

U.S. UPDATE

CARFAX FACES ANTITRUST LAWSUIT

Carfax, the dominant seller of Vehicle History Reports (“VHR’s”) in the U.S., is defending a lawsuit filed by 121 automobile dealers. The case is pending in the United States District Court for the Southern District of New York.

The dealer plaintiffs allege that Carfax is a monopolist in the sale of VHR’s for used automobiles and light trucks in the United States, with a 90% market share. They claim that Carfax has unlawfully acquired and maintained its market power in VHR’s through exclusivity agreements with numerous major players in the auto industry. Those players include the two largest websites providing classified used automotive listings, autotrader.com and cars.com. The dealer plaintiffs claim that by contractually committing those two websites to include hyperlinks to Carfax VHR’s and to exclude VHR’s of other providers, Carfax has essentially stigmatized any listing without such a link in the eyes of consumers, who allegedly infer that the absence means that the car has a blemished history. As a result, the dealer plaintiffs contend that they are effectively compelled to purchase Carfax VHR’s for their used car inventory and to supply them free of charge to persons shopping for used cars, despite the fact that there are other suppliers of VHR’s that the dealers contend are either more reliable or lower priced, or both.

The dealer plaintiffs further contend that the VHR’s represent a substantial operating expense for them, often tens of thousands of dollars per year per dealer. They allege that if the market were free and there was true competition in the VHR market, consumers would be able to obtain more reliable and less expensive VHR’s than they are able to obtain as a result of Carfax’s monopoly position.

Legally, the dealer plaintiffs make several different, but related, claims. First, the dealer plaintiffs claim that Carfax's contracts with the two websites constitute unlawful exclusive dealing arrangements under §3 of the Clayton Act, 15 U.S.C. §14. Similarly, the dealer plaintiffs challenged the exclusivity arrangements that Carfax has with 37 of about 40 auto manufacturers with certified pre-owned programs. Next, the dealer plaintiffs contend that these same arrangements constitute an unreasonable restraint of trade under §1 of the Sherman Act, 15 U.S.C. §1. Third, the dealer plaintiffs claim that Carfax is guilty of monopolization under §2 of the Sherman Act, 15 U.S.C. §2. Finally, the dealer plaintiffs also allege attempted monopolization under §2 of the Sherman Act, 15 U.S.C. §2.

Based on the facts alleged, it would certainly appear that Carfax is a monopolist. Every monopolist, however, is not by definition also guilty of violating the antitrust laws. Not all exclusive dealing arrangements are found to be anticompetitive. In many instances, exclusive dealing arrangements are found to have pro-competitive effects and/or are found to be motivated by goals that are not anti-competitive. Exclusive dealing arrangements that foreclose competitors from the market, however, can give rise to liability.

Exclusive dealing arrangements are analyzed by U.S. courts under the so-called rule of reason. A rule of reason analysis of exclusive dealing arrangements will typically focus on a number of factors, including: the defendant's market power; the extent to which competitors are foreclosed from the market; barriers to entry; the duration of the relevant contract; whether exclusivity has the potential to raise competitors' costs; the presence of actual or likely anticompetitive effects; and legitimate business justifications. Here, it appears that Carfax does have significant market power and that competitors may be foreclosed from the market by virtue of Carfax's market power. On the other hand, it may well be that barriers to entry are low, that

exclusivity does not have the potential to raise competitor's costs, or that there are no actual or likely anticompetitive effects. In addition, expect Carfax to strongly argue that it has legitimate business justifications for its exclusive dealing arrangements.