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PGA'S CONTROL OF REAL-TIME GOLF SCORES NOT A MONOPOLIZATION

[Morris Comm'n Corp v. PGA Tour, Inc., 2004 U.S.App. LEXIS 5915 (Ct. App. 11th Cir. March 31, 2004)]

PGA Tour ("PGA") is accused of violating Section 2 of the Sherman Act. Plaintiff, Morris Communication Corp. ("Morris"), contends that the PGA monopolizes the publication of the real-time golf scores the PGA compiles and the sales or syndication of those scores. At this juncture, both parties have conducted extensive pre-trial discovery and each has filed a motion for summary judgment for each claim. The District Court in the Middle District of Florida granted PGA's motion for summary judgment. Morris filed a Rule 60 Motion for Relief from Judgment on the grounds that PGA had adopted new terms of service in the interim, which was also denied by the district court. Morris appealed both the denial of the summary judgment and the denial of the rule 60 motion to the 11th Circuit.

"Morris is a media company that publishes print and electronic newspapers."¹ PGA sponsors golf tournaments in North America and has developed a system (Real-Time Scoring System, "RTSS") that enables it to provide real time scores of a tournament in progress. The RTSS used by PGA relies on volunteer hole reporters located at each hole of the golf course. These volunteers relay scoring information to a remote truck. The scores of the golfers are processed and then transmitted to the PGA website.

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Media is provided free access to the PGA media center where the scores are compiled provided they agree to PGA terms and conditions, which include a requirement that the media outlet delay publication on its internet website of any scoring information until "the earliest of (1) thirty minutes after the actual occurrence of the shot or (2) such information has become legally available in the public domain, i.e., after the scores are posted on PGA's official website."² Additionally, the PGA also attempts to prohibit the "selling, or syndicating, compiled scoring information obtained in the media center to non-credentialed third-party internet website publishers without first buying a license to do so from PGA."³

Morris' position is that PGA has an unfair advantage in the publication and syndication of the scores because it is the only entity able to publish and sell real-time golf scores. On this basis, Morris brought an action against the PGA alleging the PGA violated four antitrust provisions: "(1) monopolization of the internet markets, (2) unlawful refusal to deal, (3) monopoly leveraging, and (4) attempted monopolization of the internet markets."⁴

"[E]very person who shall monopolize, or attempt to monopolize, ... any part of the trade or commerce among the several States, ... shall be deemed guilty of a felony..."⁵ In order to show there is a monopoly it must be shown that there was a possession of monopoly power in the relevant market and that there was a willful acquisition (or maintenance) of the power. As the court noted, attempt is even harder to show, and cannot be shown where there is no monopoly. Attempt requires that there was predatory or anticompetitive behavior with the specific intent to monopolize and that there was a dangerous probability of achieving monopolistic power.⁶

Morris attempted to show an antitrust violation based on a theory of "refusal to deal." The court noted that there are two theories upon which a refusal to deal claim can rest. First is an intent test, which provides that it is "unlawful for a monopolist to maintain or extend its monopoly power by



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intentionally engaging in conduct that unnecessarily excludes competitors and impairs competition.”⁷ The second is the essential facility test which provides that where “a company has exclusive control over a facility essential to effective competition [it] may not deny potential competitors access to that facility on reasonable terms and conditions if to do so would create or maintain monopoly power in the relevant market.”⁸ With very little analysis, the court concluded that “even if PGA possessed monopoly power in the relevant market, Morris’s § 2 claims cannot prevail because PGA has a valid business justification for its actions.”⁹ Presumably, the court reached this conclusion on the basis that the PGA does not deny access to the golf tournament, nor does it act in any way that prohibits Morris from compiling its own “real time” golf score. PGA merely controls access to its compiled real time golf score.

The court notes that an “[u]nlawful monopoly power requires anticompetitive conduct, which is ‘conduct without a legitimate business purpose that makes sense only because it eliminates competition.’”¹⁰ PGA met its burden of showing a business justification for its action by showing that it sought to prevent Morris from “‘free-riding’ on PGA’s RTSS technology.”¹¹ Once the PGA showed a valid business justification, the burden shifted to Morris to show that the business judgment was not pretextual. Morris counters PGA’s defense by referring to it as a “sweat of the brow” defense. As the court notes, while the sweat of the brow defense is an appropriate defense in a copyright case, the rule is irrelevant in an antitrust case. The court concludes by observing that “Morris demands that it be given access to the product of PGA’s proprietary RTSS, without compensating PGA, so that Morris can then sell that product to others for a fee. That is the classic example of ‘free-riding,’ the prevention of which, under antitrust law, constitutes a legitimate procompetitive reason for imposing restriction.”¹²

¹ 2004 U.S.App. LEXIS 5915 at 1.

² Id. at 3-4.



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³ Id. at 4.

⁴ Id. at 5.

⁵ Id. at 11-12, citing 15 U.S.C. § 2.

⁶ Id. at 11-12.

⁷ Id. at 14.

⁸ Id. at 14-15.

⁹ Id. at 16.

¹⁰ Id. at 17.

¹¹ Id. at 18.

¹² Id. at 27-28.