ASSOCIATIONS ENGAGING IN BOTH PUBLIC AND ECONOMIC ROLES ARE SUBJECT TO ARTICLE 82**

***Non-Profit Sport Associations.*** On March 6, Advocate General Kokott ruled that non-profit sport associations are subject to Article 82 (abuse of a dominant position). Specifically, associations that

engage in public activities (such as the public body's approval process for sporting events) as well as economic activities (by organizing events that lead to advertising, insurance, and sponsor agreements) are undertakings within the scope of Article 82.

At issue was the dual role played by the Greek automobile and touring club (ELPA) in connection with motor sport events held in Greece. ELPA is responsible for organizing motor sport competitions in Greece. ELPA also participates in the public body's authorization of motorcycling events because under Greek law, authorization for such events cannot be obtained without ELPA's consent.

In 2000, MOTOE, an independent Greek motorcycling organization, attempted to organize a number of motorcycling events in Greece but was unable to obtain authorization to conduct these events as ELPA would not provide the required consent.

Because of this dual role (whereby ELPA not only organizes such events but also can effectively veto competitors from organizing similar events without any recourse), Advocate General Kokott found the case to fall within Article 82. However, Advocate General Kokott delegated the decision to the national courts on whether ELPA held a dominant position in the market and whether it abused that position in violation of Article 82 (see [C-49/07](#)).

## **EUROPEAN COURT OF FIRST INSTANCE UPHOLDS COMMISSION FINE OF DEUTSCHE TELEKOM FOR "MARGIN SQUEEZE"**

On April 10, the European Court of First Instance upheld the European Commission's 2003 fine of €12.6 million on Deutsche Telekom AG (DT). The fine was issued against DT for an abuse of its dominant position in the German telecommunications market, specifically, for charging competitors unfair prices for local access to DT's fixed telecommunications network. The Court agreed with the Commission that the margin-squeeze test involved comparing the wholesale prices charged by DT to DT's own costs of providing retail services. The Court rejected the argument that the competitors' charges costs had to be taken into account: "*the abusive nature of a dominant undertaking's pricing practices is determined in principle on the basis of its own situation, and therefore on the basis of its own charges and costs, rather than on the basis of the situation of actual or potential competitors.*" (para. 188). In addition, the Court considered that the fact that the German telecommunications regulator had reviewed and approved DT's wholesale prices did not relieve DT from any potential liability under Article 82. The CFI's analysis of the facts instead showed that even under regulatory supervision, DT retained sufficient scope to amend its tariffs so as to avoid a margin squeeze. More fundamentally, in the CFI's opinion, even if the German regulator had considered abuse of dominance issues in its assessment (a point that was debated), this did not preclude the Commission from investigating the charges and finding an infringement on competition grounds because "(...) *the Commission cannot be bound by a decision taken by a national body pursuant to Article 82 EC* (para. 120)." (see <http://curia.europa.eu/en/actu/communiqués/cp08/aff/cp080026en.pdf>) Similar issues are pending in front of the CFI in the Telefónica case.

## **EUROPEAN ANTITRUST ENFORCEMENT AGENCIES**

### **EUROPEAN COMMISSION CALLS FOR COMPETITIVE IMPROVEMENT IN GREEK ELECTRICITY SECTOR**

**Electricity Sector.** On March 5, the European Commission released its decision that found Greek measures within the electricity sector as abuse of a dominant position in violation of Article 82. By permitting Public Power Corporation (PPC), the state-owned electricity giant, somewhat exclusive access to lignite, the State of Greece has assured that PPC retains their dominant position. This is because lignite deposits, which are almost entirely owned by the state, are by far the cheapest energy source in the Greek electricity market. PPC has obtained 91% of the current exploitation rights, making it virtually impossible for others to compete within the sector. The Commission has called for

Greece to propose and adopt remedies to provide PPC's competitors with access to lignite (see [IP/08/386](#)).

## **EUROPEAN COMMISSION RELEASES POLICY PAPER ON COMPENSATION FOR VICTIMS OF COMPETITION LAW BREACHES**

On April 3, the European Commission published a White Paper outlining proposals to improve rights to compensation for businesses and consumers who have been victims of antitrust infringements. A major emphasis of the paper is providing full and fair compensation while excluding multiple damages, thus protecting against what European Commissioner Neelie Kroes called the "excesses of the US system." The paper addresses among other topics (i) the introduction of mechanisms for collective redress (the paper however excludes "opt-out" systems where claimants would not be identified); (ii) court-ordered disclosure to enable victims to prove their case for damages; (iii) the possibility for plaintiffs to rely on infringement decisions issued by the Commission and national competition authorities, at least when the latter are final; (iv) the availability of a passing-on defense for infringers; and (v) the protection from disclosure of certain materials submitted in a leniency application. Parties have been invited to comment on the paper until July 15, 2008. The Commission will review the comments and contemplate recommendations. (see [IP/08/515](#))

## **BELGIAN COMPETITION COUNCIL REVIEWS INVESTIGATION REPORT OF BELGACOM**

On April 22, the College of Competition Prosecutors submitted a report to the Belgian Competition Council on the alleged abuse of a dominant position by Belgacom and Belgacom Mobile. Following a complaint by BASE NV about alleged exclusionary practices of Belgacom Mobile NV, the College of Competition Prosecutors, with the help of the Competition Service of Federal Public Service Economy, conducted an inspection of Belgacom Mobile in 2006. The report concludes that Belgacom Mobile charged other mobile phone operators excessive prices for services, excluded competitors by giving loyalty rebates to its professional customers, and created a 'price squeeze'. The Competition Council will now issue a decision.

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Back issues of the E-Bulletin are available [here](#).

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