New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

Web address: http://www.nylj.com

An incisivemedia publication

VOLUME 240—NO. 61

THURSDAY, SEPTEMBER 25, 2008

Antitrust

BY ELAI KATZ

Joint Licensing by Sports Teams Not Illegal

The U.S. Court of Appeals for the Seventh Circuit ruled that, in jointly licensing their logos, professional football teams acted as a single entity incapable of forming an agreement in restraint of trade while the U.S. Court of Appeals for the Second Circuit decided that a similar joint licensing arrangement for professional baseball teams was not an unreasonable restraint of trade and was appropriately judged under the rule of reason.

Other recent antitrust developments of note included the publication of a Department of Justice report on monopolization that was criticized by some members of the Federal Trade Commission (FTC).

Joint Licensing

A supplier of caps and hats bearing sports teams' logos brought an antitrust suit against the National Football League (NFL) and its member teams after having lost its long-standing NFL headwear license. The complaint alleged that the professional football league and teams' agreement to grant an exclusive license to another firm constituted an unlawful conspiracy to restrict access to licenses for the teams' intellectual property.

The district court granted the league and teams' motion for summary judgment and the Seventh Circuit affirmed. The appellate panel observed that sports leagues can, in some circumstances, be considered a single entity that is incapable of forming a conspiracy in violation of §1 of the Sherman Act, citing to the Supreme Court's 1984 *Copperweld* decision. In other contexts, however, the court noted that a league is better analyzed as a joint venture between independently owned teams subject to review under §1. Accordingly, the Seventh Circuit stated that the question of whether a sports league is a single entity should be addressed "not only 'one league at a time,' but also 'one facet of a league at a time.'"

The circuit court stated that although NFL teams could have competing interests regarding the licensing of their team logos, they can still function as a single entity with respect to the promotion of their jointly produced product—NFL football—to better compete with other forms of entertainment. As such, they could not be said to have engaged in concerted action, as is required for liability under §1 of the Sherman Act.

***American Needle Inc. v. National Football League*, 2008-2 CCH Trade Cases ¶76,259**

In a decision addressing similar issues in baseball, the Second Circuit ruled that a claim that Major League Baseball (MLB) teams' joint licensing of intellectual property violated the Sherman Act must be judged under the rule of reason. The appellate court rejected arguments by a seller of stuffed plush animals that such joint licensing was a horizontal price and output restraint subject to per se condemnation or abbreviated "quick look" review. The court stated that the arrangement did not amount to price fixing but rather was an agreement to appoint a single licensor and share equally in its profits. The court observed that there was no evidence of reduction in output but rather an increase in the number of licenses granted.

The appellate court affirmed the district court's rule of reason analysis, finding no market power or anticompetitive effects and adding that other sports' trademarks were available substitutes for MLB licenses for soft toys. The Second Circuit observed that, not unlike the blanket licenses at issue in the Supreme Court's 1979 *Broadcast Music v. CBS* case, the collective arrangement in this case made possible a single license for all MLB teams' intellectual property. The court also noted that MLB formed an entity to jointly license its member teams' intellectual property in 1966 after a soft-drink-maker expressed frustration with the need to negotiate separate license agreements with each baseball team in its efforts to develop a national promotional campaign.

The Second Circuit observed that in its 1984 *NCAA* decision, the Supreme Court endorsed a rule of reason standard of review for a sports league restraint. The court distinguished the restraint at issue in the *NCAA* opinion, stating that in that case the league restricted the number of college football games that could be televised whereas the MLB arrangement did not restrict the number of licenses granted or how many units of a product bearing a given team's logo could be sold.

A concurring opinion observed that the joint licensing and profit-sharing agreement arguably eliminated price competition in licensing fees among teams but agreed that rule of reason analysis was appropriate for the arrangement as it was an ancillary restraint to a legitimate joint venture.

***Major League Baseball Properties Inc. v. Salvino Inc.*, No. 06-1867-CV, 2008 U.S. App. LEXIS 19349 (Sept. 12, 2008)**

Comment: Although the two decisions reported immediately above reached similar results in finding no antitrust violation when sports teams collaborated to jointly license their logos, the analysis used appears to be starkly dissimilar. The Seventh Circuit focused on whether an entity authorized to license different teams' logos should be treated as a single firm incapable of agreeing with itself to restrain trade while the Second Circuit emphasized that such an alleged restraint must be scrutinized under the rule of reason standard of review.

Elai Katz *is a partner at Cahill Gordon & Reindel.* **Lauren Rackow,** *an associate at the firm, assisted in the preparation of this article.*

Monopolization

The Department of Justice published a lengthy report on antitrust monopoly law. The report examines the appropriate standards for evaluating unilateral conduct under §2 of the Sherman Act, proposes specific tests and safe harbors and reflects the department's enforcement policy. The report's genesis was a series of joint Department of Justice and Federal Trade Commission hearings held in 2006 and 2007, but the commission did not sign on to the report, evidencing significant disagreement between the federal antitrust agencies on monopolization policy.

The report rejects efforts to develop a general framework that would apply to all single-firm conduct challenged under §2, expressing a preference for specific tests for several categories of potentially anticompetitive conduct by dominant firms.

The report sets forth specific analytic frameworks for the following categories of possibly exclusionary conduct:

- ***Predatory Pricing:*** The report endorses the formulation set forth in the Supreme Court's 1993 *Brooke Group* decision, whereby a plaintiff must show that a monopolist set prices below its costs and had a dangerous probability of recouping its losses.
- ***Bundles and Loyalty Discounts:*** The report advocates a cost-based safe harbor for bundled discounts. Under this test the entire discount received by the buyer of a bundle of products is imputed to the competitive product and the practice would not be deemed unlawful unless the imputed price is below an appropriate measure of the bundling firm's cost. Similarly, single product loyalty discounts should be considered lawful, according to the department, unless the costs exceed the seller's revenues.
- ***Tying:*** The department advocates abandonment of per se treatment of certain tying arrangements and states that illegality should be limited to circumstances where tying enables a dominant firm to acquire monopoly power in a tied product or maintain its monopoly in the tying product. The report observes that technologic tying—such as incorporating new features that could be sold separately into products like cars or computers—often arises from innovation in product design and should be regulated with caution unless it is a sham that serves no purpose other than to exclude competitors.
- ***Refusal to Deal:*** The report states that unilateral, unconditional refusals to deal with rivals should "not play a meaningful part in §2 enforcement" and asserts that termination of a prior course of dealing with rivals should not be used as a significant factor in determining whether antitrust law imposes a duty to deal on a dominant firm.
- ***Exclusive Dealing:*** The report advocates a safe harbor for exclusive dealing arrangements that foreclose rivals' access to less than 30 percent of the distribution channels or customer base and rejects reliance on the length of an exclusive dealing arrangement as the sole determinant of its legality.

The FTC issued a statement noting that the commission did not join or endorse the report. Three commissioners expressed the view that the report could significantly weaken the enforcement of §2 of the Sherman Act, if adopted by the courts.

***Competition and Monopoly: Single-Firm Conduct Under §2 of the Sherman Act* (September 2008) available at www.usdoj.gov/atr and *FTC Commissioners React to Department of Justice Report* (Sept. 8, 2008), available at www.ftc.gov**

Comment: Although the Department of Justice's monopolization report synthesizes and analyzes a broad range of voluminous scholarship and jurisprudence, its utility as a guide for future antitrust enforcement of single-firm conduct may be limited because, as the circumstances of the report's publication reflect, the FTC appears to be more likely to bring new monopolization enforcement actions than the Department of Justice.

Class Actions

Car dealers alleged that an automobile manufacturer's customer satisfaction program violated the Robinson-Patman Act by providing discounts and other benefits to dealers using varied and inconsistent standards. A district court certified a class of dealers to pursue the claims and the U.S. Court of Appeals for the Third Circuit reversed, finding that some dealers benefited from the program while others were injured, thereby creating a conflict with the proposed class and a predominance of individualized issues over common issues regarding each proposed class member's treatment under the program.

***Danvers Motor Co. v. Ford Motor Co.*, No. 07-2287, 2008 U.S. App. LEXIS 19354 (Sept. 12, 2008)**

Parent-Company Liability

A district court ruled that a parent company could not violate §1 of the Sherman Act solely based on a viable claim that had been asserted against its subsidiary. The plaintiffs alleged that the parent and subsidiary conspired with a third party to allocate market share and fix prices in the pressure-sensitive label-stock industry. After deciding that the plaintiffs' complaint contained sufficient allegations of a conspiracy to restrain trade against the subsidiary, the district court dismissed the claim against the parent. The court stated that neither knowledge of an agreement between the subsidiary and a competitor nor a decision to sell the subsidiary to that competitor could be regarded as participation in the alleged conspiracy. Contrasting the allegations about the subsidiary with those made about the parent, the court held the claim against the parent consisted of "conclusory assertions" that did not entitle the plaintiffs to relief after the Supreme Court's 2007 *Twombly* decision.

***In re Pressure Sensitive Labelstock Antitrust Litigation*, 2008-2 CCH Trade Cases ¶76,253 (M.D. Pa.)**

Intervention in Actions

The U.S. Court of Appeals for the Ninth Circuit ruled that a trade organization of beer and wine distributors could be liable for attorney's fees after it intervened in an action brought against the state of Washington, alleging that state liquor regulations violated federal antitrust law. Applying §16 of the Clayton Act, the court found that the trade organization had a significant financial interest at stake and behaved like an involved defendant in the litigation. The Ninth Circuit remanded the case to the district court to determine whether the plaintiff "substantially prevailed" in its claim for injunctive relief.

***Costco Wholesale Corp. v. Hoen*, 2008-2 CCH Trade Cases ¶76,264**

Attempted Monopolization

A leader in the credit-scoring market brought suit alleging that the creation of a joint venture by three major credit bureaus amounted to attempted monopolization in violation of the Sherman Act. Denying a motion to dismiss, the district court stated that the plaintiff sufficiently alleged that the credit bureaus—which collectively dominated the aggregated credit data market and controlled the sales of bundled credit data and scores—could succeed in monopolizing the market for credit scoring through the formation of the joint venture.

***Fair Isaac Corp. v. Equifax Inc.*, 2008-2 CCH Trade Cases ¶76,266 (D. Minn.)**