PHILADELPHIA, TUESDAY, APRIL 13, 1999

The Legal Intelligencer

1843—1999 THE OLDEST LAW JOURNAL IN THE UNITED STATES Vol. 220 No. 70 • $3.00

NFL's Antitrust Exemption Doesn't Extend To Satellite Broadcasts, 3rd Circuit Rules

Sports Fans' Class Action Over 'Sunday Ticket' May Proceed

BY SHANNON P. DUFFY
U.S. Courthouse Correspondent


MANSMANN


GAWTHROP


SEDRAN

Professional football's exemption from antitrust laws — which allows teams to join forces in making big package deals with television networks — does not extend to satellite broadcasts because Congress specifically exempted only "sponsored" telecasts, a federal appeals court has ruled.

"Exceptions to the antitrust laws must be narrowly construed," U.S. Circuit Judge Carol Los Mansmann wrote for a unanimous three-judge panel.

Satellite broadcasts are not included within the exception, Mansmann said, because the Sports Broadcasting Act of 1961 created an exemption only for "sponsored telecasting," a phrase that clearly refers only to broadcasts of games that are free to the viewing public and funded by businesses in return for advertising time.

The ruling in *Shaw v. Dallas Cowboys Football Club, et al.* upholds the June 1998 decision by U.S. District Judge Robert S. Gawthrop III that cleared the way for a proposed class-action suit in which consumers claim that the NFL and its member teams have conspired to fix the price of the "NFL Sunday Ticket," which allows satellite television buyers to see a full menu of the pro football games airing on any given Sunday.

Gawthrop certified an immediate appeal of his ruling since no court had ever tackled the question of whether the SBA should be extended to satellite broadcasts.

Yesterday's ruling clears the way for the case to go into the discovery phase and head for trial.

According to the suit, the Sunday Ticket is an all-or-nothing proposition, meaning that viewers with satellite dishes who want to see games not available on their local channels must pay $139 per month for access to *every* NFL game, and cannot choose single games or smaller packages.

Plaintiffs' lawyers argued that the collective pricing of the Sunday Ticket violates antitrust laws and is not covered by the exemptions created in the Sports Broadcasting Act. The SBA was passed in response to the 1953 decision of a Philadelphia federal judge in *United States v. National Football League* which held that the NFL's package sale of games to CBS violated the Sherman Antitrust Act.

But while the SBA exempted "sponsored telecasts," the plaintiffs argued that it could not be extended to satellite broadcasts in which the consumer pays a ticket price.

Gawthrop agreed, saying, the SBA "did not pronounce a broad, sweeping policy, but rather engrafted a narrow, discrete special interest exemption upon the normal prohibition on monopolistic behavior. In the SBA, the NFL got what it lobbied for at the time. It cannot now stretch that law to cover other means of broadcast."

Now the 3rd U.S. Circuit Court of Appeals has upheld that ruling, saying Gawthrop's "well-reasoned opinion" properly focused on Congress's intent in passing the law.

The ruling is a victory for attorneys Howard J. Sedran and Donald E. Haviland Jr. of Levin Fishbein Sedran & Berman, who filed the suit along with Roberta Liebenberg of Liebenberg & White; Ira Neil Richards of Trujillo Rodriguez & Richards; and David T. Shulick of Frank & Rosen.

Joining them as co-counsel are lawyers from five other firms — Milberg Weiss Bershad Hynes & Lerach in New York;

Lieff Cabraser Heimann & Bernstein in San Francisco; Cohen Millstein Hausfeld & Toll in Washington, D.C.; Taylor Gruver & McNew in Greenville, Del.; and Heins Mills & Olson in Minneapolis.

Named as defendants in the suit are the NFL; the Philadelphia Eagles; the New York Giants; the Dallas Cowboys; the San Francisco 49ers; and the Oakland Raiders. The league's 25 other teams are listed in the suit only as "co-conspirators."

Defense lawyers from the Washington, D.C., firm of Covington & Burling, along with Richard P. McElroy of Blank Rome Comisky & McCauley, argued that the wording of the SBA's antitrust exemption was broad enough to cover even satellite sales.

But Gawthrop looked to the specific language of the SBA, which bars suits complaining of "any agreement" among football teams by which a league "sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games."

The plaintiffs focused on the term "sponsored" and insisted that law clearly exempted only sales of broadcasts that have formal sponsors and presumably run commercials so that viewers can see the game for free.

Defense lawyers insisted that the Sunday Ticket was merely the sale of residual rights in games which were also broadcast on "sponsored telecasts" and should therefore be considered a sale of "part of the rights" to a "sponsored broadcast."

Gawthrop disagreed, saying, "I, however, look to the broadcast which goes to these particular plaintiffs, not its earlier, sponsored incarnation."

Otherwise, Gawthrop said, the NFL could circumvent the law by simply always using earlier broadcasts with commercials.

"I do not believe that to have been Congress's intent," Gawthrop wrote. "To construe the statute that way would cause the statute to self-destruct — an absurd result."

The legislative history also supported his ruling, Gawthrop said, quoting testimony from then-NFL Commissioner Pete Rozelle, who answered "absolutely" when asked if the SBA exemption would cover "only the free telecasting" of games.

Now Gawthrop's analysis has won the enthusiastic endorsement of the Court of Appeals.

NFL lawyers agreed that a package of its satellite broadcasts sold to individual subscribers could not be considered a "sponsored" telecast, but argued that its pooled sales to satellite distributors were within the SBA exemption because they constituted sales of residual or retained rights.

Mansmann, in an opinion joined by U.S. Circuit Judges Anthony J. Scirica and Richard L. Nygaard, disagreed, saying, "we agree with the District Court that one looks to the nature of the broadcast."

While the NFL was correct in saying that it still owns partial rights to the games broadcast by the free networks, Mansmann said it erred in characterizing its rights as rights in the sponsored telecasts.

"The NFL's underlying rights are in the games themselves and, more specifically, they include the right to sell images of those games for broadcast through various media. The broadcast rights sold to sponsored telecasters do not subsume the separate broadcast rights sold to a non-sponsored medium," Mansmann wrote.

The NFL, she said, "attaches great significance" to the fact that its satellite broadcasts use the same images as the sponsored telecasts and are fed from the same network television cameras.

But Mansmann found that using the same signal to broadcast over two media "does not render the rights in one broadcast derivative of the rights in the other."

Just as easily, she said, the logic could be reversed and one could argue that it is the broadcast rights that are derivative and constitute part of the NFL's rights in the non-sponsored satellite telecasts.

Legally, Mansmann said, each transaction is a sale of part of the NFL's underlying rights to the images of its games, but only the sales to sponsored telecasters are "exempt from antitrust scrutiny."

To adopt the NFL's argument, Mansmann said, "would allow the exception to swallow the rule: a sponsored telecast to a limited geographic area would secure an antitrust exemption for nationwide sales."

After reviewing the legislative history of the SBA, Mansmann found that both Congress and the NFL intended that the law would apply only to sponsored telecasts.

Such a "special interest" law must be narrowly construed, Mansmann said, because it is inappropriate to expand them beyond the objective that the lobbyists and lawmakers intended at the time.

Mansmann said the 7th Circuit Court of Appeals put it quite succinctly in its 1992 opinion in *Chicago Pro. Sports Ltd. Partnership v. NBA* when it said: "When special interests claim they have obtained favors from Congress, a court should ask to see the bill of sale."