The Bulls Storm the Court(room): *Chicago Professional Sports Limited Partnership v. The National Basketball Association*

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The Rise of the Bulls

"The Chicago Bulls pick Michael Jordan of the University of North Carolina."[1] Those words, uttered by a young, mustachioed David Stern at the 1984 NBA Draft, changed the course of basketball history, especially for fans in Chicago. After the Houston Rockets selected Hakeem Olajuwon with the first pick, and the Portland Trailblazers, with questionable foresight, selected Sam Bowie with the second pick, the Bulls selected the 6'6" shooting guard from the University of North Carolina. Over the course of his career, Michael Jordan would go on to win ten scoring titles, five Most Valuable Player awards, six NBA Final MVP awards and lead the Bulls to six NBA Championships. Jordan is regarded by most as the best player to ever play the game of basketball, prompting one federal court judge to label him "the Mikhail Baryshnikov of basketball."[2]

By 1990, the Bulls had reached the Eastern Conference finals for three consecutive years, only to be stopped short of the NBA Finals by the Detroit Pistons in each of those three years. Finally, in 1990-91, the Bulls seized their first championship trophy, sweeping the Pistons in the Eastern Conference finals and beating Magic Johnson's Los Angeles Lakers in five games in the championship series. The Bulls would go on to win championships in the following two seasons, completing the first of two championship "three-peats." After a two-year championship drought, largely attributable to Michael Jordan's temporary retirement and brief foray into professional baseball, the Bulls returned to league's pedestal, winning three more consecutive titles from 1996 to 1998. The 1995-96 team won an astounding 72 games, suffering defeat in a mere 10 contests over the course of the regular season.

Due to Jordan's unparalleled skills and overwhelming popularity, and the unmatched success of his team on the court, the Bulls became one of the NBA's most visible franchises by the late 1980s and the league's premier franchise during the 1990s. For instance, during the 1989-1990 season, officially licensed Chicago Bulls paraphernalia dominated the market, outselling every other team.[3]

Along with the Bulls' success, the NBA was experiencing its own good fortune in the early 1990s, dramatically increasing its revenues, attendance and the value of its television contracts. In 1988, league revenues stood at just under $300 million. By 1990, just two short years later, total revenue had increased by two-thirds and approached $500 million. The NBA's

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[1] 1984 NBA Draft Video, available at http://broadband.nba.com/cc/playa.php?content=video&url=http://boss.streamos.com/wmedia/nba/nbacom/draft/1984_jordan_m_3.asx&video=blank&nbasite=nba (accessed April 17, 2008).
[2] *Chicago Professional Sports Ltd. Partnership v. NBA*, 754 F. Supp. 1336, 1339-40 (N.D. Ill. 1991) (hereinafter "*Chicago Professional Sports I*").
[3] *Id.* at 1340.

1988-1990 television contract with CBS and TBS was valued at $142.5 million, or just over $71 million per season.[4] By 1990-1991, however, its single season contract with NBC and TNT was worth $180 million—a more than doubling of value.[5] Revenue from NBA-licensed merchandise also soared, jumping from $200 million in 1987 to $525 million in 1990.[6] Clearly, by the turn of the decade, the NBA was a thriving sports league.

Looking to capitalize on its individual success and ensure long-term financial stability, the Bulls sought a wider audience for their local television broadcasts. As luck would have it, located right in Chicago was a prominent local broadcast station, WGN-TV, whose signal had been transformed into a national channel carried by many cable companies. When the Bulls switched their local broadcasts from the Chicago Fox affiliate to WGN, viewership in Chicago dramatically increased, and a substantial number of Bulls games were suddenly available to viewers around the country.

Threatened by the prospect of individual teams competing against the league's own national broadcast contracts, the NBA acted swiftly to curtail national NBA coverage on channels such as WGN. The conflict between the NBA and the Bulls—both seeking to maximize revenues during boom periods—was born. Facing increasingly restrictive policies against its broadcasts on WGN's superstation, the Bulls resorted to litigation to fight for their right to televise their games on the channel of their choice, free from NBA interference. This is the story of the battle waged not on the basketball court but rather in federal court.

Superstations

So-called "superstations" have existed since the enactment of Section 111 of the Copyright Act of 1976, which instituted a compulsory license scheme that allows cable operators to retransmit copyrighted broadcast programming to their customers throughout the country.[7] Under Section 111, the local broadcast station has no ultimate control over the national retransmission of its programming; it is legal for a cable operator to transmit the copyrighted material if it abides by the statutory royalty schedule, even without the permission of the station whose signal is being retransmitted. Ted Turner pioneered the development of national superstations when, in 1976, he partnered with a satellite company to pick up the local Atlanta TBS broadcast signal (originally known as WTCG), transmit it to a satellite transponder and then send the signal back down to earth to cable operators across the United States for retransmission as part of their cable packages.[8]

At the time of the lawsuit in 1990, the NBA defined a superstation as any commercial over-the-air television station whose broadcast signal is received outside of the station's local market by more than 5% the country's cable subscribers.[9] Under that definition, three superstations existed in the United States—WGN from Chicago, WTBS from Atlanta and WWOR from New York—and all three carried at least some NBA games.

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[4] Thomas, Robert McG. "N.B.A. Optimistic on Finances," *New York Times*. June 7, 1988, available at http://query.nytimes.com/gst/fullpage.html?res=940DE7DB123FF934A35755C0A96E948260 (accessed April 17, 2008).

[5] *Chicago Professional Sports I,* 754 F. Supp. at 1342.

[6] Kleinfield, N.R. "How One Man Rescued Basketball, and Its Bottom Line," *New York Times*. March 4, 1990, available at http://query.nytimes.com/gst/fullpage.html?res=9C0CE1DD103FF937A35750C0A966958260&sec=&spon=&pagewanted=all (accessed April 17, 2008).

[7] *Chicago Professional Sports I*, 754 F. Supp. at 1346.

[8] *Id.*

[9] *Id.* at 1345.

WGN

Unlike TBS, which partnered with a satellite provider to pick up the local WTBS signal for national retransmission, WGN was an involuntary entrant to the superstation field. In 1978, United Video began intercepting WGN's local over-the-air broadcast signal for retransmission. Given the Copyright Act's compulsory license scheme, United Video's actions were completely legal, and United Video paid nothing directly to WGN. The transformation to superstation status did benefit WGN, however, as it received the statutory licensing payments from cable operators for any copyrighted programming it owned. (When WGN was not the copyright holder, the statutory royalty payment went to the actual copyright holder.) Moreover, WGN's total viewer audience increased dramatically, which affected the value of advertising slots sold by WGN.

While United Video initially acted without WGN's assistance, the two entities eventually realized the symbiotic nature of the relationship. In 1985, WGN began providing to United Video a direct and exclusive microwave link-up, meaning that United Video no longer had to intercept the over-the-air signal in Chicago. This arrangement provided United Video with operational redundancy because it had two sources to access WGN's programming; if there were any problems with the microwave link-up, United Video could resort to acquiring the WGN broadcast signal to ensure uninterrupted national programming. In 2001, WGN took over from United Video the role of providing its signal to cable providers.[10]

At the time the lawsuit was filed, WGN's and United Video's technology did not permit the local, over-the-air signal to broadcast different content than the nationally retransmitted signal. The exact same content that was being shown in Chicago, whether local news, movies, sports or other programming, was available to WGN viewers across the country. Technological advancements in the mid-1990s, however, changed the nature of superstations by introducing split signals—a development that had a critical impact in the case.[11] By having two separate signals—one broadcast over the air to the local market and a separate signal transmitted to cable companies for rebroadcasting—WGN's programming can now be "split," meaning that certain programs can be broadcast to its over-the-air audience in the local market, while separate content is provided through the national cable feed. Thus, WGN viewers in Chicago today are, at times, viewing completely different programming from WGN viewers receiving the station through a cable provider outside of the Chicago market. This makes superstations, and WGN, particularly appealing to advertisers, since local merchants can purchase advertising time on the local broadcast feed to reach local customers, while national advertisers can target the national market through the superstation's cable feed. For example, during its superstation broadcasts of Chicago Cubs games, WGN offers advertisers three targets for their commercials: a local audience through the over-the-air signal, a national cable audience that excludes the Chicago market, or a combination of both options that reaches WGN's entire audience (i.e. the advertisement is shown on the local airwaves and the retransmitted cable feed).

WGN is the sole remaining national superstation in the United States. TBS became a "regular" cable channel on October 1, 2007, and airs separate content from the local, Atlanta-based precursor station. The lack of additional superstations can be attributed to increasingly stringent regulations imposed by the Federal Communications Commission on superstations,

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[10] *See* http://www.tribune.com/investors/transcripts/bearstearns_02.html.

[11] Interview, Joel Chefitz, April 18, 2008.

prompted by complaints by local stations upset with the intrusion into their markets by superstation programming.

The NBA's Broadcast Policy

The NBA's broadcast policy is a hybrid model, with the league's central office negotiating and controlling the national contracts and individual teams retaining control over local broadcasts of games not covered by the national agreements. During the 1990-1991 season (the season during which the first phase of trial occurred), the NBA contracted with NBC, a national broadcast network, and TNT, a cable network, to televise a subset of NBA games to a national audience. The combined value of the contracts exceeded $180 million. In exchange for that significant financial outlay, NBC gained the right to televise 22 regular season games, TNT showed 50 regular season games, and each station carried about 30 playoff games.[12] Revenue from the nationally broadcast games on those two networks was shared equally among the league's 27 teams, with each team pocketing approximately $6.8 million. This shared revenue from the national television contracts was the league's largest source of communal wealth; 80% of money distributed by the league to individual teams originated from the national television contracts.[13] In contrast to the national contracts, teams are entitled to keep 100% of revenues from their local broadcast contracts covering games not shown on the national networks.

Since the early 1980s, in an attempt to maximize the value of its national broadcast contracts, the league made the strategic decision to limit the number of games in the market and impose various restraints on a team's local broadcasting agreements.[14] For example, in 1980, the NBA's Board of Governors adopted a resolution limiting each team to broadcasting 41 games (half of the team's regular season games) on over-the-air, free broadcast stations. Along with the policy came ample muscle to enforce it, as teams were threatened with forfeiture of any games broadcast in violation of the rules and faced fines up to $100,000 for each violation of the policy. The Chicago Bulls voted in favor of these rules. Despite the limits on local, over-the-air broadcasts, there are virtually no limits on a team's ability to broadcast its games over local *cable* stations, thereby allowing teams to show all 82 regular season games by utilizing a combination of cable and broadcast stations (or all cable stations).[15] Most teams utilize local cable sports channels, such as Comcast Sports Net, as the primary broadcaster of their games. The 41-game over-the-air broadcast station limit, therefore, has little impact on most teams due to the popularity of local cable sports stations and the dominance of national, non-sports programming on the broadcast stations.

The 41-game over-the-air limit technically applied to superstations, since, as explained above, the superstation signal retransmitted over cable networks originates as an over-the-air signal in the superstation's home market. WGN, for example, is available for free over the public airways in Chicago, meaning the NBA's 41-game broadcast station rule applies to it. In addition to the indirect effects on superstations from that rule, the league began imposing superstation-specific restrictions in 1982. After signing cable contracts with the ESPN and USA networks, and in an effort to limit head-to-head broadcast competition, the league prohibited teams from televising games over superstations on nights when any NBA game was being shown

[12] *Chicago Professional Sports I*, 754 F. Supp. at 1342.
[13] *Id.* at 1340.
[14] *Id.* at 1342.
[15] *Id.* at 1343.

on ESPN or USA.[16] Under this rule, teams could theoretically still broadcast 41 games over superstations, so long as the games being broadcast via a superstation did not conflict with the games being shown on ESPN or USA. The same-night superstation blackout rule, however, significantly restrained teams' broadcast flexibility.

In 1985, the NBA moved to further restrict the ability of teams to reach a national audience via a superstation by enacting an explicit limit on the number of games that individual teams could broadcast over a superstation. During the 1985-1990 seasons, the NBA's rules permitted each team to broadcast only 25 games on a superstation, down from the previous 41-game level. In April 1990, the league adopted another new rule that limited teams to broadcasting only 20 games on superstations. The Chicago Bulls and New Jersey Nets voted against these stricter superstation restrictions, and the NBA's new 20-game limit was the specific impetus that prompted the Bulls to file suit against the NBA.[17] According to an NBA spokesman, the more stringent superstation limits were required because "the issue is that, as a superstation, WGN is competing against other local, as well as our national, cable telecasts…We need to protect the interests of the entire league."[18]

The Bulls were the only team directly affected by the more stringent 20-game superstation limit. The TBS superstation and the Atlanta Hawks had contracted to televise 20 games during the 1990-1991 season, in compliance with the new rule. Additionally, TBS and the Hawks waived any right to wage a legal challenge against the superstation broadcast rules when their parent company, Turner Broadcasting System, Inc., explicitly promised to refrain from suing as a means of enticing the NBA to enter the national cable contract with TNT, also owned by Turner Broadcasting. The only other superstation carrying NBA games, WWOR of New York, broadcast only six New Jersey Nets game in the 1990 season and was thus unaffected by the reduction from 25 to 20.

Games broadcast over superstations are the only nationally available games not directly controlled by the league's central office. Before the resolution of the lawsuit between the Bulls and the NBA, the team contracting with the superstation was entitled to keep the advertising revenue from those contracts, but the league collected the statutorily mandated royalty payments that cable operators must pay to the copyright holder for the retransmission rights (because the league is the ultimate copyright holder). These royalty payments were distributed equally among the teams, but the revenue generated was relatively sparse in comparison to the league's national broadcast contract revenues. For example, in 1988 the NBA collected roughly $3.96 million in royalty payments for games broadcast over superstations.[19]

Bulls-WGN Contract

In September 1989, the Bulls terminated a local broadcasting contract with Chicago's Fox affiliate (WFLD) and entered into an agreement with WGN to televise 25 games in the 1989-90 and 1990-91 seasons over WGN, both to local viewers and to a national audience via

[16] *Id.*
[17] *Id.*
[18] Simon, Ellis. "Full-Court Press Forces WGN to Become Bulls Cablecast," *Crain's Chicago Business*. October 28, 1996, page 47.
[19] *Chicago Professional Sports I*, 754 F. Supp. at 1344.

the superstation signal.[20] According to Joel Chefitz, the Bulls' lead counsel in the case, the Bulls were seeking to expand their fan base by moving to a more prestigious and well-known Chicago station. The Bulls "took WGN as [they] found it," meaning that its superstation status was a secondary concern; the primary motivation for switching to WGN was to capitalize on its preeminent status as *the* station for Chicago sports.[21] The contract stipulated that either party could exercise an irrevocable option to extend the contract through the 1993-94 season. The parties' lawyers must have sensed that additional NBA restrictions on superstation telecasts were possible, as the contract contained a walk-away provision exercisable by either party if the league's rules precluded WGN from showing at least 21 games.

The contract provided that WGN would pay the Bulls half of its advertising revenues for commercials broadcast during the games, with a guaranteed minimum payment of $61,000 for each game shown on WGN.[22] The move to WGN proved lucrative for the Bulls: gross revenues from local broadcasts doubled, and the Bulls received an average of $128,000 for each of the 25 games shown on WGN, compared to just $43,000 per game it received the previous year under its Fox contract.[23] Local television ratings—a measure of the number of households tuned into a particular broadcast—also rose dramatically for games broadcast on WGN, with about 320,000 homes viewing each game, compared to just 150,000 for the games shown the previous season on Fox. According to Mr. Chefitz, the potential for these higher local ratings—and not WGN's superstation status—was the primary motivation for the Bulls' move to WGN.[24]

The increased revenues and ratings were likely a function of WGN's unique status in the Chicago broadcast market. WGN had long been associated with the Chicago sports scene, as evidenced by the fact that WGN was the only broadcast station licensed by a professional Chicago sports team to televise games in 1991.[25] According to Mr. Chefitz, "WGN had a reputation as a *sports* station in Chicago," and, given its independent status, it was better able to emphasize the sports component of its programming than were more traditional network-owned broadcast stations like Fox or NBC.[26]

Despite the huge increases in local viewership, the contract with WGN put the Bulls between "a rock and a hard place," as WGN had no control over the extraterritorial reach of its broadcast signal (which was being retransmitted by United Video, as explained above), and the Bulls were well aware of the NBA's pre-existing limits on superstation broadcasts. According to Mr. Chefitz, the Bulls were, at best, "ambivalent" about WGN's extraterritorial superstation

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[20] *Id.* at 1347. The 25-game contracts complied with the NBA's existing rules at that time that permitted up to 25 games to be broadcast over superstations.
[21] Interview, Joel Chefitz. April 18, 2008.
[22] *Id.* at 1348.
[23] *Id.*
[24] Interview, Joel Chefitz. April 18, 2008.
[25] *Chicago Professional Sports I*, 754 F. Supp. at 1348. In addition to the Bulls, WGN also broadcast Chicago White Sox and Chicago Cubs games in 1990. The Chicago Bears were prohibited from licensing games under the NFL's national television contracts. The Chicago Blackhawks did not broadcast any games on over-the-air broadcast stations, and, until this season, televised only road games on cable channels. Interestingly, on April 1, 2008, the Blackhawks announced a new agreement with WGN to broadcast 20 Blackhawks games each of the next three seasons on the local WGN broadcast station, returning the Blackhawks to their television home of the 1960s and 1970s. In 1961, WGN televised the clinching game of the Blackhawks last Stanley Cup championship; the new agreement will surely return the storied franchise to its rightful place among the NHL's elite teams. *See* "Blackhawks Announce All Games to Be Televised," available at http://blackhawks.nhl.com/team/app/?service=page&page=NewsPage&articleid=358783 (accessed April 3, 2008).
[26] Interview, Joel Chefitz. April 18, 2008.

reach.[27] This superstation status, however, undoubtedly affected ratings and revenues as well, adding significant cash to the Bulls' coffers. Thirty-four percent of television households across the nation had access to WGN in 1991, which represented more than 30 million homes. Of these potential viewers, approximately 450,000 households outside of Chicago watched Chicago Bulls telecasts on WGN—more than the 320,000 local households that tuned in to watch the games.[28] In total, more than 700,000 households viewed Chicago Bulls games on WGN, which was roughly equivalent to the 775,000 viewers who watched the average NBA game shown on TNT through the NBA's national contract.[29] A WGN Vice President estimated that WGN earned approximately 15% more revenue due to its superstation reach than it otherwise would for local over-the-air broadcasts of Chicago Bulls games.[30] Thus, the contract with WGN was a win-win for the Bulls: better ratings and higher revenues in the local broadcast area and additional income from the national viewers of WGN's superstation signal.

The NBA's increasingly restrictive policies affecting superstations, however, threatened to sharply curtail the flourishing relationship between the Bulls and WGN. The league's broadcasting limits came at a time when the Bulls were beginning to dominate rivals on the court and were amassing a passionate group of fans around the country. Faced with the prospects of losing both broadcasting revenue and national exposure, and after failing to reach an amicable agreement with the NBA, the Bulls and WGN, as a "last resort," challenged in court the new NBA policy that reduced the number of games a team could broadcast via a superstation from 25 to 20.[31]

The Litigation

District Court Round One

The Chicago Bulls and WGN filed suit against the NBA on October 26, 1990, alleging that the NBA's restrictions on the number of games teams were permitted to broadcast via a superstation, and its five game reduction in particular, constituted a horizontal agreement by the league to restrict output and effectively boycott superstations in violation of §1 of the Sherman Act. In essence, the plaintiffs argued that the NBA was comprised of teams, who, in addition to being joint venturers, were also economic competitors. Thus, the league could not impose output restrictions on local broadcast agreements without running afoul of the Sherman Act. Joel Chefitz, lead counsel for the Bulls at trial, would later candidly admit to the Seventh Circuit that "the profit motive is why we're here."[32]

Gary Bettman, then the NBA's vice president and general counsel (and now the commissioner of the NHL), framed the issue of the case this way: "The issue is a sports league's right to regulate the extent to which teams take their local games into the national marketplace. We want to protect the national television contract that is shared by all the teams. The Bulls and WGN have a different view."[33] Key to the NBA's position was that the league should have the

[27] *Id.*
[28] *Chicago Professional Sports I*, 754 F. Supp. at1346. The national audience watching Bulls games on WGN dropped to about 336,000 after January 1990, due to changes in rules affecting cable companies.
[29] *Id.* at 1349.
[30] *Id.*
[31] Interview, Joel Chefitz. April 18, 2008.
[32] Warren, James. "Appeals Court Referee in Bulls, NBA Dispute," *Chicago Tribune*. October 18, 1991, p. C1.
[33] Kaplan, Joel. "The Most Fun They've Ever Had," *ABA Journal*. April 1992.

ability control national broadcasts, in order to protect each franchise from frequent intrusion into its local broadcast territory, and to protect the value of the league's national contracts with NBC and TNT.

The case promised to be a sports litigator's dream, as the suit pitted figures from the NBA's most prominent team against the league itself. Mr. Chefitz, however, did not let the star-factor change his approach to the case. "I treated it like any other case…It obviously helps to understand the industry and the facts like any other case, so being a sports fan is a plus, but getting caught up in that instead of doing your job as a trial lawyer…is a mistake."[34]

Senior District Judge Hubert L. Will

The case was tried before Judge Hubert Will, a legendary figure in the Northern District of Illinois. A Milwaukee native and University of Chicago Law School graduate originally appointed to the bench by President John F. Kennedy in 1961, Judge Will viewed judging as a form of art. Judging, according to Will, "cannot be produced on any kind of standard form or computer. If it's done right, it has a large element of decency, skill, technique and judgment…The perfect trial is as much an art form as the perfect symphony."[35]

This appreciation for the mechanics of the trial led Judge Will to be a preeminent proponent of innovative case management techniques, especially those involving increased organization and efficiency. Demonstrating his knack for innovation, he was among the first judges to utilize pretrial scheduling conferences, pretrial orders, and other devices to control the trial in its early stages. An amendment to Rule 16 of the Federal Rules of Civil Procedure, which covers pretrial scheduling conferences, is often called the "Will Rule." Judge Will was also a strong proponent of bifurcated trials and was a master handler of complex civil litigation.

Judge Will led training seminars for other federal judges for over 20 years, instilling in them the following principle: "Our job is to produce the highest quality of justice in the shortest possible time at the lowest possible cost consistent with that highest quality."[36] A former district court colleague, Frank McGarr, observed that Judge Will's "contributions have been major, not only in his own court…but across the country as well."[37] In a particularly impressive episode, Judge Will, while maintaining a full caseload in the Northern District of Illinois, travelled to the district court in Philadelphia three days each month, where he disposed of more than 100 cases in less than ten months.[38] Interestingly, the speed with which the first phase of the Bulls' suit against the NBA went to trial would become a key issue upon appeal.

In addition to being an innovative jurist, Judge Will earned the respect of his colleagues by serving as the lead plaintiff in a class action lawsuit that challenged Congress' decision to withhold cost-of-living payment adjustments due to judges under the existing salary statutes. The case, originally decided in district court, was appealed directly to the Supreme Court in 1980, with the Court awarding back pay and significant pay increases to all federal judges.[39]

Evidencing the respect he commanded among his colleagues, Judge Will was awarded the Edward J. Devitt Distinguished Service to Justice Award in 1992, a prestigious award doled

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[34] Interview, Joel Chefitz, April 18, 2008.

[35] Rooney, John Flynn. "A Judge Much Honored by His Peers," *Chicago Daily Law Bulletin*. December 14, 1994, page 3.

[36] *Id.*

[37] *Id.*

[38] "Will, Hubert Louis." *Legal Encyclopedia*, available at http://www.answers.com/topic/hubert-louis-will?cat=biz-fin (accessed March 17, 2008).

[39] *See Will v. U.S.*, 449 U.S. 200 (1980).

out by fellow judges. In presenting him with the award, the committee labeled Judge Will "a judge's judge," citing his case management reforms and his effort to increase judicial pay.[40] Judge Will assumed senior status in the Northern District of Illinois in 1979, but he remained active on the bench—even outside of his home district—for an additional 15 years, hearing cases until just months before his death.[41] In 1993, for example, Judge Will sat by designation on the Seventh Circuit Court of Appeals in 12 cases and presided over an additional 35 cases on the Ninth Circuit Court of Appeals, on top of maintaining a caseload of six cases in the Northern District of Illinois.[42]

Thinking back on what it was like to be in Judge Will's courtroom, Joel Chefitz remarked, "I loved trying a case before Judge Will...He expected at any point in trial for you to be ready with a mini-closing argument, and to go toe-to-toe with him. I just loved it; it was the most exciting experience you could imagine…He was smart, obviously very well credentialed." Chefitz continued, "The attribute I most admired is that he wasn't presumptuous. He wanted you to engage with him. He wasn't afraid of effective counter-attack by a lawyer being questioned by him, and that's just the kind of judge you would want."[43]

Judge Will would play an enormous role in shaping the course of this litigation.

The Decision

Key to the disposition of the case was the proper characterization of the league for antitrust purposes—is the league a joint venture, a single entity or something different? Under the antitrust laws, a single entity—such as a large corporation—is incapable of violating §1 of the Sherman Act because that statute requires an agreement or conspiracy among competitors. A single entity simply cannot make illegal agreements with itself, thus making §1 inapplicable. If the league were a joint venture of individual competitors, however, then the agreements among the teams and the league would face some type of antitrust scrutiny.

Judge Will noted that the league's national television contract with NBC and TNT was essentially a "nonaggression pact" among all the teams to not compete with each other for national television rights.[44] This type of non-compete agreement reflects what one would expect to see from a wholly integrated, single firm, but Judge Will concluded that the NBA teams also retain elements that make them very much separate entities in competition with one another.[45] Teams located in the same geographic region, such as the Los Angeles Lakers and Clippers, for example, must directly compete for fans, media coverage, team management and many other resources. Most importantly, individual teams maintain control over their own budgets and earn the bulk of their revenues from individual, rather than collective, sources. For instance, during the late 1980s, gate receipts accounted for more than 50% of a team's revenues, and teams were entitled to keep roughly 94% of their own home gate revenues.[46] In brief, the most difficult analytic hurdle for antitrust purposes is that the NBA resembles neither an integrated, single firm

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[40] Rooney, John Flynn. "A Judge Much Honored by His Peers," *Chicago Daily Law Bulletin*. December 14, 1994, page 3.
[41] "Hubert L. Will, Federal Judge, 81," *New York Times*. December 16, 1995.
[42] Rooney, John Flynn. "A Judge Much Honored by His Peers," *Chicago Daily Law Bulletin*. December 14, 1994, page 3.
[43] Interview, Joel Chefitz. April 18, 2008.
[44] *Chicago Professional Sports I*, 754 F. Supp. at 1340.
[45] *Id.* at 1340-41.
[46] *Id.* at 1341.

nor a marketplace of competitors; rather, the league displays characteristics of both. According the Judge Will, "The teams in the NBA cooperate in some ventures, but they engage in many others, on the court and off, as independent firms."[47] Despite the analytic difficultly in characterizing the league, the court concluded that the NBA was best described as a special type of joint venture.

Having lost on the single entity argument, the NBA claimed that its challenged restrictions on superstation broadcasts were nevertheless immune from antitrust attack due to a specific statutory exemption contained within the Sports Broadcasting Act ("SBA"). Enacted in 1961, the SBA exempts from antitrust scrutiny "any joint agreement…by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games[.]"[48]

Judge Will summarily dismissed the NBA's defense of SBA immunity, noting that the SBA exempts only those broadcasting rights transferred or sold *by a league*.[49] Under the NBA's broadcast policy, however, all teams retained the broadcasting rights to games not selected for broadcast by NBC or TNT. In other words, the Bulls, not the NBA, owned the television rights to the 25 games at issue, and the only sale or transfer of those rights was from the Bulls to WGN. According to Judge Will, "[T]he antitrust laws therefore apply. The SBA is not ambiguous on that point. It says transfers *by a league* and does not require deep interpretation."[50] The vulnerability of the NBA's position—and the reason the SBA does not apply in the same was as it does for the NFL—is that the *NBA* has not transferred the rights for the games in question. Instead, *individual teams* own and control the rights to all games not previously transferred to the national networks under the NBA's television contract.

Having decided that the new superstation 20-game limit was not exempted by the SBA, Judge Will examined its validity under traditional antitrust principles. For several reasons, the court concluded that the league's policy was a restraint on trade. Judge Will characterized the superstation broadcast limit as a "horizontal agreement among competitors to divide markets and control output, with the stated purpose of raising prices" [for the national broadcast contracts], thereby reducing competition among the teams, between the teams and the league, and between superstations and other television networks.[51] Essentially, the superstation agreement was held to place an "artificial limit" on the supply of NBA basketball games, with a corresponding negative impact on consumers, in violation of the Sherman Act. In addition, Judge Will characterized the NBA's broadcast limits as a concerted refusal to deal and form of group boycott against superstations.

In assessing the legality of the NBA's policy, Judge Will rejected the Bulls' and WGN's calls for *per se* condemnation and instead applied the Rule of Reason, which balances the negative effects of the impermissible conduct against any redeeming virtues of the conduct. To justify its restrictions on superstation broadcasts, the NBA relied heavily on the need to protect individual teams and local markets from over-saturation and dilution. If too many Bulls games are available nationally on WGN, the argument goes, the value of other teams' local television contracts will be reduced as viewers opt to watch Bulls telecasts instead of their own local team's

[47] *Id.* at 1342.
[48] 15 U.S.C. § 1291.
[49] *Chicago Professional Sports I*, 754 F. Supp. at 1350.
[50] *Id.* (emphasis in original).
[51] *Id.* at 1355.

games. Similarly, the NBA argued that restrictions on superstations were necessary to protect the value of the national contracts with NBC and TNT; if too many games were televised nationally, then the NBA would have a weaker bargaining position when negotiating national television contracts, and the product being sold by the NBA would be diluted.[52]

Judge Will rejected most of the NBA's proffered justifications on principle, noting that the antitrust laws are designed to protect competition—and therefore ultimately consumers—and not particular competitors. Despite the NBA's arguments to the contrary, consumers are made better off by the presence of more games in the national marketplace. Moreover, the NBA failed to produce any data to support its claim that individual teams were harmed by superstation broadcasts; no evidence was presented showing a decline in viewership or a reduction in the value of local television contracts due to WGN's cable telecasts. Likewise, no evidence was produced showing that the NBA's national television contracts with NBC and TNT were affected adversely by superstations. One failure of the NBA's position was its reliance on sweeping generalities, such as the following offered by Commissioner David Stern: "To the extent that somebody has watched a national game [on a superstation] on Monday night and Tuesday night and Wednesday night and Thursday night and Friday night and Saturday night, that…person is less likely to watch the Sunday afternoon match up [on NBC]."[53] The district court rejected this contention as "sheer fantasy," noting that the quality of the teams playing is the primary driver of viewership, and the national networks have priority and select the most appealing matchups for their broadcasts. Thus, even diehard NBA fans who watch multiple games per week would likely select the national NBC Sunday broadcast as one of the games to watch, given that it is likely to be the most appealing matchup. Casual fans will still be drawn to the marquee national broadcasts, while diehard fans will probably continue to watch the NBC/TNT games, regardless of whether they have also viewed superstation games.[54]

In brief, the Bulls and WGN prevailed in the district court because they successfully argued that the five-game reduction in the number of allowable superstation broadcasts was an unreasonable restraint on trade that suppressed competition. The NBA failed to persuade the court that the restriction had procompetitive justifications or was necessary to protect the value of the league's national contracts or the territorial exclusivity of other teams. The district court enjoined the NBA from enforcing the 20-game superstation limit, meaning that the 25-game limit would remain intact.

Seventh Circuit Round One

Predictably, the NBA quickly appealed Judge Will's decision to the Seventh Circuit Court of Appeals. Writing for a unanimous panel, Judge Easterbrook, one of the nation's preeminent antitrust jurists, affirmed the lower court's decision.[55] Joel Chefitz recalled that the decision came as a bit of a surprise since Judge Easterbrook was no friend of the antitrust plaintiff. "The most surprising thing about that decision was that it was pro-plaintiff in an antitrust case. It was the first decision I was aware of in which Judge Easterbrook had sided with

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[52] *Id.* at 1359.
[53] *Id.* at 1360.
[54] *Id.*
[55] *Chicago Professional Sports Ltd. Partnership v. NBA*, 961 F.2d 667 (7th Cir. 1992) (hereinafter "*Chicago Professional Sports II*").

a private plaintiff in an antitrust case."[56] It was not all positive news for the Bulls, however. In affirming the decision, the Seventh Circuit essentially laid out a roadmap for the NBA to follow in order to impose the superstation restrictions in a manner consistent with the antitrust laws.

First of all, Judge Easterbrook disapproved of Judge Will's interpretation of the Sports Broadcasting Act. Reasoning that if the SBA only applied when the league transferred the licenses of all games for broadcast, there would be no need for the antitrust exemption: if the rights to show all games were transferred, there would be no reduction in output and, therefore, no antitrust liability. The only way the SBA serves an antitrust purpose, according the Judge Easterbrook, is if it empowers a sports league to keep some games off the air.[57] Nonetheless, the NBA was not entitled to the SBA's antitrust protection because the statute only applies when the league has "transferred" a broadcasting right. The Seventh Circuit affirmed Judge Will's conclusion that the individual teams retain the full copyright interests in all games not transferred to NBC or TNT; consequently, the SBA, by its terms, did not apply.[58]

Even though it affirmed the district court's decision, the Seventh Circuit acknowledged several ways for the NBA to restructure its broadcasting agreements and league policies in order to fall within the purview of the SBA. Judge Easterbrook took the liberty to essentially provide the NBA with a course of conduct to follow in order to prevail in court in the future. Mr. Chefitz noted that if Judge Easterbrook has thoughts on a case, even if not necessary for disposition of the case, he fully expects the judge to offer them. "I've always been grateful to hear Judge Easterbrook's thoughts. [Having him lay out the roadmap for the NBA] wasn't so bad. I was glad to hear what he had to say at that point in the case, rather than being surprised by it later."[59] Specifically, Judge Easterbrook noted in dictum that instead of permitting individual teams to license broadcasting rights, the league could instead license directly to the local broadcasters. Alternatively, the court suggested that the league could have included a superstation cap in its national NBC and TNT contracts, thereby tying the superstation restrictions to a transfer of broadcasting rights under the SBA. Finally, the court instructed the NBA that it could mimic professional baseball and allow unlimited superstation broadcasts but reap a portion of the revenues for redistribution among the league's teams.[60] Shortly after the decision was announced, the NBA would attempt to heed much of Judge Easterbrook's candid advice.

In evaluating whether the district court had property characterized the league for antitrust purposes as a joint venture in the production of games but a cartel in the sale of output, the Seventh Circuit acknowledged the difficultly that sports leagues pose for antitrust purposes: "Whether this is the best characterization of professional sports is a subject that has divided courts and scholars for some years, making it hard to characterize the district judge's choice as clear error."[61] Holding that the district court properly selected the use of the Rule of Reason to evaluate the restraint and any countervailing procompetitive justifications, Judge Easterbrook went on to evaluate anew the supposed redeeming characteristics of the NBA's superstation restraint.

Having rejected all other proffered justifications, the Seventh Circuit considered the NBA's argument that its superstation policy was necessary to control free-riding by the Bulls and

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[56] Interview, Joel Chefitz, April 18, 2008.
[57] *Chicago Professional Sports II*, 961 F.2d at 670.
[58] *Id.* at 671.
[59] Interview, Joel Chefitz. April 18, 2008.
[60] *Chicago Professional Sports II*, 961 F.2d at 671.
[61] *Id.* at 672.

WGN. The Bulls and WGN are able to benefit—without bearing any of the costs—from the NBA's, NBC's, and TNT's national advertisements promoting NBA basketball. In addition, to the extent that the WGN telecasts may diminish the value of the national contracts due to reduced viewership, the Bulls are reducing the NBA's communal wealth that is distributed among all the teams, while still garnering substantial national broadcasting income from the WGN contract. Judge Easterbrook rejected the NBA's claim of free-riding, noting that the Bulls' free ride can be addressed by simply requiring the Bulls to pay for the right to televise over a superstation. Again, the court appeared to be directing the NBA's next move: "[T]he league may levy a charge for each game shown on a superstation, or require the club to surrender a portion of its revenues. Major League Baseball does exactly this and otherwise allows its teams access to superstations. Avoidance of free-riding therefore does not justify the NBA's 20-game limit."[62] Indeed, the court noted that by selecting the "superstation tax" carefully, the league could "induce the Bulls to broadcast 20 games, neither more nor less, on WGN."[63]

The final piece of the appellate decision was an observation of the speed with which the litigation proceeded in the district court. "We are conscious that this case went to decision like greased lightning. Seven weeks from complaint to trial is unheard of in antitrust litigation."[64] Judge Will's knack for case management was clearly on display in this case. To Judge Easterbrook, however, the swiftness of the process was particularly concerning since the district court relied on the NBA's inability to produce statistical evidence of harm to the value of broadcast contracts as a rationale for finding the NBA guilty of violating the antitrust statute. Nevertheless, identifying a potential tactical error committed by the defendants, Judge Easterbrook noted that the NBA did not protest the district court's schedule or ask for a preliminary, rather than final, injunction to be issued. As such, the decision prohibiting the NBA from reducing the number of superstation broadcasts from 25 to 20 was affirmed.

Round One Postscript

Having lost at both the district court and appellate levels, the NBA petitioned the Supreme Court for a writ of certiorari. The National Hockey League and the National Football League filed amicus briefs with the Supreme Court, urging it to grant certiorari. In particular, those sports leagues objected to the Seventh Circuit's characterization of the NBA as a type of cartel, with the member teams acting as horizontal competitors. This characterization "utterly ignored the fundamental nature of sports leagues," the NHL and NFL wrote. If such a characterization of sports leagues gained traction, it could "seriously disrupt the operation of sports league joint ventures."[65] Despite the pleas of three of the major sports leagues, the Supreme Court denied the petition, thereby validating Judge Will's decision.

After the district court's injunction was affirmed on appeal, the NBA, somewhat inexplicably, agreed that teams could license superstations to carry 30 games (up from the previous 25 mandated by the injunction and ten more than the proposed 20-game limit that gave rise to the litigation). This 30-game agreement was in place for the 1991-92, 1992-93, and 1993-94 seasons. For the 1994-95 season, the NBA reverted back to the 25 game limit specified in the original district court injunction.

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[62] *Id.* at 675 (internal citations omitted).
[63] *Id.* at 676.
[64] *Id.*
[65] Henderson, Greg. "Supreme Court Allows More Cable Broadcasts of Bulls Games," *United Press International*. November 2, 1992.

District Court Round Two

The focus of the first trial was limited to the legality of the reduction in superstation broadcasts from 25 to 20. In the second phase of the litigation, which was decided in early January 2005, the NBA sought a decision on (1) the legality of prohibiting superstation broadcasts altogether, and (2) if it was not able to bar all superstation broadcasts, its ability to impose a superstation fee or tax on games broadcast via superstations. The Bulls and WGN countered that they should be able to show up to 41 games on the WGN superstation (the maximum number of games on broadcast stations permitted under league rules), and any restrictions on superstation broadcasts were illegal restraints of trade under the antitrust laws. [66]

In opening arguments, which occurred in front of Judge Will in fall 2003, Joel Chefitz argued that the team, following the loss of Michael Jordan to professional baseball, was now in special need of WGN's higher viewership potential. "The Bulls no longer have a natural draw. Now they need WGN more than ever."[67] Bulls' owner Jerry Reinsdorf agreed with that assessment, arguing that without the team's biggest superstar, its ability to reach fans—both locally and nationally—through WGN was critical to its financial success. Reinsdorf testified that, at a very basic level, more exposure to the team through WGN broadcasts generates more fans. He used the Chicago Cubs' frequent broadcasts on WGN as an example (and an opportunity to take a shot at the cross-town rival of his Chicago White Sox): "The Cubs have proven they can be bad consistently and still have a hard-core following." Joel Chefitz recalled that Mr. Reinsdorf was quite fond of the Cubs example: if even the lowly Cubs could attract a passionate fan base with the aid of a WGN contract, the Bulls would clearly gain from having their games shown on that channel.[68] With Michael Jordan suddenly absent from the team, Mr. Reinsdorf viewed the WGN broadcasts as critical to the success of the franchise, arguing that he would air as many games on WGN as they would accept.[69] According to Mr. Chefitz, showing their games on WGN, to a wide audience, was the Bulls' best means of promotion and would ensure a broader season ticket-holder base and more life-long Bulls fans.[70] Thus, the plaintiffs continued to claim that they had the right to negotiate their own broadcast agreements, free from interference from the league, in an effort to maximize the team's exposure and profit—regardless of whether WGN's superstation signal happened to be available nationally.

Beyond their right to maximize their own profits, the plaintiffs also stressed the value of the WGN local and national broadcasts to advertisers and fans. In closing arguments at the second district court trial, the lawyers for WGN and the Bulls argued that sports fans and advertisers are the ultimate losers in the NBA's restrictive superstation scheme. The restrictions would mean fewer choices for viewers and less programming space for advertisers.[71]

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[66] *Chicago Professional Sports Ltd. Partnership v. NBA*, 874 F. Supp. 844 (N.D. Ill. 1995) (hereinafter "*Chicago Professional Sports III*").
[67] "Bulls, WGN Take the Court Against NBA," *Chicago Daily Law Bulletin*. October 18, 1993, page 1. The Bulls' claims of poverty are somewhat hard to accept, given that the 1993-94 Bulls won 55 games even without Michael Jordan, advancing to the second round of the playoffs, before suffering elimination against the New York Knicks in seven games only after a controversial foul call in Game 5 by Hue Hollins that Bulls fans have yet to forget.
[68] Interview, Joel Chefitz, April 18, 2008.
[69] Lehmann, Daniel J. "Bulls, WGN Seek More Air Time," *Chicago Sun-Times*. October 23, 1993, page 12.
[70] Duncan, Laura. "Judge to Rule on WGN Bulls Broadcasts by End of Year," *Chicago Daily Law Bulletin*. September 30, 1994, page 1; Interview, Joel Chefitz. April 18, 2008.
[71] Fordahl, Matthew. "Bulls, WGN: TV Limits Would Hurt Fans," *Chicago Sun-Times*. April 14, 1994, p. 22.

The NBA, familiarly, argued that the league should be able to control its national television exposure to protect and control the identity of the NBA brand. By sidestepping the NBA's contracts with NBC and Turner to televise games nationally on WGN, the NBA felt the Bulls were being unfairly enriched. "Some cable networks were willing to pay the NBA a fair market price for showing the games in the national market," claimed Jeffrey Mishkin, the league's senior vice president of legal and business affairs. "WGN wants to get the games from the Bulls and show them in the national market…They could have negotiated with us. We could have sold to WGN, but they were not involved in negotiations. That's really what's at the bottom of this case."[72]

NBA Commissioner David Stern testified that while individual teams market themselves locally, the teams have entrusted the league with national marketing.[73] According to Stern, the Bulls' contract with WGN interfered with the league's ability to control its national exposure and image. The goal of the NBA is to be "like the Walt Disney corporation," with quality entertainment at each of its 27 locations, David Stern testified in district court. In response, Judge Will quipped, "So you honestly think you have 27 Magic Kingdoms?" Stern replied, "Yes."[74] Stern's analogy demonstrates the league's desire to be a sort of national guardian of the quality of NBA basketball, just like Disney closely controls its brand identity across its various theme parks, movies and merchandise. According to Stern, the Bulls' foray into national broadcasts threatened its ability to replicate the Disney empire.

In the opinion, Judge Will seemed to be a bit miffed by Judge Easterbrook's rather explicit statements detailing how the NBA could achieve its objectives while complying with the Sherman Act or the Sports Broadcasting Act exemption. Judge Will remarked, "[T]he appeals court's suggestions as to how the NBA might prevent all such [superstation] telecasts effectively eliminated the very real possibility of a negotiated settlement of the case."[75] Indeed, the Seventh Circuit's opinion essentially instructed the NBA to revise its policy in order to become compliant while preventing national telecasts of NBA games outside of the NBC and TNT contracts. Not surprisingly, within weeks, the NBA adopted most of Judge Easterbrook's suggestions and moved to have the injunction lifted that prevented the NBA from limiting superstation broadcasts to fewer than 25 games.

In assessing whether the NBA's changes affected the earlier antitrust analysis, the district court reexamined its conclusion that the NBA is not a single entity but rather a type of joint venture. Ronald Rauchberg, an NBA attorney, argued in favor of characterizing the league as a single entity, rather than a joint venture: "The league and the teams were created simultaneously. They got together and created a joint venture…and agreed to do this together."[76] The court again rejected the NBA's single-entity theory: "The NBA confuses…the necessary and beneficial cooperation of a joint venture, with the unified interests of a single entity. When independent actors join in order to achieve mutual benefit, or even to accomplish what they could not on their own, the result is not automatically exempt from antitrust scrutiny."[77] Since the NBA teams did not have a total unity of interest, Judge Will held, they could not properly be classified as a single entity. Thus, finding no material changes in the structure of the league that would affect

[72] "Bulls, WGN Take the Court Against NBA," *Chicago Daily Law Bulletin*. October 18, 1993, page 1.
[73] "Stern Testifies in Bulls' Lawsuit over TV," *New York Times*. November 3, 1993, page B16.
[74] Lehmann, Daniel J. "NBA Must Control TV Deals, Stern Tells Judge," *Chicago Sun-Times*. November 3, 1993, page 20.
[75] *Chicago Professional Sports III*, 874 F. Supp. at 847.
[76] Fordahl, Matthew. "Bulls, WGN: TV Limits Would Hurt Fans," *Chicago Sun-Times*. April 14, 1994, p. 22.
[77] *Chicago Professional Sports III*, 874 F. Supp. at 850 (citing the Supreme Court's *NCAA* decision).

its earlier conclusion about the proper characterization of the league, Judge Will concluded once again that the NBA is a joint venture of competing teams, subject to scrutiny under §1 of the Sherman Act.

Even though no structural changes had occurred since the appellate decision, the NBA had adopted several new policies, many based on Judge Easterbrook's suggestions, which potentially affected its antitrust liability. Taking the Seventh Circuit's advice, Commissioner Stern recommended, and the teams approved (over several dissents), a transfer of all copyrights from the teams to the league, meaning that the league, for the first time, owned all team copyright interests.[78] However, the district court rejected the NBA's contention that this substantively affected the NBA's ability to restrict superstation broadcasts because teams retained the rights to license television broadcasts and sell copyrighted materials: "The ultimate fact is that there has been no change in either the teams' rights to enter into contracts involving local and regional TV or radio transmission of NBA games and the sale of other copyrighted products, or in the league's continuing in all of its contracts to act as agent for the teams and not as the owner and licensor of the copyrights…[T]he nominal transfer of various teams' copyrights to the NBA does not immunize it from the application of the antitrust laws."[79]

Beyond the transfer of copyrights, the NBA Board of Governors passed several additional resolutions, most of which responded directly to the dicta in the court of appeals' decision. For instance, the teams authorized the league to enter a new television contract with NBC that would transfer to NBC the exclusive right to televise *all* NBA games. The contract specified that NBC would then allow the league to license to national cable networks a subset of games not televised by NBC, and NBC would also permit the league to transfer rights to individual teams for local broadcasts.[80] In essence, the contract transferred all rights for all games to NBC but then specified that rights would be transferred to national cable networks and local teams. An additional resolution adopted by the Board of Governors repealed the 25-game superstation rule and implemented a ban on superstations, or, alternatively, a tax on any games shown on superstations.

Judge Will was not amused by this shell game. "The effect of these resolutions and the new NBC contract, so far as the individual team's local and regional television arrangements are concerned, is that they are exactly the same as they were before the rights to televise all 1107 regular season NBA games were ostensibly given to NBC. For while NBC theoretically received the rights, it simultaneously gave back the rights to all but 25 or 26 [games that would be shown on NBC] and the NBA promptly authorized the individual teams to continue with existing or to enter into new contracts with respect to local and regional over the air and cable televising of their games."[81] Dick Ebersol, president of NBC Sports, admitted during trial that he only cared about having the right to televise the 25 games plus the playoffs; he permitted the league's lawyers to put in whatever language they wanted with respect to rights to the other games so long as NBC was guaranteed the rights to its subset of games.[82]

The fundamental issue for Judge Will in this second round of litigation was whether this newly structured contract was immune from antitrust scrutiny under the Sports Broadcasting Act because the rights to all games had now, at least in theory, been transferred by the league to

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[78] *Id.* at 851.
[79] *Id.*
[80] *Id.* at 853.
[81] *Id.*
[82] *Id.*

NBC. While agreeing that the new contract technically complied with 15 U.S.C. §1291, the court, in what must have been a surprise to the NBA, held that the sister provision of §1292 had been violated. The second section of the SBA removes antitrust immunity for any agreement that imposes restrictions on the televising of games (with an exception for blackouts in home territories). Since the NBA-NBC agreement limits the number of games that can be shown nationally, §1292 mandates that the agreement is not exempt under the SBA from antitrust scrutiny.

In sum, Judge Will held that the changes made by the NBA's Board of Governors did nothing to change his earlier finding that the NBA had illegally restrained trade in violation of the Sherman Act. The new policies were simply "an extraordinary exercise in elevating form over substance," with the end result an attempt to deprive the public of the ability to see additional NBA games on nationally available channels such as the WGN superstation.[83] Again, in employing Rule of Rule analysis, Judge Will rejected the NBA's procompetitive justifications that the superstation restrictions were necessary to maximize league revenues and protect the NBA's national broadcast partners. Commissioner David Stern testified that "the ability to act as a single seller allows [the NBA] to compete more effectively…That ability to compete is very beneficial to the league."[84] Judge Will, however, viewed the restraints not as necessary to protect the NBA's competitive position but instead as illegal restraints on trade. Regarding this issue, Jeffrey Mishkin, senior vice president for legal and business affairs for the NBA, proclaimed, "[W]e still believe that a league should be able to control all national distribution and will be appealing the part of the decision that allows the Bulls to telecast [nationally] on WGN."[85]

In addition, the district court concluded that that since the NBA had voluntarily agreed to *increase* the number of superstation broadcasts from 25 to 30—above the level required by the initial injunction—the existence of superstation broadcasts could not be of serious import to the league. As in the first phase of the trial, no evidence was produced to show that the league was harmed by WGN's broadcasts, and some witnesses even testified that the additional superstation coverage of the Bulls (and, to a lesser extent, the Atlanta Hawks, while WTBS was showing Hawks game via its superstation) strengthened the public interest in the NBA and substantially increased consumer demand for the NBA and its associated products. The original injunction setting a floor of 25 games was modified to prohibit the NBA from restricting the number of superstation broadcasts to below 30 games per team for each season.[86]

Despite losing on most of its claims, there was at least a bit of a silver lining for the NBA. As part of the new policies adopted by the Board of Governors in response to the first piece of litigation, the NBA imposed a refined superstation blackout rule that prohibited any team from televising its games on a superstation on the same night that an NBA game was being broadcast on a national cable network (i.e. TNT or TBS).[87] The effect of this new restriction was that the Bulls could not televise games on WGN on Tuesday, Thursday and Friday nights (in addition to Sunday afternoons, when NBC's contract precluded the showing of other games).

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[83] *Id.* at 858.
[84] "Stern Favors Limiting Superstation Telecasts," *Charleston Gazette*, January 11, 1994.
[85] Lehmann, Daniel J. "Judge Keeps Bulls on Ch. 9; 30-Game Deal Upheld Despite NBA Opposition," *Chicago Tribune*. January 7, 1995, page 3.
[86] *Chicago Professional Sports III*, 874 F. Supp. at 869.
[87] *Id.* at 864.

Despite the restrictions, the Bulls and WGN presented no evidence that the policy restrained output, and the court, therefore, allowed that particular restriction to remain in place.

In a separate, yet related district court decision, Judge Will ruled on the ability of the league, given that it could not block superstation broadcasts, to impose a "superstation fee" on the Bulls for each game shown on WGN. Acting in response to Judge Easterbrook's roadmap, the NBA Board of Governors on April 27, 1993, had adopted a policy that authorized the league to collect a fee from any team who licensed a national telecast.[88] The NBA's rationale for such a fee is that revenue from nationally televised games on NBC, TNT and TBS was shared among all teams; the superstation broadcasts allowed national viewing without the concomitant contribution to league revenues.

The NBA's formula calculated the superstation fee based on the supposed fair market value of superstation telecasts in the national market. The calculation starts with the per-game fee paid by Turner for the right to broadcast games on its national cable channel. This figure is then discounted based on the smaller number of homes receiving WGN as compared to TNT or TBS, and it is further reduced in proportion to the broadcast ratings to account for any differences in the desirability or marketability of the games being shown. At the time of the decision, the formula determined that the Bulls owed $.003 per household reached by WGN outside the Chicago market, or about $114,000 per game. (By contrast, Turner paid $.008 per household, or $469,000 per game).[89]

The court ruled that on its face, the superstation fee is a restraint designed to reduce output and control prices. However, in contrast to the other league restrictions on superstations, the court accepted the NBA's justifications for the fee, agreeing that some level of fee is reasonable and can control free riding by the Bulls. The court reserved judgment on whether the particular fee formula devised by the NBA was reasonable and instead left it to the parties to negotiate a reasonable fee. In an oral summary of his 67-page opinion, Judge Will warned that if the parties were unable to reach an agreement on a fee, he would have to "get back in the picture."[90] The NBA responded positively to Judge Will's ruling on the ability of the league to charge a fee for superstation broadcasts. "After four years of litigation, we are gratified that the court has validated the league's right to charge a fee for these national telecasts," stated Jeffrey Mishkin, the NBA's senior vice president for legal and business affairs.[91]

Even though he upheld the NBA's right to impose a superstation fee on the Bulls, Judge Will's opinion delivered another important victory for the Bulls and WGN, as it refused to validate the NBA's superstation restrictions and actually increased the maximum number of games the Bulls could show on WGN. The potential impact of this decision was huge, possibly extending beyond the NBA. According to John McCambridge, an attorney for WGN, "One big plus for us is the deterrent effect [the decision] has on Major League Baseball from even thinking about throwing the Cubs and the White Sox off WGN."[92]

As expected, the decision was once again appealed to the Seventh Circuit.

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[88] *Id.* at 865.
[89] *Id.* at 866.
[90] Nicodemus, Charles. "Bulls Bounce NBA in Court; WGN Broadcasts Increased," *Chicago Sun-Times*. January 6, 1995, page 3.
[91] Lehmann, Daniel J. "Judge Keeps Bulls on Ch. 9; 30-Game Deal Upheld Despite NBA Opposition," *Chicago Tribune*. January 7, 1995, page 3.
[92] Lehmann, Daniel J. "Judge Keeps Bulls on Ch. 9; 30-Game Deal Upheld Despite NBA Opposition," *Chicago Tribune*. January 7, 1995, page 3.

The Death of Judge Hubert L. Will

After issuing his second round of major opinions in the case, but before the Seventh Circuit ruled, Judge Will passed away at the age of 81. After 34 years on the federal bench, Judge Will succumbed to cancer on December 9, 1995. Tragically, cancer had 13 years earlier also claimed the life of his daughter, Wendy Will Case, at the age of 39. After her death, Judge Will had established the Wendy Will Case Cancer Fund, Inc., a non-profit organization that provided more than $1.5 million in grants to researchers studying causes, prevention techniques, and cures for cancer. In a 1994 interview with the Chicago Daily Law Bulletin, Judge Will proclaimed that as a result of his daughter's death, "Cancer has become my number one enemy."[93] A fellow board member of the Fund remarked that Judge Will's response to his daughter's premature death was "to absolutely go to war with cancer."[94] Unfortunately, Judge Will ended up losing that war on a very personal level.

Judge Will's death undoubtedly affected the parties involved in the case. Joel Chefitz recalled, "I was deeply saddened by his death. At that point, he was almost like a family member."[95] With the guiding father-figure now suddenly absent from the litigation picture, the parties awaited the appellate court's decision, eager to learn where the litigation would head next.

Seventh Circuit Round Two

Nearly six years after the original suit was filed by the Bulls and WGN, the Seventh Circuit sent both teams back to square one. The Bulls had appealed the 30-game superstation broadcast level, still hoping to be able to show 41 games over WGN. The NBA, on the other hand, contended that the antitrust laws did not prevent it from setting a 15 or 20 game superstation limit—or a total ban on superstations—and, alternatively, sought to have its superstation fee approved. In his opinion, Judge Easterbrook quipped, "With apologies to both sides, we conclude that they must suffer through still more litigation."[96] The lower court decision was vacated and remanded.

Judge Easterbrook agreed with the district court's conclusion that the NBA's reformulated contract with NBC triggered the nullification provision of §2 of the Sports Broadcasting Act, due to the restrictions placed on superstation broadcasts. Given that analysis of §2 was absent from his first opinion, it appears that this SBA nullification provision was overlooked by both Judge Easterbrook in his roadmap for the NBA and by the NBA when implementing their revised broadcast policies. Judge Easterbrook conceded that, due to §2, the antitrust immunity provision of §1 did not apply to the league's action, and a full scale rule of reason analysis was required. He disagreed, however, with Judge Will's conclusions and method of antitrust analysis.

On the issue of the superstation fee, Judge Easterbrook levied relatively harsh words at the late Judge Will: "The district court's opinion concerning the fee reads like the ruling of an agency exercising a power to regulate rates. Yet the antitrust laws do not deputize district judges

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[93] Rooney, John Flynn. "A Judge Much Honored by His Peers," *Chicago Daily Law Bulletin*. December 14, 1994, page 3.
[94] Rooney, John Flynn. "A Judge Much Honored by His Peers," *Chicago Daily Law Bulletin*. December 14, 1994, page 3.
[95] Interview, Joel Chefitz. April 18, 2008.
[96] *Chicago Professional Sports Ltd. Partnership v. NBA*, 95 F. 3d 593, 595 (7th Cir. 1996) (hereinafter "*Chicago Professional Sports IV*").

as one-man regulatory agencies."[97] Rather than judicial interference with the rate-setting process, the Seventh Circuit held that the NBA's internal governance policies should determine the fee. Since the Bulls were still seeking to televise additional games on WGN, despite the existence of the league's fee, output had not been restricted. Therefore, there simply was not an antitrust issue; high prices themselves do not violate the antitrust laws unless output is curbed.[98] Judge Easterbrook analogized the superstation fee to the NBA's policies on how teams share gate receipts or merchandise revenues.

The fundamental issue pervading all stages of the litigation remained—how to properly characterize the NBA for antitrust purposes (joint venture, single entity, cartel or something else). Noting that the speed with which the first trial proceeded was virtually unprecedented in complex litigation, Judge Easterbrook afforded the NBA significant latitude in advancing a refined "single entity" theory even though it had failed to develop the argument during the first round of appeals. The Seventh Circuit rejected Judge Will's conclusion that the NBA was subject to full-scale antitrust scrutiny because its member franchises lacked a complete unity of interest and could not, therefore, qualify as a single entity. In doing so, however, Judge Easterbrook refused to declare whether the league actually was a single entity or joint venture; the opinion merely rejected the district court's conclusion that the single entity status could not apply.[99] The issue, therefore, was remanded for the district court to revisit.

Of particular note, Judge Easterbrook noted that the cases characterizing other sports leagues have not yielded consistent outcomes, and there is no clear principle to guide the proper characterization of sports leagues for antitrust purposes. "Sports are sufficiently diverse that it is essential to investigate their organization…one league at a time—and perhaps one facet of a league at a time, for we do not rule out the possibility that an organization such as the NBA is best understood as one firm when selling broadcast rights to a network in competition with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few other market opportunities."[100]

Despite not deciding the ultimate issue, the court instructed the district court to consider carefully the issue of market power, noting that a firm can only violate the Rule of Reason if it possesses sufficient market power to harm competition. The court noted that NBA broadcasts do not dominate any particular time slot (such as college football does on Saturday afternoons), the NBA season overlaps all other professional sports, and games are played every day of the week during the eight-month season. Given these facts, the NBA faces significant competition in attracting viewers to its broadcasts; sports fans have other options available, and non-sports entertainment options, such as television shows, movies, opera, might also properly be considered part of the relevant market for the district judge to evaluate on remand.[101]

In vacating the opinion and remanding the case, the Court of Appeals effectively ruled that the Bulls and WGN must abide by the league's limitations on superstation broadcasts—a substantial blow to the plaintiffs, who had to this point been shielded from those limitations by the district court's injunctions.[102] Thus, after six years of litigation, the parties had made essentially no progress in resolving their dispute. The Bulls and WGN now faced the prospect of

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[97] *Id.* at 597.
[98] *Id.*
[99] *Id.* at 599.
[100] *Id.* at 600.
[101] *Id.* at 600-01.
[102] *Id.* at 601.

complying with more restrictive superstation limits—the very type of restrictions that prompted the legal challenge in the first place. The NBA had failed to convince the courts to sign off on its broadcasting restrictions, meaning that it could not be certain that its restrictions would ultimately pass antitrust scrutiny. With further litigation on the horizon, before a new district court judge and covering many of the exact same issues already tried over the previous stages of the case, the atmosphere was ripe for settlement.

The Effect of the Decision: Superstation Blackout

The Seventh Circuit's decision allowed the NBA to prohibit Bulls game from being shown nationally on WGN while the ultimate resolution of the case was pending. By the time the second round of the case was decided, technology had advanced to allow for the splitting of WGN's signal between the local signal and the nationally retransmitted superstation signal. To comply with Judge Easterbrook's decision and the NBA's policies, WGN moved all of its Bulls coverage to its local signal and provided separate programming for its national superstation feed.[103] WGN and the Bulls were fearful that if they pushed the boundaries of the NBA's policies, the NBA would seek to prevent WGN from airing *any* games, whether over the local broadcast signal or the cable superstation outlets.[104] Chuck Sennett, senior counsel for the Tribune Company, which owns WGN, remarked that WGN's decision to pull Bulls games from the national feed was temporary. "We'd like to get a definitive ruling before the season is over, but we can't be optimistic."[105] Indeed, given the six years of uncertainty tied to the unresolved litigation, the prospects of the Bulls returning quickly to WGN's national cable feed did not appear to be good.

As a result, the 40 million households outside of Chicago with access to WGN over their cable system were unable to view any Bulls games on WGN at the start of the 1996-97 season. Instead, WGN viewers outside of Chicago saw movies and popular first-run action-adventure programming.[106] An article in the local Madison, Wisconsin, newspaper typified the sentiments of Bulls fans across the country: "Judging by the amount of Chicago Bulls paraphernalia I've seen, the 1995-96 NBA champions have a large fan base in Madison. And while these fans celebrate the Bulls' 9-0 start and enjoy Michael's movie 'Space Jam,' one issue must be bothering them: the fact Michael, Scottie and the rest of Da' Bulls can't be seen on WGN (cable Ch. 13 in Madison) outside of the Chicagoland area."[107] Instead, after the NBA's tentative victory at the Seventh Circuit, Bulls fans across the country had to be content with seeing only the 20 Bulls games broadcast that season on NBC, TBS and TNT. WGN shared the fans' pain. According to Paul Walker, WGN's vice president and general manager, "[W]e are extremely disappointed that our cable audience outside the Chicago area will not be able to share in watching the world champion Chicago Bulls on WGN Television this season."[108]

An editorial in a central Illinois newspaper further demonstrated the frustration of Bulls fans across the nation who could no longer see games on WGN after the NBA blocked

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[103] Simon, Ellis. "Full-Court Press Forces WGN to Become Bulls Cablecast," *Crain's Chicago Business*. October 28, 1996, page 47.
[104] "WGN to Televise 35 Chicago Bulls Games in 1996-97," *PR Newswire*. October 14, 1996.
[105] Simon, Ellis. "Full-Court Press Forces WGN to Become Bulls Cablecast," *Crain's Chicago Business*. October 28, 1996, page 47.
[106] "WGN to Televise 35 Chicago Bulls Games in 1996-97," *PR Newswire*. October 14, 1996.
[107] Kleinmaier, Bryan. "Ruling Hurts Area Bulls Fans," *Wisconsin State Journal*. November 16, 1996, page 2D.
[108] "WGN to Televise 35 Chicago Bulls Games in 1996-97," *PR Newswire*. October 14, 1996.

superstation broadcasts: "Perhaps the NBA has forgotten that it was 'free' TV and the exposure to national audiences of the likes of Michael Jordan that has caused the meteoric rise in popularity of NBA basketball. With that rise came money flowing into NBA coffers, and into the pockets of franchises and players throughout the U.S. WGN-TV has been feeding that frenzy for years because the station is on basic cable-TV systems around the United States. That's a prime reason the Bulls have become so popular and draw large crowds wherever they go…Like so many other professional sports, the NBA has forgotten what has made it financially successful."[109] Given their on-the-court success, the Bulls had attracted fans across the country, accustomed to watching games on WGN; however, with the lawsuit unresolved and WGN and the Bulls unwilling to risk further broadcast restrictions, these fans no longer had access to Bulls games on WGN.

The new blockade of WGN superstation games in the 1996-97 season did not just affect Bulls fans eager to see the team compete on its way to a 69-13 season and its fifth championship of the decade. The financial impact was felt by WGN and the local distributors of WGN to cable systems around the country. Chuck Sennett, the attorney for WGN and the Tribune Company, lamented that the "national ad revenue [forfeited by the loss of the WGN superstation games] will not be recovered."[110] The director of marketing for UVTV, which distributed WGN to cable systems in the Tulsa, Oklahoma, area, remarked, "We can find [substitute] programming to appeal to a large number of people, but there's only one Michael Jordan and there's only one Dennis Rodman."[111] The loss of the Bulls games would substantially affect UVTV's viewer demographics, as the number of male viewers would decrease with the loss of the Bulls telecasts. While cable systems would not drop WGN as a result, according to the UVTV marketing director, stations will "have to work harder to get the message out about [WGN's] other programming."[112]

In brief, after seven years of televising hundreds of Bulls games to a national audience, WGN was relegated in the fall of 1996 to restricting the audience for its Bulls broadcasts to the local Chicago market. But WGN and the Bulls were definitely not content with this outcome. According to Peter Walker, WGN's vice president and general manager, "We intend to return to federal court and win a reaffirmation of our rights to televise the Chicago Bulls, making them available to fans in Chicago and nationwide."[113] Starting back in the district court, in front of a new judge, however, did not seem like an attractive prospect to either party.

Settlement

The forces pushing towards settlement ultimately prevailed, and after a long and contentious legal battle spanning more than six years and four major judicial opinions, the Bulls and WGN settled their dispute with the NBA on December 12, 1996. Under the terms of the settlement, the Bulls gained the ability to show 41 games over WGN's local, over-the-air broadcast signal (but not the superstation feed)—the maximum number allowed by the NBA's broadcast policies relating to all broadcast stations. During the 1996-97 season, WGN broadcast

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[109] "Bulls Fans Crying 'Foul' over NBA's TV Blackout," *The Pantagraph (Bloomington, IL)*. November 14, 1996, page A10.
[110] Simon, Ellis. "Full-Court Press Forces WGN to Become Bulls Cablecast," *Crain's Chicago Business*. October 28, 1996, page 47.
[111] Simon, Ellis. "Full-Court Press Forces WGN to Become Bulls Cablecast," *Crain's Chicago Business*. October 28, 1996, page 47.
[112] Simon, Ellis. "WGN Limits Bulls Telecast to Chicago," *Crain's Chicago Business*. October 21, 1996, page 14.
[113] "WGN Slate Will Be on Only Locally," *Chicago Sun –Times*. October 15, 1996, p. 80.

35 games—the most ever since it began televising Bulls games in 1989—but only the local Chicago audience had access to all 35 games.[114] Taking advantage of the unique technological characteristics of a superstation, the settlement allowed the Bulls and WGN to show 12 of those WGN games during the 1996-97 season on both the local and the superstation feed. The number of games permitted to be shown on WGN's superstation signal increased to 15 for each of the subsequent four seasons. The games shown on WGN's local feed in excess of the 15-game limit were blacked out over the superstation feed, and alternate programming was provided.

On the issue of an appropriate fee, the parties agreed to replace the NBA's proposed superstation tax with an advertising revenue sharing plan that entitled the NBA to collect 50% of the advertising revenues from WGN's national cable broadcasts.[115] This financial agreement contrasted starkly with the NBA's cable contracts with TNT and TBS, which have those Turner stations paying a combined $350 million for the rights to broadcast NBA games nationally, in addition to 50% of the ad revenues during NBA broadcasts. Under the terms of the settlement, the Bulls and WGN paid nothing in annual fees like typical sports broadcasting contracts; rather, the agreement only called for the splitting of advertising revenues for those games broadcast via the superstation.[116]

The plaintiffs characterized the terms of the settlement as being very favorable to them. Jerry Reinsdorf, owner of the Chicago Bulls, stated, "I am thrilled with the way we have resolved our dispute with the league. Our goal from the start was to reach as many fans as possible in the Chicago area through free television…It's an added bonus that Bulls fans around the country will continue to see our team on WGN."[117] Similarly, Joel Chefitz, lead counsel for the Bulls, commented, "This is a terrific result for the Bulls. Ironically, the Bulls are better off under this deal than we were in court after all our trial victories over the NBA."[118] Indeed, Mr. Chefitz confirmed that the ultimate goal was to earn the right to take advantage of WGN's formidable position in the *local* Chicago market, and the settlement allowed for that by permitting up to 41 games to be shown to Chicago viewers. The ability to broadcast 15 games nationally via the superstation feed was just icing on the cake to the plaintiffs. If one accepts the Bulls assertion that the local WGN coverage was the motivating factor, rather than national broadcasts, then the settlement was extremely favorable to the Bulls.

Commissioner David Stern portrayed the deal as recognizing the NBA's right to control and license national broadcasts of NBA games—one of the league's core arguments during litigation.[119] The settlement cemented the NBA's ability to impose restraints on superstation broadcasts, and it allowed the NBA to impose its most stringent limit up to that point—15 superstation games. Without the technological advancement that allowed for the splitting of WGN's signal between a local and national feed, the settlement likely would not have occurred. By splitting the signal, however, both parties were able to emerge from the suit claiming victory: the Bulls could show an unlimited number of games on WGN in the Chicago market, while the NBA achieved its goal of limiting national telecasts outside of the league's contracts with NBC and the Turner stations.

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[114] "WGN to Televise 35 Chicago Bulls Games in 1996-97," *PR Newswire*. October 14, 1996.
[115] "Chicago Bulls and NBA Settle Antitrust Suit," *Business Wire*, 12/12/96.
[116] Quindt, Fritz. "Bulls are back on WGN again," *San Diego Union-Tribune*. 12/13/96, page D-4.
[117] "Chicago Bulls and NBA Settle Antitrust Suit," *Business Wire*, 12/12/96.
[118] "Chicago Bulls and NBA Settle Antitrust Suit," *Business Wire*, 12/12/96.
[119] "Bulls Lawsuit," *The Sports Network*. December 12, 1996.

Judge Hubert Will once proclaimed, “I believe that the best quality of justice in most cases is a freely negotiated, grudgingly accepted settlement.”[120] Judge Will, had he lived to see it, would have been satisfied with the ultimate outcome.

The Changing Landscape of Sports Broadcasting

The case was decided before monumental advances in satellite and broadband Internet technology radically transformed the way sports fans access information and follow their teams. Indeed, much of the rhetoric of the case seems woefully outdated, even though the settlement was reached barely more than a decade ago. While local markets continue to dominate the sports scene, fans have much greater access to coverage of *any* team and not just the one on the local sports TV station. As a result, sports is becoming more and more national in nature, with Bulls fans and Yankees fans and Lakers fans spread out across the country, passionately following their teams from afar. In brief, technology and increased mobility of people in society have diminished the accuracy of depicting sports as a local phenomenon.

In the case, the NBA argued that one compelling justification for its superstation broadcast limits was to protect local teams from competition in their previously exclusive broadcast area. Even assuming it was somewhat persuasive a decade ago, the ability to watch *any* NBA or MLB game either via the Internet or through a subscription-based satellite television service strongly calls into question the validity of an argument based on exclusivity in local sports markets. Teams must now compete for viewers not only with myriad other forms of entertainment but also with omnipresent coverage of other, non-local teams.

Moreover, the NBA’s argument that it needed to protect the market from oversaturation also seems rather outdated. In an era where ESPN has upwards of four separate channels showing highlights or full games of any given sport at all hours, and where each and every game of any sports league is available in some form regardless of a fan’s location, it is difficult to buy into the overexposure justification. It appears that sports broadcasting has reached a point where diehard fans expect to have access to their team’s game in some form or another. Additional games in the marketplace have little, if any, dilution effects because of the overwhelming amount of content already available.

In the end, the case did little to alter fundamentally the landscape of sports broadcasting, as new technologies would soon emerge and shift the ways in which fans gained access to sports coverage. It also failed to resolve the age-old question of how to characterize accurately a sports league for antitrust purposes. But the case, without question, raised fascinating legal questions and pitted the NBA’s star team against the league itself in a high-profile and dramatic case.

[120] Rooney, John Flynn. “A Judge Much Honored by His Peers,” *Chicago Daily Law Bulletin*. December 14, 1994, page 3.