New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

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An ALM Publication

VOLUME 252—NO. 83

WEDNESDAY, OCTOBER 29, 2014

ANTITRUST

Expert Analysis

Sports Leagues Restrictions Under Antitrust Scrutiny

By
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A district court decided that NCAA rules prohibiting colleges from compensating student athletes for use of their names and likenesses in video games and telecasts unreasonably restrained trade. Another district court ruled that territorial restrictions for broadcasting professional baseball and hockey games could violate antitrust law and that those kinds of restrictions were not shielded from antitrust scrutiny by the common law baseball exemption. The U.S. Court of Appeals for the Tenth Circuit affirmed a billion-dollar judgment awarded to a class of industrial customers who claimed that chemical companies fixed the prices of polyurethane products.

Other antitrust developments of note included the Department of Justice's challenge of the merger of two food companies because it was likely to lessen competition to buy pigs from farmers and the Federal Trade Commission's imposition of a fine on Berkshire Hathaway for failing to comply with premerger reporting regulations.

College Athletes

Following a three-week bench trial, a California federal judge decided that the National Collegiate Athletic Association's (NCAA) rules prohibiting colleges from paying athletes for the use of their names, images and likenesses violated antitrust laws and ordered the NCAA to stop enforcing those rules. *O'Bannon v. NCAA*, 2014-2 CCH Trade Cases ¶78,865, *No. C09-3329*, (N.D.Cal. Aug. 8, 2014). The NCAA argued that its rules were procompetitive and that compensating student-athletes would set them apart from their classmates. The court rejected these arguments and suggested that colleges could collect revenue from licensing student-athlete likenesses and hold it in trust to distribute equally amongst the student-athletes when they graduate.

A group of current and former college student-athletes brought this antitrust class action to challenge the NCAA's rules barring student-athletes from receiving a share of the revenue that the NCAA and its member schools obtain from the sale of licenses to use the names, images and likenesses of the student athletes in video games and game telecasts. The court applied a rule of reason analysis and found that the restrictions restrained competition among colleges in the market for recruits' athletic services and licensing rights and suppressed compensation to student athletes —in violation of §1 of the Sherman Act.

The court rejected the NCAA's arguments that the restrictions were needed to maintain the competitive balance among its football and basketball teams and to educate and integrate student-athletes into their schools' academic communities. The court determined that the NCAA did not present sufficient evidence that the restrictions affected competitive balance or that the restraints were necessary to achieve either of the claimed benefits. The court also rejected the NCAA's contention that the restrictions increased output.

The court enjoined the NCAA from enforcing rules or bylaws that would prohibit its member schools and conferences from offering their football or basketball recruits a share of the revenues from the use of their names, images and likenesses. Further, the NCAA cannot enforce any rules that prevent its members from offering to deposit a limited share of the licensing revenue in trust for their recruits. However, the NCAA can still cap the amount of compensation that can be paid to student-athletes. The injunction permits the NCAA to set a cap on the amount of money that can be held in trust every year for the student-athlete, as long as it is at least $5,000. And, the

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NCAA may prohibit student-athletes from endorsing commercial products, among its other existing rules.

The court's remedy, permitting the NCAA and its members to cap some forms of payment at $5,000 per year per athlete, appears to allow a variant of the very restriction that the court found anticompetitive and suggests that the court believed that the Sherman Act would tolerate some price-based restraints on unfettered competition to compensate student athletes.

Baseball's Exemption

Cable and satellite television subscribers challenged territorial restrictions for broadcasting professional baseball and hockey games as unlawful agreements to limit competition among the clubs and their broadcast affiliates and sought to recover allegedly excessive prices paid for sports packages.

The district court ruled that the common law antitrust exemption for baseball—an enduring doctrine providing that the business of baseball was outside the scope of federal antitrust laws, first enunciated by the Supreme Court in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922)—did not extend to territorial broadcast restrictions. *Laumann v. NHL and Garber v. MLB*, 2014-2 CCH Trade Cases ¶78,868, 2014 WL 3900566, Nos. 12-cv-1817, 12-cv-3704 (S.D.N.Y. Aug. 8, 2014).

The court first reviewed the history of the baseball exemption, noting that the Supreme Court has refused to extend the exemption to other sports and denigrated it as "at best of dubious validity," and observed that antitrust exemptions are to be construed narrowly. The court then determined that the exemption did not apply to contracts for broadcasting rights, "a subject that is not central to the business of baseball, and that Congress did not intend to exempt."

The challenged restrictions required each club to license its games only within its designated home television territory to a regional sports network on an exclusive basis, while the leagues retained the exclusive right to license national broadcasts. The court stated that the territorial broadcast restrictions must be judged under the rule of reason because per se condemnation of broadcast restrictions would not be appropriate in light of the interdependence of teams within a sports league. Applying the rule of reason, the court decided that the claimed pro-competitive effects of the restrictions, including the maintenance of competitive balance among teams and incentives to produce higher quality and a greater number of telecasts, did not outweigh the evidence of negative impact on the output, price and quality of sports programming, raising a genuine issue of material fact regarding the overall competitive impact of the challenged restrictions and foreclosing the possibility of summary judgment for the leagues.

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The district court denied a motion seeking interim appellate review of the exemption ruling. *Garber v. MLB* (Sept. 22, 2014).

Chemical Price-Fixing Verdict

Industrial purchasers of chemical products brought a class action alleging that Dow Chemical Company conspired with rivals to fix prices for polyurethane chemical products, used in mattress foams, insulation, and footwear, among other things. Other defendants settled before trial. The district court certified the proposed class and following a trial, the jury returned a verdict against Dow awarding $400 million in damages, which after trebling and deduction of recovery from settlements, amounted to over $1 billion. Dow appealed several of the district court's decisions and a three-judge panel of the Tenth Circuit affirmed. *In re Urethane Antitrust Litigation*, *No. 13-3215* (10th Cir. Sept. 29, 2014).

Dow argued that the trial court should not have allowed the case to proceed as a class. To certify the class under Rule 23(b)(3) of the Federal Rules of Civil Procedure, the court must determine that "questions of law or fact common to class members predominate over any questions affecting only individual members." The alleged conspiracy to fix list prices did not affect all customers equally, according to Dow, because actual prices were often negotiated separately and therefore individualized questions about impact would predominate over common questions, such as the existence of a conspiracy.

The Tenth Circuit ruled that the district court's certification of a class was not improper, stating that while it was true that some members of the class of customers may have avoided damages through individualized negotiations, the court could infer class-wide impact from a price-fixing conspiracy, especially where there was evidence that the conspiracy artificially inflated the baseline for price negotiations. The appellate court noted that witnesses acknowledged that price-increase announcements affected the starting point for negotiations.

Most of the cases the Tenth Circuit cited in support of its assertion that class-wide impact can be inferred from a price-fixing conspiracy were decided before the U.S. Court of Appeals for the Third Circuit's opinion in *Hydrogen Peroxide*, 552 F.3d 305 (3d Cir. 2008), a decision recognizing that individually negotiated prices can undercut class treatment and one of the leading decisions challenging the previously prevailing presumption in favor of certifying classes in price-fixing cases.

Dow argued that *Comcast v. Behrend*, 133 S.Ct. 1426 (2013), which was decided shortly after the jury trial in this case, required reversal of the court's decision to certify a class. In *Comcast*, the Supreme Court ruled that individualized questions would "inevitably overwhelm" questions common to the class at trial because plaintiffs had not demonstrated a method to prove class-wide damages arising from the permitted liability theory. The Tenth Circuit distinguished *Comcast* on two grounds. First, in *Comcast* the plaintiffs conceded that class certification required a method to prove class-wide damages through a common methodology, which the Urethane plaintiffs did not concede. Second, unlike in *Comcast*, the trial court in this case did not need to predict what would predominate at trial because the trial had already taken place by the time Dow raised the issue.

Dow contended there was insufficient evidence that the price-fixing agreement was effectively implemented and that therefore the court should have entered judgment in its favor as a matter of law. The Tenth Circuit disagreed, observing that the evidence went beyond mere parallel price announcements and reflected frequent and secretive communications among top executives, including clandestine calls from public phone booths. In addition, the jury heard evidence that some of the announcements were partially or fully implemented.

Dow recently sought review en banc—before all the judges of the Tenth Circuit—of the three-judge panel's unanimous decision, contending that it conflicted with the Supreme Court's recent teaching on the standards for class certification.

Sausage Merger

The U.S. Department of Justice *announced* the settlement of charges that the proposed acquisition of The Hillshire Brands Company, a leading sausage, hot dog, and cold cut producer, by Tyson Foods, one of the world's largest meat companies, would have substantially reduced competition for the purchase of sows—female adult pigs—from farmers in violation of §7 of the Clayton Act. *United States v. Tyson Foods*, *No. 14-cv-1474* (D.D.C. Aug. 27, 2014). As part of the settlement, Tyson agreed to divest its sow purchasing business to a department-approved buyer. The department, along with Illinois, Iowa and Missouri, asserted that the proposed merger would have combined two major buyers of sows from farmers in the United States, accounting for over a third of all purchases, and would have eliminated the benefit farmers received from competition between the two.

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Most merger challenges focus on the potential reduction in competition for the sale of products or services and the risk that eliminating a competitor may lead to higher prices, but the antitrust laws also seek to prevent undue concentration among buyers, which may in some circumstances lead to lower prices—presumably anticompetitively low prices—paid to sellers.

Premerger Notification

Berkshire Hathaway agreed to pay a civil penalty of nearly $900,000 for failing to comply with premerger notification requirements before converting notes into voting securities of a company in which it had made prior investments. *U.S. v. Berkshire Hathaway*, *No. 14-cv-01420*, (D.D.C. Aug. 20, 2014).

The Hart-Scott-Rodino (HSR) Act requires persons contemplating mergers or acquisitions of voting securities or assets that meet statutory thresholds to notify the antitrust agencies and observe a waiting period before completing those transactions. In some situations, a prior filing to report a minority stock acquisition does not eliminate the obligation to report subsequent acquisitions. In this case, Berkshire Hathaway's December 2013 conversion of notes into USG Corporation voting securities—which constituted an acquisition—took place past the expiration date of Berkshire's HSR filing to acquire an initial USG stock position, more than five years after the original filing.

Notably, only six month earlier, Berkshire failed to submit HSR filings to report another transaction. The Federal Trade Commission said it took no action after Berkshire's first violation and stated: "although we may not seek penalties for every inadvertent error, we will enforce the rules when the same party makes additional mistakes after promises of improved oversight." U.S. premerger notification requirements do not depend on the existence of potential antitrust issues, and the FTC has not hesitated to bring enforcement actions for failure to report acquisitions that had no possible anticompetitive effects.

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