

# Bond Case Briefs

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## 2nd Suit Targets ‘Abusive’ CUSIP Licensing Fees, Tactics.

Another suit has been filed in federal court challenging long-standing practices regarding licensing fees regarding the use of CUSIP numbers.

The [latest suit](#) was filed March 7 in the Southern District of New York by Hildene Capital Management LLC. As did the [suit filed earlier this month](#), this one involves CUSIPs—those unique identifiers that are used to identify U.S. and Canadian registered stocks, U.S. government and municipal bonds, exchange traded funds and mutual funds. And like the first suit, it alleges that S&P Global, Cusip Global Services (CGS) and the American Bankers Association (ABA)—not to mention an entity called FactSet, which recently took over as GS’ new operator—conspired to eliminate competition in the use of CUSIP numbers, or to bring alternatives online.

The suit here also asserts—as did the one filed before it—that “there is nothing original, unique, or special about CUSIP numbers; they are trivial except for the fact they are the standard for identifying financial instruments. Hildene’s use of the CUSIP numbers is both necessary and fair because CUSIPs are the designated standard.”

The suit, which alleges several violations of federal law,<sup>[i]</sup> says the essence of the problem is “S&P’s abuse of its monopoly power in the financial instruments identification market, and Defendants’ conspiracy to maintain S&P’s (and now FactSet’s) monopoly power and unreasonably restrain trade in the financial instruments identification market, in order to extract artificially inflated payments from investors and other users of financial data through subscription agreements to access CUSIP numbers.”

### **‘Hold Up’**

The suit explains that these particular plaintiffs “receive no financial data services from Defendants; but rather obtain financial data from other sources that necessarily include CUSIP numbers”—a dependency that the suit says means that the defendants can “hold up” users of the data “to pay prices unilaterally determined by Defendants not because there is anything special or valuable about the string of numbers and letters they generate, but simply because CUSIPs have been designated as the standard.”

The suit also alleges that the defendants “have conspired to prevent competition from, and the implementation of, alternative free, or far more cost-friendly financial instruments identifiers of equal or superior efficiency and quality”—motivated by the reality that “CUSIPs are worthless except for the fact that they are the standard.”

### **Fee ‘Fie’**

It’s not as though there isn’t already money changing hands here—the suit notes that S&P charges securities issuers a fee (typically about \$280 per CUSIP) in order to obtain CUSIP numbers for its securities, and S&P also charges data providers (like Bloomberg), licensing fees for using CUSIPs in its databases (a.k.a. “Data Providers”). However, the sticking point here—and the subject of the

suit—is S&P’s demand that Data Providers’ end users (such as the plaintiffs here)—or “entities that otherwise download CUSIP numbers as part of financial data for their own use” to enter their own subscription agreements with S&P under duress—more specifically, the threat of stripping the CUSIP numbers from their data feeds “if the unilaterally determined licensing fee is not paid.”

The suit argues that the ABA retains 30% of CGS’s licensing fees from all Data Users and the remainder is kept by S&P (and now FactSet). Meanwhile, the plaintiffs argue that S&P claims that through its CGS division it provides administrative services to Data Users to justify these fees.

“However, Data Providers (like Bloomberg), not Defendants, provide these administrative services to Data Users,” while—as noted above—the defendants already receive fees for CUSIP numbers twice: first from issuers of securities, and then from the Data Providers. “Defendants’ extraction of fees for a third time from Data Users merely because they download financial data that necessarily includes CUSIPs, does not constitute compensation for administrative services,” they note. “Rather, they are demands for payments for a valueless alphanumeric string as part of hold ups monetizing the monopoly power held by virtue of being the standard.”

## **Pressure Tactics**

The suit outlines how this impacts data users (like Hildene). Noting first that in Hildene’s case this subscription payment amounts was \$10,500 annually, the suit goes on to note that “under the threat of stripping CUSIP numbers from the users’ data feed. Hildene and the members of the Class are then left with two unenviable options: (i) pay S&P’s supracompetitive subscription rates or (ii) have CUSIP numbers stripped from their data feed and suffer, at a minimum, significant disruption to their businesses.” Now, when Hildene “balked” at paying these licensing fees, the suit notes that “S&P sent a series of increasingly hostile letters, and eventually constant threats that Hildene must pay the unilaterally set fee or face a debilitating lock out from access to CUSIP numbers. Hildene, with no legitimate business alternative, like other members of the Class, eventually signed the subscription agreement.”

But that, as it turns out, is not the end of things. The suit goes on to explain that “S&P’s pressure tactics do not end with the signing of a subscription agreement. The form subscription agreement includes a ‘Usage Review’ provision to inspect a Data User’s records concerning the level of usage of the CUSIP identifiers to determine whether additional fees and charges should be imposed.” Moreover, there is apparently even a clause that provides S&P with the right to seek reimbursement for the cost of any such inspection if, “in its discretion, the Data User is underpaying by five percent or more.”

Beyond that, the suit alleges that S&P reserves the right to increase its fees and change the terms of the subscription agreement. “Without any reasonable choice, the Data User is forced to accept these unfair and deceptive terms,” the suit notes. “In sum, S&P is using CUSIPs’ designation as the standard and the threat of depriving market participants access to the standard to collect enormous sums of money (and share the money with ABA) from Hildene and members of the Class. It’s an abuse of monopoly power, anticompetitive, and simply unfair.”

By way of lending support to their arguments (and related attempts to either resolve the current practices and/or to provide alternatives), the suit outlines several attempts to bring the matter (and related concerns) to the attention of the Securities and Exchange Commission (SEC), as well as what it describes as a “similar scheme” in Europe regarding S&P’s licensing fee policies for the use of U.S. International Securities Identification Numbers (“US ISINs”) in the European Economic Area—an attempt that the European Union found to be an “abuse of monopoly power.”

Will there be other suits challenging this structure/fees/practices? Stay tuned.

[i] More specifically, the suit alleges violations of Section 1 of the Sherman Act, Section 2 of the Sherman Act, New York General Business Law § 349(a), Connecticut Unfair Trade Practices Act § 42-110b(a), as well as breach of contract, and injunctive relief. Outside of the class action, Hildene, on its own behalf, also brings this action for a declaratory judgment that Hildene's use of CUSIPs is a "fair use" that does not infringe on any purported intellectual property rights of Defendants over CUSIPs.

NATIONAL ASSOCIATION OF PLAN ADVISORS

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