

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 [Jay Modrall](#), [Patricia Brink](#), [Tanya Dunne](#), [Adam Nyhan](#), [Tracey Topper Gonzalez](#), [Mitchell Stoltz](#), and [Daniel Streeter](#).

EDITORS' NOTE

This is the last issue of the monthly e-bulletin to be edited by Jay Modrall and Adam Nyhan. The editors would like to thank Jay and Adam for their numerous years of service to the e-bulletin. Patty Brink will take over Jay Modrall's responsibilities for the e-bulletin. Her contact details are provided below.

U.S. DECISIONS

NINTH CIRCUIT, REJECTING *LEPAGE'S*, HOLDS THAT BELOW-COST PRICING IS REQUIRED IN SECTION TWO BUNDLING CASES

Cascade Health Solutions v. PeaceHealth, 2007 WL 2473229 (9th Cir. Sept. 4, 2007). The plaintiff, McKenzie-Willamette Hospital, now Cascade Health Solutions (McKenzie), and the defendant, PeaceHealth, are the only two hospitals in Lane County, Oregon. 2007 WL 2473229, at *1. With three hospitals in the county, PeaceHealth had a 90% share of the market for tertiary neonatal services, 93% of the market for tertiary cardiovascular services, and 75% of the market for primary and secondary care services. McKenzie, with one hospital, had the remaining shares. The parties agreed that the relevant market was the market for primary and secondary care services in Lane County. *Id.*

PeaceHealth offered insurers "bundled" or packaged discounts of 35 to 40 percent on tertiary care services in return for making PeaceHealth their exclusive provider for all services – primary, secondary and tertiary. *Id.* at *2. McKenzie alleged that such bundling, in light of PeaceHealth's dominant positions in the three sectors, was actual and attempted monopolization under Section 2 of the Sherman Act. *Id.* at *3. McKenzie had also alleged that PeaceHealth tied its primary and secondary services to its tertiary services in violation of Section 1 of the Sherman Act. *Id.* at *21.

The district court granted summary judgment for PeaceHealth on the tying claim. The jury found for PeaceHealth on the claims of monopolization, conspiracy to monopolize and exclusive dealing. It found for McKenzie on the attempted monopolization, price discrimination and tortious interference claims.

On PeaceHealth's appeal, the court first considered whether PeaceHealth's use of bundled contracts satisfied the anticompetitive conduct element of attempted monopolization. *Id.* at *3. The jury had found liability on that claim following a jury instruction that followed *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003). *Id.* at *6. *LePage's* held, and the lower court here had instructed the jury, that that a defendant with monopoly power could engage in exclusionary conduct by offering a bundled discount that its competitor could not match; the defendant need not price below costs to be liable. *Id.*

The Ninth Circuit, after reviewing examples of bundled discounts in the national economy and describing benefits that they afford consumers, rejected *LePage's*. It held that the exclusionary conduct element of a Section 2 claim based on bundled discounts requires that the defendant price

below an appropriate measure of its costs. *Id.* at *11. Specifically, the court adopted a so-called “discount attribution” standard. *Id.* at *14. Under that standard, one attributes the entire discount on all products in the defendant’s bundle to the single product for which exclusion is claimed. If the resulting price is less than the defendant’s incremental cost to produce that product, liability may be found. *Id.* This approach, the court explained, makes the defendant’s bundled discounts legal unless the discounts could exclude a hypothetical equally efficient producer of the competitive product. The court followed Ninth Circuit precedent in using average variable cost as the appropriate cost measure for bundling claims under Section 2. *Id.* at *17 (citing *William Inglis & Sons Baking Co. v. ITT Cont’l Baking Co.*, 668 F.2d 1014, 1033 (9th Cir.1981)). As the jury had followed *LePage’s* rather than the approach described here, the Ninth Circuit reversed the verdict on the attempted monopolization claim and remanded. *Id.* at *25.

McKenzie cross-appealed the summary judgment for PeaceHealth on the tying claim. The Ninth Circuit concluded that the evidence showed genuine factual disputes about whether PeaceHealth forced insurers to accept its primary and secondary services as a condition to receiving its tertiary services. *Id.* at *23. The court therefore vacated the summary judgment and remanded the tying claim. *Id.*

THIRD CIRCUIT HOLDS THAT PATENT HOLDER’S DECEPTION CONSTITUTES ACTIONABLE ANTICOMPETITIVE CONDUCT

Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3d Cir. Sept. 4, 2007). Qualcomm Inc. (“Qualcomm”) manufactures “chipsets” used in the operation of cellular telephones. Chipsets are the core electronics that allow a cellular telephone to transmit and receive information from base stations to and from telephone and computer networks. *Id.* at 303. Because multiple vendors manufacture the chipsets, base stations, and networks, industry-wide standards are necessary to ensure their interoperability. *Id.* Two technology paths, or families of standards, are in use today: CDMA, which stands for code division multiple access, and GSM, which stands for global system for mobility. The standard used in GSM-path networks is known as Universal Mobile Telecommunications System (“UMTS”). *Id.*

Broadcom Corporation (“Broadcom”) claims to have been preparing to enter the UMTS chipset market for several years prior to the filing of its complaint on July 1, 2005. In its complaint, Broadcom alleged that Qualcomm, by its intentional deception of private standards-determining organizations (“SDOs”) and its predatory acquisition of a potential rival, monopolized certain markets for cellular telephone technology and components in violation of section 2 of the Sherman Act. *Id.* at 304. Qualcomm moved to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. *Id.* at 305. Reasoning that Qualcomm enjoyed a legal monopoly over its patented technology, which entitled it to exclude competition and set the terms by which its technology was distributed, the district court granted Qualcomm’s motion. *Id.* at 305-06.

On appeal, Broadcom raised three issues: (1) whether deception of an SDO gives rise to antitrust liability under the circumstances alleged; (2) whether the Complaint adequately pled claims of attempted monopolization and monopoly maintenance; and (3) whether the claim relating to Qualcomm’s acquisition of a competitor, Flarion, was properly dismissed. *Id.* at 306.

The Third Circuit began its analysis with an extensive review of the elements of a monopolization claim under § 2 and of various court decisions concerning deceptive conduct in the standard-setting process, including the landmark opinion *In the Matter of Rambus, Inc.*, 2006-2 Trade Cases P 75364, 2006 WL 2330117 (Aug. 2, 2006 F.T.C.). There, the F.T.C., finding that Rambus’s deception of an

SDO had “grave implications for competition,” held for the first time that deceptive conduct constituted “exclusionary conduct” under § 2 of the Sherman Act.

Against this backdrop, the court determined that “the authorities we have cited in our lengthy discussion that has preceded this point . . . decidedly favor a finding that Broadcom’s allegations, if accepted as true, describe actionable anticompetitive conduct.” *Id.* at 313. The court stated: “We hold that (1) in a consensus-oriented private standard-setting environment, (2) a patent holder’s intentionally false promise to license essential proprietary technology on FRAND [fair, reasonable, and non-discriminatory] terms, (3) coupled with an SDO’s reliance on that promise when including the technology in a standard, and (4) the patent holder’s subsequent breach of that promise, is actionable anticompetitive conduct.” *Id.* at 314.

Next, the Third Circuit addressed Broadcom’s claim for monopolization. Broadcom alleged that Qualcomm possessed monopoly power in the market for Qualcomm’s proprietary “WCDMA” technology, a technology essential to the implementation of the UMTS standard. The court found that the complaint adequately alleged that Qualcomm possessed monopoly power in that relevant market, since Qualcomm’s proprietary technology was not interchangeable with or substitutable for other technologies. *Id.* at 315. It also found that the complaint adequately alleged that Qualcomm obtained and maintained its market power willfully, not as a consequence of a superior product, business acumen, or historic accident. *Id.* The court stated, “Having now held that a firm’s deceptive FRAND commitment to an SDO may constitute actionable anticompetitive conduct, we may conclude quickly and easily that [Broadcom] states a claim for monopolization under § 2 of the Sherman Act.” *Id.*

The court next reviewed the district court’s dismissal of Broadcom’s attempted monopolization claim. First, the court found that Broadcom described “numerous specific [anticompetitive] practices,” such as Qualcomm charging double royalties to cell phone manufacturers who use non-Qualcomm UMTS chipsets and discouraging price competition by demanding sensitive sales and pricing information from its UMTS chipset licensees, even when the licensees were competing directly with Qualcomm. *Id.* at 318. The court found these allegations to be “sufficiently specific” to satisfy the first element of an attempted monopolization claim. *Id.* Next, the court found that the complaint satisfied the element of specific intent, since several of the anticompetitive practices listed in the complaint allegedly lacked a legitimate business justification. *Id.* Finally, the court addressed whether the complaint alleged sufficient facts as to the dangerous probability of Qualcomm obtaining monopoly power in the UMTS chipset market. The court noted that the complaint alleged 1) Qualcomm’s licensing practices in considerable detail and described their anticompetitive effects; 2) that the market was experiencing rapid growth; and 3) that Qualcomm was extending its anticompetitive licensing practices into this emerging market by signing deals, including with three of the leading UMTS cell phone manufacturers and six of the top seven Chinese manufacturers. *Id.* at 319. “Because it is by no means ‘clear on the face of the complaint that the ‘dangerous probability’ standard cannot be met as a matter of law,” we conclude that the District Court erred in dismissing [Broadcom’s attempted monopolization claim].” *Id.* (internal citation omitted).

Finally, the court turned to Broadcom’s claim that Qualcomm maintained a monopoly in the markets for third-generation CDMA technology and chipsets. Qualcomm had argued in the district court that Broadcom lacked standing to raise the claim because it failed to allege that it participated in those markets, and Broadcom responded only on that ground. *Id.* at 320. The district court, however, dismissed the claim on the merits without addressing the standing issue. *Id.* Both parties dispute the court’s decision and resurrected their positions on standing. *Id.*

Applying a five-factor balancing test to the standing issue, the Third Circuit found that Broadcom did not allege that Qualcomm sells goods in the same relevant market as Qualcomm – and indeed conceded that it does not. Thus, “we conclude that Broadcom’s alleged injury is not ‘inextricably intertwined’ with Qualcomm’s alleged anticompetitive conduct, and that Broadcom lacks standing to assert [its monopoly maintenance claim].” *Id.* at 321.

SECOND CIRCUIT AFFIRMS DISMISSAL OF ELEVATOR MAINTENANCE SERVICES CASE

In re Elevator Antitrust Litigation, 2007 WL 2471805 (2d Cir. Sep. 4, 2007). The plaintiffs are a class of purchasers of elevators or elevator maintenance and repair services from the defendants. The Defendants, Otis Elevator Company, Schindler Elevator Corporation, Kone, Inc., and Thyssenkrupp Elevator Corporation, sell elevators. The plaintiffs sued the defendants for violations of Sections 1 and 2 of the Sherman Act. 2007 WL 2471805, at *1. Under Section 1, the plaintiffs claimed that the defendants had conspired to fix prices and drive independent repair companies out of business. Under Section 2, the plaintiffs claimed that each defendant had employed “exclusionary conduct” to monopolize or attempt to monopolize the maintenance market for its own elevators. *Id.* at *4. The District Court for the Southern District of New York dismissed all claims, and the plaintiffs appealed. The Court of Appeals affirmed the dismissal of all claims.

In support of their Section 2 claims, the plaintiffs alleged that the defendants had designed their elevators to prevent servicing by third parties, refused to sell parts, tools, software, and diagrams to independent repair companies, and obstructed those companies’ efforts to obtain parts. *Id.* The court, citing *Verizon Communications v. Trinko*, 540 U.S. 398 (2004), held that the defendants’ refusal to deal with competitors did not raise a claim under Section 2. The court held that the one exception to this principle articulated under *Trinko* is when the defendant terminates a prior course of dealing with a competitor. The court held that the plaintiffs had not alleged a termination.

The plaintiffs argued that *Trinko* applies only to regulated industries, and that the standard for pleading an illegal refusal to deal is lower in non-regulated industries. The court held that while *Trinko* involved a regulated telephone utility, that fact was “not essential,” and furthermore that two other Supreme Court cases, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) and *Eastman Kodak Co. V. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992), reached the same conclusion but involved non-regulated industries. *Id.* at *5. Therefore, the court held that the plaintiffs had failed to state a Section 2 claim and affirmed the dismissal of that claim along with the plaintiffs’ Section 1 claims.

NINTH CIRCUIT FINDS ANAHEIM STILL VIABLE AFTER TRINKO; APPLIES BOTH TO PRICE-SQUEEZING CLAIM

LinkLine Commc’ns, Inc. v. SBC California, Inc., 2007 WL 2597258 (9th Cir. Sept. 11, 2007). Plaintiffs linkLine Communications, Inc.; In-Reach Internet LLC; Om Networks; and Nitelog, Inc. (collectively, “linkLine”) are internet service providers (“ISPs”) who sell DSL access to the internet to retail customers. LinkLine leases the infrastructure and facilities for transmitting data between the internet and consumers from defendants SBC California, Inc.; Pacific Bell Internet Services; and SBC Advanced Solutions, Inc. (collectively, the “SBC Entities”).

LinkLine filed its original complaint in 2003, alleging that the SBC Entities monopolized and attempted to monopolize the regional DSL market in violation of the Sherman Act. *Id.* at *1. Reading linkLine’s complaint as alleging refusal to deal, denial of access to an essential facility, and

price squeezing, the district court, upon the SBC Entities' motion for judgment on the pleadings, dismissed the first two as barred by the Supreme Court's decision in *Verizon Comm'cns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), which held that businesses, including monopolists, are generally free to decide with whom they will deal, and are not required to share assets or "essential facilities" with competitors. As to the price squeezing claim, the court ordered linkLine to file an amended complaint "that details beyond the normal requirements of Rule 8 specific facts supporting Plaintiffs' price squeeze claim." *Id.* at *2. In its amended complaint, linkLine argued that the SBC Entities intentionally charged independent ISPs wholesale prices for DSL services that were too high in relation to the prices they were charging for retail DSL services. *Id.* LinkLine claimed that "[g]iven the price margin relationship between retail and wholesale prices, defendants are clearly attempting to compensate for deliberately sacrificing profits on the retail end of their operations (with offsetting margins on the wholesale side) in order to stifle, impede and exclude competition from independent ISPs such as plaintiffs that are both wholesale customers and retail rivals." *Id.* at *3.

After the district court denied the SBC Entities' motion to dismiss, it certified the order for interlocutory appeal. *Id.* at *3. The Ninth Circuit began its analysis by reviewing its decision in *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1371 (1992), in which it held that price squeezing claims under § 2 are viable against monopolists in regulated industries. *Id.* at *4. It then discussed the *Trinko* decision and whether *Anaheim* remained viable after *Trinko*. The court stated, "[R]econsideration of *Anaheim* is not required because the reasoning and theory of *Anaheim* is not 'clearly irreconcilable with the reasoning or theory' of *Trinko*. . . . First, *Trinko* did not involve a price squeezing theory. . . . Second, *Anaheim* did not embrace an unlimited view of § 2 price squeeze liability in regulated industries." *Id.* at *6.

Applying both *Anaheim* and *Trinko* to the instant case, the court affirmed the district court's denial of judgment on the pleadings, explaining that, at the wholesale level, there are "a series of regulatory mechanisms and regulatory agencies" to which the SBC Entities were subject if they wished to offer DSL internet access, including a prohibition against requiring competitive ISPs to purchase "unnecessarily expensive" methods of interconnection with the network in question. *Id.* at *7. Noting that the regulations apply only to the wholesale prices the SBC Entities charged linkLine, and that "[a]ny restrictions on pricing at the retail level derive primarily from the antitrust laws," the court stated that "since linkLine could prove facts, consistent with its complaint, that involve only unregulated behavior at the retail level, its action or lawsuit survives a motion for judgment on the pleadings." *Id.*

FIFTH CIRCUIT DISMISSES MONOPOLIZATION CLAIMS BROUGHT BY FORMER DISTRIBUTORS OF HOUSTON CHRONICLE

Norris v. The Hearst Trust, 500 F.3d 454, 2007 WL 2702941 (5th Cir. Sept. 18, 2007). The plaintiffs are former distributors of the Houston Chronicle. 500 F.3d at 457. The plaintiffs allege that the defendants, the Hearst Trust, the Hearst Corporation and Hearst Newspapers Partnership, L.P., (collectively, Hearst), as the owners of the only daily newspaper in the area, have a monopoly in the market for daily newspapers in Houston. The plaintiff distributors further allege that Hearst tried to coerce them into producing fraudulent Houston Chronicle circulation reports as part of a scheme to increase Hearst's advertising sales and revenue. *Id.* The distributors claim that Hearst wrongfully cancelled their distributor contracts when they refused to participate in the scheme in violation, *inter alia*, of Sections 1 and 2 of the Sherman Act. Hearst moved to dismiss the antitrust claims, arguing that the distributors lacked standing because they failed to allege an antitrust injury. *Id.*

The Fifth Circuit noted that the only users or consumers of the product at issue – the Houston Chronicle – are the paper's subscribers and its advertisers. *Id.* The Fifth Circuit also noted that the

distributors do not allege harm to the readers or advertisers. Rather, the distributors alleged that they were harmed when they were terminated as distributors due to their refusal to participate in the alleged scheme to inflate circulation numbers.

The Fifth Circuit stated that, to show standing, the distributors must allege an injury that the antitrust laws were meant to prevent and that which flows from the allegedly unlawful act. *Id.* at 465. Although, the Fifth Circuit reasoned that Hearst's alleged scheme to inflate circulation numbers would tend to cause harm to the paper's readers, its advertisers, or to other media selling advertising in competition with the paper, the distributors were not consumers, advertisers, or competitors of the Houston Chronicle. As a result, the Fifth Circuit concluded that the distributors did not have standing to assert antitrust claims. *Id.* at 466.

The Fifth Circuit also rejected the argument that the distributors suffered an antitrust injury because they were terminated due to their refusal to participate in antitrust violations. *Id.* The distributors relied on the case of *Blue Shield of Virginia v. McCready*, 102 S.Ct. 2540 (1982), in which the Supreme Court found that a patient of a psychologist had standing to challenge Blue Shield's policy of only paying for its members to receive care from psychiatrists. The Fifth Circuit distinguished the case, reasoning that the plaintiff in *McCready*, unlike the distributors here, was actually a consumer in the market at issue and thus "'within that area of the economy...endangered by [that] breakdown of competitive conditions.'" *Id.* at 466-67.

The Fifth Circuit also stated that antitrust standing could not be achieved by the bare allegation, untied to anything else, that Hearst had integrated vertically into the distribution of the Houston Chronicle and had become a competitor of its distributors. *Id.* at 468. The Fifth Circuit stated that the distributors did not allege that this alleged situation had anything to do with their termination, nor do the distributors allege that their termination had an adverse impact on the paper's readers, advertisers, or competitors. *Id.* The court stated that, as alleged, Hearst has a monopoly over the relevant market. For Hearst to terminate a distributor and itself take over the distribution of the paper is not in these circumstances a separate antitrust violation that the terminated distributors have standing to assert. *Id.*

Based on the analysis above, the Fifth Circuit granted Hearst's motion to dismiss.

NEW HAMPSHIRE COURT FINDS RECORD EVIDENCE OF SHERMAN ACT VIOLATIONS LACKING

***Hypertherm, Inc. v. American Torch Tip Co.*, 2007 WL 2695323 (D.N.H. Sept. 11, 2007).** Plaintiff Hypertherm designs and manufactures plasma arc cutting systems and replacement parts that are used for cutting carbon steel and other metals. Defendant American Torch Tip Co. ("ATTC") supplies replacement parts for metal cutting systems, including plasma systems manufactured by Hypertherm. Thus, Hypertherm and ATTC compete in the business of replacement parts for Hypertherm's systems. Hypertherm brought a patent infringement claim against ATTC, and ATTC responded by filing a counterclaim. ATTC amended its counterclaim and Hypertherm moved to dismiss the counterclaim or, in the alternative, for summary judgment. ATTC claimed, *inter alia*, that Hypertherm engaged in illegal tying, monopoly leveraging, monopolization, and attempted monopolization in violation of the Sherman Act. *Id.* at *2.

ATTC claimed that Hypertherm engaged in illegal tying by threatening purchasers of their systems that, if they did not use Hypertherm replacement parts, their warranties on the cutting systems would be void. *Id.* at *5. The court found that although ATTC did offer some evidence that Hypertherm system owners heeded Hypertherm's threats, that evidence "fails to show that those customers were not free to choose to forego Hypertherm's warranty, included with the sale of the cutting system, and buy ATTC or other replacement parts." *Id.* at *6. Thus, the court found that ATTC failed to show a

material issue of fact as to whether Hypertherm's threats constituted an illegal tying arrangement, *id.*, and granted Hypertherm's motion for summary judgment as to the illegal tying claim. *Id.* at *8.

Next, ATTC claimed that Hypertherm engaged in monopoly leveraging, monopolization, and attempted monopolization, alleging that Hypertherm "controls 80% of the market for high end plasma cutting systems and 75-80% of the replacement parts market." *Id.* at *6. Hypertherm responded that ATTC improperly defined the relevant market and that ATTC lacked proof of the alleged 80% market share for high end plasma cutting systems. *Id.* The court denied Hypertherm's motion for summary judgment, stating, "The record is not sufficiently developed to permit a determination on summary judgment as to whether the relevant market is limited to high end cutting systems, whether it is global or limited to the United States, and whether Hypertherm's share of the relevant market is monopolistic." *Id.* at *7.

PENNSYLVANIA COURT GRANTS SUMMARY JUDGMENT TO UTILITIES ON MUNICIPALITIES' CLAIMS

***Borough of Lansdale v. PP&L, Inc.*, 2007 WL 2597559, 2007-2 Trade Cas. ¶ 75,868 (E.D. Pa. Sep. 4, 2007).** The plaintiffs are fourteen Pennsylvania municipalities that sell power to their residents. The defendants are four commonly owned utilities that sell power on both the retail and wholesale markets. 2007 WL 2597559, *1. The plaintiffs sued the defendants under Section 2 of the Sherman Act, alleging that the defendants had monopolized the market for wholesale power in the plaintiff boroughs, then created a "price squeeze" by charging the plaintiffs a high price for wholesale power while selling power to the borough residents at a low retail price. *Id.* The defendants moved for summary judgment. In a previous opinion, the court denied summary judgment on the basis of the "filed rate doctrine" but allowed the parties to raise additional arguments in new briefs. *Id.* After reviewing the merits of the defendants' summary judgment claims, the court held that the plaintiffs had not established that a price squeeze existed, that the defendants had monopoly power, or that the defendants had the requisite intent to create a price squeeze, and the court granted summary judgment to the defendants on all claims. *Id.* at *2-15.

The court defined a price squeeze as the situation where the defendant supplies the plaintiff at the wholesale level and competes with the plaintiff at the retail level, and the defendants set wholesale prices such that the plaintiffs cannot compete at the retail level. To violate Section 2, the court held, the defendant must intend to create a price squeeze. *Id.* at *3. The court reviewed the evidence presented by the plaintiffs and concluded that it was too anecdotal to allow a jury to find that a price squeeze occurred. *Id.* at *4. The plaintiffs had produced wholesale prices only for a single week, and only for three of the fourteen plaintiff boroughs. The court also held that even if the evidence of wholesale prices were sufficient, the plaintiffs would have had to provide evidence of their operating costs for the court to determine whether their profits would be too small or nonexistent under the alleged squeeze. *Id.* at *5.

With regard to monopoly power, the court held that the plaintiffs had not shown that the defendants had monopoly power in the wholesale market within the plaintiff boroughs. *Id.* at *8-9. The plaintiffs' evidence of market power in the "daily capacity market" for power was insufficient because the defendants could not explain how market power in that market created market power in the wholesale market. *Id.* Finally, with regard to intent, the court held that the price squeeze itself was not evidence of predatory intent. *Id.* at *13. The court also held that the plaintiffs had not shown that the timing of the defendants' price changes were evidence of predatory intent. The defendants' rates for the wholesale market were set two years before those for the retail market, and the court held this was too far apart to have been part of a deliberate plan to squeeze the plaintiffs. *Id.* Finally, the

court held that because the plaintiffs had not raised a refusal to deal claim in their complaint, the court would not consider the defendants' refusal to enter into a new wholesale contract with the plaintiffs as evidence of predatory intent. *Id.* at *15.

NEW YORK COURT DENIES PRINTER INK MANUFACTURER'S MOTION TO DISMISS COUNTERCLAIMS

Xerox Corp. v. Media Sciences Int'l, Inc., 2007 WL 2685063 (S.D.N.Y. Sep. 14, 2007). The plaintiff, Xerox Corporation, sells phase change color printers and the solid ink sticks used in those printers. The defendants, Media Sciences International, Inc. and Media Sciences, Inc., also manufacture ink sticks for use in Xerox phase change color printers. Other than Xerox, the defendants are the only significant manufacturer of ink sticks. 2007 WL 2685063 at *1. Xerox sued the defendants for infringing Xerox's patent on its recently redesigned ink sticks. The defendants brought an antitrust counterclaim of monopolization under Section 2 of the Sherman Act. They alleged that ink sticks for Xerox phase change color printers constitute a relevant product market, and that Xerox controls over 90% of that market. *Id.* at *1. The defendants also alleged three kinds of anticompetitive behavior. First, they alleged that Xerox redesigned its printers so that the defendants' ink sticks would not fit. Second, that Xerox patented the redesign even though the redesign provided no benefit to the consumer. Finally, that Xerox "disseminated false and disparaging statements" about the defendants. Xerox moved to dismiss the defendants' Section 2 counterclaims for failure to state a claim. *Id.*

The court first addressed whether the defendants had antitrust standing. The court held that the defendants had alleged a threat of being driven from the market, which is "exactly the type [of injury] that antitrust laws were designed to prevent." *Id.* at *4. Regarding the alleged "false and disparaging statements," the court held that these were not an antitrust injury because the defendants had not alleged that the statements threatened to drive them out of the market. *Id.* The injury alleged was therefore an injury to a competitor but not to competition. The court also addressed the defendants' allegations that Xerox offered "loyalty rebates" to resellers who agreed not to buy the defendants' ink sticks. The court held that this was sufficient to allege an antitrust injury, because it "stems from conduct that prevents potential customers from obtaining a desired product." *Id.* at *5. Xerox contended that even if the defendants could show antitrust injury they should nonetheless be denied standing because "the threat of injury is speculative at best." *Id.* The Court found that the alleged injuries from the patent enforcement and loyalty rebates were not speculative, and the court concluded that the defendants had standing on those claims. Regarding the relevant market, the parties agreed that the relevant geographic market was the United States. *Id.* at *6. As for the product market, Xerox contended that "sale of replacement solid ink sticks for use in Xerox phase change color printers" could not be a relevant product market because it consists of a single brand. The court noted that both Xerox and the defendants marketed the product. But even if there were only one brand of ink stick in the market, the court held, it *could* constitute a relevant market because no other consumable product is compatible with Xerox's printer. *Id.* at *7 (citing *Eastman Kodak Co. V. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992)).

Xerox argued that it could not have monopoly power because consumers would respond to any increases in its prices by switching to competing suppliers of color printers in numbers sufficient to render the price increase unprofitable. *Id.* at *8. Citing *Kodak*, however, the defendants alleged that consumers would be constrained from switching for two reasons. First, the costs were high to acquire "lifecycle price" information (the costs of equipment and required service, parts and consumables over the equipment's lifetime). Second, consumers would tolerate ink stick price increases because

their significant investments in the market for Xerox phase change color printers left them “locked in” to that product. The court held that these, together with the allegation that Xerox controlled 90% of the market, sufficiently alleged monopoly power. *Id.* at *7-*8. The court also held that the presence of competition in the market for printers does not mean that competition in the consumables market exists as a matter of law *Id.* at *7-8 (citing *Kodak*, 504 U.S. at 470-71).

As to the element of anticompetitive conduct, the court held that the allegations of Xerox’s redesign of its printer to exclude the defendants’ ink sticks stated a claim because the defendants might later show that the redesign was done for the sole purpose of excluding the defendants. *Id.* at *10. The court also held that Xerox’s “loyalty rebates” were anticompetitive conduct for purposes of a motion to dismiss, because the defendants alleged that the rebates excluded the defendants’ ink sticks from “much of the market.” *Id.* at *11-12. The court denied Xerox’s motion to dismiss. *Id.* at *12.

MISSOURI COURT REFUSES TO DISMISS CLASS ACTION ALLEGING MONOPOLIZATION OF MARKET FOR GENETICALLY ENHANCED SEEDS

***Schoenbaum v. E.I. Dupont De Nemours and Company*, 2007 WL 2768383 (E.D. Mo. Sept. 20, 2007).** The plaintiffs are a class of farmers who purchase genetically modified seeds and the defendants, Monsanto Company (Monsanto), Pioneer Hi-Bred International, Inc., and E.I. Dupont De Nemours and Company, are seed manufacturers. 2007 WL 2768383 at *1. The plaintiffs allege that defendant Monsanto conspired with its competitors to monopolize the market for genetically modified seeds. *Id.* at *1-2. Specifically, the plaintiffs allege that Monsanto entered into a series of licensing agreements with its competitors wherein Monsanto licensed its competitors to manufacture genetically modified seeds using Monsanto’s patented gene technology, but placed restrictions on the licenses that enabled Monsanto to monopolize and restrain the seed market and to control the price consumers paid for the seeds. *Id.* Based on these allegations, the plaintiffs asserted causes of action, *inter alia*, for violations of Section 2 of the Sherman Act. *Id.* at *4. The defendants moved to dismiss the monopolization claims, arguing that the plaintiffs were indirect purchasers without standing to assert antitrust claims and that the plaintiffs failed to allege that the defendants had the specific intent to monopolize the seed market.

In regard to standing, the court stated that it could not reconcile statements made in the current action with statements made in related actions as to whether the plaintiffs purport to be direct or indirect purchasers of seeds. *Id.* at *9. The court, however, refused to invoke the doctrine of judicial estoppel to prevent the plaintiffs from claiming to be direct purchasers. *Id.* at *12. The court acknowledged that the plaintiffs had presented multiple theories on this issue, but stated that the court could not make a determination on the issue of standing until the facts were further developed. *Id.*

The defendants also moved to dismiss the plaintiffs’ monopolization claims on the ground that the plaintiffs lacked standing because they are not users of the seed or competitors in the seed market. *Id.* at *14. The court rejected the defendants’ theory of standing, stating that standing is based on a number of factors, with the threshold issue being whether the plaintiff had suffered an injury that antitrust laws were intended to prevent. *Id.* at *14-15. The court refused to dismiss the claims based on standing, stating that the proof may show that the plaintiffs are the target of anticompetitive activity. *Id.* at *15.

On the issue of specific intent to monopolize, the court noted that the plaintiffs alleged that the defendants held meetings and made secret agreements as part of a scheme to monopolize the seed market. *Id.* at *15. The court also noted, however, that the defendants have a long history of competition with each other. *Id.* at *16. Nonetheless, the court found that the plaintiffs’ allegations, however inexplicable, properly stated a specific intent to monopolize the seed market. *Id.* Accordingly, the court denied the defendants’ motion to dismiss.

DELAWARE COURT AFFIRMS THAT INDIRECT PURCHASERS OF ARTIFICIAL TEETH LACK STANDING TO ASSERT MONOPOLIZATION CLAIMS AGAINST TEETH MANUFACTURER AND ITS SUPPLIERS

Howard Hess Dental Labs. Inc. v. Dentsply Int'l., Inc., 2007 WL 2807292 (D. Del. Sept. 26, 2007). Plaintiffs Jersey Dental Laboratories and Philip Gutierrez d/b/a Dentures Plus are dental laboratories that purchase products made by defendant Dentsply International, Inc. (Dentsply). 2007 WL 2807292 at *1. Also named as defendants were twenty-six dealers who actually sold Dentsply products to the plaintiffs. *Id.* at *2. In a 2005 decision, the Third Circuit determined that the plaintiffs, as indirect purchasers, lacked standing to sue Dentsply for damages on their exclusive dealing claims, rejecting the plaintiffs' use of the co-conspirator exception because the plaintiffs conceded that the dealers involved were not equal participants in the alleged conspiracy. *Howard Hess Dental Labs. Inc. v. Dentsply Int'l., Inc.*, 424 F.3d 363 (3rd Cir. 2005). Following the Third Circuit's opinion, the plaintiffs amended their complaint to allege that Dentsply and the dealer defendants conspired to monopolize the artificial teeth market. 2007 WL 2807292 at *4. The plaintiffs moved for summary judgment, arguing that Dentsply should be collaterally estopped from contesting its liability for monopoly maintenance in violation of Section 2 of the Sherman Act based on a prior decision in a U.S. government action against Dentsply. *Id.* at *6. Dentsply and the dealer defendants moved to dismiss the plaintiffs' conspiracy to monopolize claims for lack of standing and failure to plead a specific intent to monopolize. *Id.* at *12-13.

In regard to collateral estoppel, the court explained that, in 1999, the U.S. Government filed an action against Dentsply alleging that Dentsply's agreements with its dealers lessened competition in the market for artificial teeth. *Id.* at *6. On the appeal of a bench trial finding for Dentsply, the Third Circuit found that the conditions Dentsply placed on its dealers excluded competitors from the market and was harmful to competition. *Id.* Based on this decision, the plaintiffs argued that Dentsply should be collaterally estopped from contesting its liability for violation of Section 2 of the Sherman Act. *Id.* Dentsply argued that collateral estoppel should not apply because the issue of antitrust injury – specifically the issue of whether the plaintiffs paid higher prices due to Dentsply's conduct – was not litigated in the prior government action. *Id.* The court agreed with Dentsply, noting that, although it is plausible that the plaintiffs suffered injury due to the wrongdoing litigated in the government action, the Third Circuit issued no such finding in its earlier decision. *Id.* Accordingly, the court refused to apply collateral estoppel to the plaintiffs' monopolization claims against Dentsply.

The dealer defendants moved to dismiss the plaintiffs' conspiracy to monopolize claims, arguing that the Third Circuit had already decided that the plaintiffs could not rely on the co-conspirator exception to the prohibition against actions by indirect purchasers. *Id.* at *13. The plaintiffs countered that the Third Circuit decision did not address their standing in regard to claims against the dealer defendants because the dealers were not named in the action at that time. *Id.* The court determined that the Third Circuit decision addressed the same alleged vertical price fixing conspiracy at issue here. The court reasoned that the amended complaint, like the earlier complaint, contained no indication that the dealers were equal participants in the alleged conspiracy. *Id.* Consequently, the court determined that the plaintiffs' status as indirect purchasers also meant that they lacked standing to assert their antitrust claims against the dealer defendants. *Id.*

The dealer defendants also argued that the plaintiffs' conspiracy to monopolize claims should be dismissed because the plaintiffs failed to allege a specific intent by the dealers to monopolize. *Id.* at *13-14. The court stated that, on its face, the plaintiffs' amended complaint contained general allegations that the dealers intended for Dentsply to maintain a monopoly, but the plaintiffs failed to plead “‘facts from which it can reasonably be inferred that the [dealers] formulated [the] intent’ that ‘maintaining [Dentsply’s] monopolies was a goal they themselves wanted to accomplish.’” *Id.* at *14 (quoting *In re Microsoft Corp. Antitrust Litig.*, 127 F.Supp.2d 728, 731 (D. Md. 2001)). The court stated that the plaintiffs' complaint did not assert facts to support the plaintiffs' general assertions and

that the plaintiffs had asserted previously in the litigation that the dealer defendants were coerced into accepting defendant Dentsply's alleged scheme. *Id.*

U.S. ANTITRUST ENFORCEMENT AGENCIES

AMERICAN AND EUROPEAN COMMUNITY REGULATORS TRADE CRITICISMS OVER EUROPEAN *MICROSOFT* DECISION

The European Court of First Instance (CFI) on September 17, 2007 upheld the European Commission's ruling that Microsoft abused its dominant position (see below). On the same day, citing the United States' own antitrust case against Microsoft and the importance of the computer industry, Assistant Attorney General Thomas O. Barnett of the United States Justice Department's Antitrust Division voiced the Division's concerns over the CFI's approach. In a release, Barnett stated that the CFI's decision may harm competition and chill innovation. See [here](#) for the release.

In response to Barnett's statement, European Commission for Competition Neelie Kroes reportedly stated that European officials refrain from criticizing foreign courts' decisions and admonished United States officials to do the same. See [here](#) for a story describing the Commissioner's comments.

EUROPEAN DECISIONS

EUROPEAN COURT OF FIRST INSTANCE UPHOLDS EUROPEAN COMMISSION DECISION IN *MICROSOFT*

Microsoft Corp. v European Commission. On September 17, the Court of First Instance (CFI) upheld the substantive parts of the European Commission's decision in the Microsoft antitrust case concerning refusal to supply and tying. The CFI determined that the gravity and duration of Microsoft's abuse of its dominant position justified the Commission's €497 million fine.

The Court upheld the Commission's finding of illegal tying of Windows Media Player to Windows, which the Commission had found excluded competition in streaming media players and contributed to the maintenance of Microsoft's software platform monopoly. The court noted that Microsoft enjoys an undisputed dominant position in PC operating systems and described Microsoft's market power in this area as "extraordinary." The Court also agreed with the Commission that media players constitute distinct products from PC operating systems. The court found that the Commission correctly determined that Microsoft's tying distorted competition in media players to the advantage of Microsoft since it provided Windows media player with the ubiquity of the Windows monopoly. The remedy imposed by the Commission—unbundling the two products—would not alter Microsoft's current technical practice apart from the development of a new version of Windows.

The Court also upheld the Commission's finding of illegal refusal to supply interoperability information that third-party server manufacturers needed to enable their workgroup servers to communicate fully with Microsoft Windows clients and server networks. The court noted that refusal to supply interoperability information does not constitute a *per se* abuse of a dominant position, unless it: (i) relates to a product necessary to the exercise of an activity in a related market; (ii) excludes any effective competition in that market; and (iii) precludes new products for which there is potential consumer demand. The CFI found that these conditions were met, and dismissed Microsoft's proffered justification that the technology was subject to intellectual property rights.

On a procedural note, the CFI annulled part of the decision ordering Microsoft to appoint a monitoring trustee empowered to access information, employees, and source code of the relevant Microsoft products. The CFI held that the Commission lacks the authority to force Microsoft to grant a monitoring trustee powers that the Commission itself cannot authorize to a third party. Microsoft has two months to appeal the CFI judgment to the European Court of Justice (see [Case T-201/04](#)).

[Editors' note: As the readers are no doubt aware, this decision has been subject to much discussion and debate in Europe, US, and elsewhere between antitrust practitioners, competition authorities, and other interested parties. It has also received significant press coverage. The summary provided above is intended only to give the reader a brief overview of the decision.]

TELEFÓNICA APPEALS EUROPEAN COMMISSION'S €152 MILLION FINE IN MARGIN SQUEEZE DECISION

Telefónica. On September 10, Telefónica filed an appeal with the CFI against the European Commission's July 4, 2007 decision to fine Telefónica €152 million fine for abuse of a dominant position in the Spanish broadband market. The Commission found that Telefónica charged unfair prices by engaging in margin squeeze practices between the wholesale prices it charged its competitors and the retail prices it charged its own customers. In its appeal, Telefónica argued that it acted in accordance with Spanish regulator CMT's requirements as CMT had previously condoned the company's activities. In addition, Telefónica asserted that Commission made factual and legal errors regarding market definition and the allegations of dominance, as well as infringing Telefónica's rights of defense during the administrative process. Telefónica also refuted the Commission's application of Article 82 EC, arguing that there was no factual basis either that its upstream pricing was extreme, or that its downstream pricing was predatory. Lastly, Telefónica specifically opposed the amount of the fine since past financial penalties in this sector had been less severe. Supporting Telefónica's position, the CMT requested that the national government lodge an appeal against the Commission decision, asserting that the decision weakens their regulatory position as a national authority because the Commission did not request assistance from the CMT before issuing the fine (see [Commission decision](#)).

EUROPEAN COURT OF FIRST INSTANCE REJECTS COMPLAINT AGAINST LA POSTE

Union française de l'express v. European Commission. The CI rejected an appeal by the Union française de l'express (UFEX) against the European Commission's 2005 decision not to investigate allegations that La Poste abused its dominant position in the postal delivery market. The case focused on whether the Commission erred in deciding that the case lacked Community interest, thereby violating legal rules on the assessment of Community interest. Specifically, the CFI analyzed UFEX's claim that the Commission should have examined not just whether the alleged abuse continued—it had ceased—but also the lasting effects of the alleged abuse. The CFI agreed with UFEX that the Commission incorrectly interpreted its obligations in claiming that it was not required to consider the gravity and duration of the alleged Article 82 EC infringements. The CFI determined, however, that this error would not have had a decisive effect on the Commission's decision and did not vitiate the Commission's assessment. The CFI held that the Commission did not commit manifest error with regard to its assessment of Community interest, and noted that UFEX could have brought its allegations before the relevant national authorities (see [Case T-60/05](#), in French).

SLOVAK COURT ANNULS TELECOM'S €26 MILLION FINE FOR ABUSE OF A DOMINANT POSITION

Slovak Telecom. On September 28, the County Court of Bratislava annulled the Slovakia Competition Authority's 2005 decision fining Slovak Telecom €26 million for abuse of its dominant position by refusing access to its network of local lines. This was the largest antitrust fine ever imposed by the Authority. The court rejected the Authority's conclusion on procedural grounds. The judgment cannot be appealed, but the matter has been remanded to the Competition Authority for re-examination (see [press release](#)).

EUROPEAN ANTITRUST ENFORCEMENT AGENCIES

EUROPEAN COMMISSION INITIATES PROCEEDINGS AGAINST QUALCOMM IN RESPONSE TO ALLEGED ABUSE OF A DOMINANT POSITION

Qualcomm. On August 30, the European Commission began a formal investigation of Qualcomm Incorporated, an US chipset manufacturer, for alleged abuse of its dominant position. Qualcomm holds IP rights to CDMA and WCDMA standards for mobile telephony. A number of mobile phone and chipset manufacturers complained to the Commission that Qualcomm was not licensing these technologies on fair, reasonable, and non-discriminatory (FRAND) terms. The complainants allege that, as a result of the non-FRAND terms employed by Qualcomm for licensing of patents essential to the WCDMA standard (part of the 3G standard for European mobile phone technology), the development of the relevant standards may be slowed and consumers could bear the cost of higher handset prices. The Commission will now investigate whether these claims are true. There is no deadline for the Commission to conclude its investigation (see [MEMO/07/389](#)).

NETHERLANDS COMPETITION AUTHORITY CLEARS APPLE IN TYING CASE

Apple. On September 6, the Netherlands Competition Authority (NMa) dismissed a complaint brought by the Dutch consumers' association against Apple for abusive practices with regard to portable music players and online music purchases. The NMa concluded that Apple had not engaged in tying practices by linking sales of portable iPod music players to its iTunes online music store. The NMa stated that consumers were able to use music purchased from the iTunes music store on players other than the iPod, and could transfer music files from other online music stores to iPods (see [press release](#)).

FRENCH CONSEIL DE LA CONCURRENCE FINES PORT DU HAVRE FOR ANTICOMPETITIVE PRACTICES

Port du Havre. On September 13, the Conseil de la Concurrence (French Competition Council) fined Port du Havre and two harbor companies, Compagnie industrielle des pondéreux du Havre (CIPHA) and the Société havraise de gestion et de transport (SHGT), €2.8 million for abuse of a dominant position. Port de Havre manages harbor infrastructure, while CIPHA and SHGT are international shipping and logistics companies that unload and store shipments at Port du Havre.

The Conseil found the Havre port authority charged its competitors, including the Société générale maritime (Sogema), twice the rate it charged other customers for the use of its public unloading equipment at the terminal. The Conseil stated that discrimination on the basis of the status of the company was unjustified. The case was especially grave given that the port authority is a public operator charged with a public service that is essential to enable companies to unload ships. The Conseil fined CIPHA €50,000 for abuse of its dominant position in the Seine low valley coal storage market. Tying storage and dock services removed Sogema from the dock work market since it faced twice the cost paid by CIPHA and its subcontractors. SHGT was fined €55,000 for related anticompetitive agreements with CIPHA that were intended to drive Sogema from the coal storage market (see [press release](#)).

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