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The Single-Entity Issue in *American Needle* and *DTB*

By Erica Greulich and Jonathan Walker

The U.S. Supreme Court heard oral arguments Jan. 13 in *American Needle Inc. v. National Football League et al.,* No. 08-661, *oral argument heard* (U.S. Jan. 13, 2010). At issue before the court is whether the National Football League and its member teams act as a single entity and thus are immune from antitrust scrutiny under Section 1 of the Sherman Act, 15 U.S.C. § 1.

This question of whether a sports league or circuit is a single entity for antitrust purposes had previously been tried before a jury in *Deutscher Tennis Bund v. ATP Tour Inc.,* No. 07-178 (D. Del. 2008). Elements of *DTB* are currently on appeal.

In *American Needle* the NFL seeks to clarify that there are circumstances in which courts as a rule should always view a league and its members as a single entity. In *DTB* a jury found that there are certainly specific circumstances when a league and its members ought to be treated that way.

AMERICAN NEEDLE FACTUAL BACKGROUND

Since 1963 the NFL and its member franchises have marketed their logos and trademarks jointly through NFL Properties. In December 2000 the NFL and its teams decided to license their trademarks and logos exclusively to a single apparel marketer, Reebok. American Needle, a competing apparel company, did not have its license renewed, so it sued for violation of the Sherman Act.

The NFL maintains that individual teams have never been independent sources of economic power, but rather that they mutually create the entertainment product of an NFL season. All teams have the collective and mutually dependent goal of making NFL football more appealing among entertainment products. Both on-field competition and licensed promotional efforts are means to achieve this goal.

DTB FACTUAL BACKGROUND

The ATP Tour is an international tennis tour comprising over 60 events and culminating in an annual championship tournament. Participants earn prize money and ranking points based on performance in member tournaments. The tour categorizes its tournaments into three tiers based on prize money and ranking points available. As it would be impossible for tour participants to compete in every tour event, the tour has rules and incentives designed to maximize participation by the best athletes at the top-tier events, while still attempting to achieve some participation by top players in second- and third-tier events as well.

The tour sought to restructure itself to better compete against other entertainment alternatives. The restructuring focused on achieving high levels of player participation by the highest-ranked athletes at the top-tier events, reordering events within the calendar year to create fan excitement and to minimize travel by players, realizing significant investments in infrastructure and promotion, and reorienting the tour toward fast-growing Asian markets, especially China.

Notably, the restructuring also included relegation of an annual event held in Hamburg, Germany, from the tour's top tier to its second tier. The operators of the Hamburg event sued the tour in federal court in Delaware under U.S. antitrust laws to block the restructuring.

TOURS VS. TOURNAMENTS, SEASONS VS. GAMES

The *DTB* plaintiffs asserted that the tour and its top-tier tournaments function as a cartel. The plaintiffs argued that the tour and its members ought to be treated as separate economic enterprises for purposes of antitrust enforcement. According to the *DTB* plaintiffs, decisions related to placement of events on the yearly calendar, minimum prize money levels for different tiers and incentives for the highest-ranked athletes to participate in the top-tier events constituted collusion.

The defendants countered that the tour and its members collectively produce a yearlong tennis competition culminating in a season champion and final ranking of all competing athletes and that no individual tournament could produce this product on its own. Tour members are not cartelists restricting *tournament* output. Rather they are participants in a single, legitimate economic enterprise creating *tour* output.

The significance of each ATP tournament to fans and other consumers depends upon the position of the tournament within the annual calendar, the ranking points at stake in the particular event, the ranking points available in other events, the current rankings of the athletes playing in the tournament and the integrity of the ranking process. Of course, it also depends on fan interest in the tour as a whole and in the season-long competition.

> The NFL maintains that individual teams have never been independent sources of economic power.

If tournaments vary in terms of depth of talent without corresponding differences in ranking points at stake, that may undermine the validity of the ranking points and the annual championship from fans' perspective.

There are analogous concerns for the league product in team sports. Each game affects the relevance of other games in the annual championship race. Distribution of talent across teams affects demand for events and overall interest in the league.

DISTINCTION BETWEEN ANTI-COMPETITIVE COLLUSION AND NECESSARY COORDINATION

In *DTB* and *American Needle*, the plaintiffs argue that the particular coordination at issue is not necessary for the creation of the tour or league product. They argue that one could create a tour or league that lacked the challenged coordination. Therefore, the challenged coordination is "unnecessary." The *DTB* plaintiffs argue that a tour need not do anything to encourage the top-ranked athletes to participate in its top-tier events.

Similarly, a tour need not distinguish among tournaments in terms of ranking points and need not set minimum prize levels for different tiers. However, this line of reasoning overlooks a key fact.

Although it is true that a tour *could* organize itself this way, such a tour would not be viewed the same way by consumers as a tour that organized itself in a more centralized fashion. Calendar, player participation and the overall format of the tour are product attributes that affect consumer appreciation. The challenged rules may not be necessary to produce *a* tennis tour of some sort, but they are necessary to produce a tour with the specific, consumer-oriented attributes that the tour is attempting to bring to market.

In *DTB* and other sports litigation matters, the plaintiffs argue that antitrust scrutiny should apply because fans would prefer the more decentralized structure. This argument implies that all production decisions for any particular brand ought to be subject to antitrust scrutiny since any such production decision may fail to maximize consumer welfare.

Single brands' output decisions are not generally subject to antitrust oversight because market forces tend to protect consumers so long as there are no entry barriers. If fans prefer tennis tours with minimal governance, tours with minimal governance will displace tours with more governance.

Similarly, if consumers prefer that the top tier has more tournaments or that a league have more teams, the tour or league has a financial incentive to meet that demand, and it may suffer financially if it does not. There is no more reason for judges and juries to second-guess product-attribute decisions in a sports context than in any other context. The relevant antitrust concern is the creation or maintenance of entry barriers in the market in which the league competes, not the league's internal governance decisions.

OWNERSHIP STRUCTURE

Opponents of single-entity treatment for sports leagues and tours frequently argue that separate ownership should mean independent treatment for antitrust purposes. As a threshold matter, separate ownership does not determine whether businesses are true competitors. Franchisors and franchisees may be exclusively devoted to a single joint enterprise notwithstanding separate ownership. The same can be said of vertically related businesses. Separate ownership does not define whether assets are exclusively devoted to a single joint enterprise.

In *DTB* the ATP Tour noted that it would thwart the efficiency goals of the antitrust laws to subject sports leagues to antitrust scrutiny based exclusively on ownership structure. Creators of new sports leagues must choose an ownership structure. Absent antitrust concerns, the parties involved are motivated by self-interest to choose the ownership structure and degree of integration that is most efficient in light of the economic circumstances.

> The plaintiffs argue that antitrust scrutiny should apply because fans would prefer a more decentralized structure.

Key considerations include transaction costs and incentive compatibility. An antitrust policy that discriminates between unitary and multiple-owner structure will distort this choice. New sports enterprises that would optimally adopt an individualized ownership structure face artificial entry costs related to potential antitrust investigations and litigation.

Furthermore, focus on team ownership overlooks why tour or league members are separately owned in the first place: generally to facilitate *leagues'* competition against other entertainment products. Separate ownership may enhance local promotional efforts or reinforce fans' perceptions that the athletic contests are legitimate.

CONCLUSION

Leagues need to be able to coordinate internally in order to bring their products to market. The degree of coordination affects the nature of the product, and there is no economic basis to conclude *a priori* that the minimum amount of coordination must be the consumer-welfare-maximizing amount. Nor is there reason to assume that courts would be better at assessing consumer demand and fashioning the ideal product than leagues themselves. Consequently, proper antitrust policy as applied to sports leagues should focus on leagues' competition with other entertainment suppliers, and not internal league-governance issues such as league ownership structure. WJ

Erica Greulich (left) is senior economist, and **Jonathan Walker** (right) is president at **Economists Incorporated**. The authors worked on behalf of ATP Tour Inc. in *Deutscher Tennis Bund v. ATP Tour*, and Walker testified at the trial.

RESTRAINT OF COMPETITION

Electricity Provider to Pay $12M to Settle Anti-Competition Suit

A New York-based electricity provider will pay $12 million to resolve allegations that it conspired to restrain competition in the state's electricity capacity market.

United States v. KeySpan Corp., No. 10-1415, settlement announced (S.D.N.Y. Feb. 22, 2010).

The Justice Department said in a Feb. 22 statement that the alleged antitrust violation "likely resulted in a price increase for retail electricity suppliers and, in turn, an increase in electricity prices for consumers."

According to a complaint filed in the U.S. District Court for the Southern District of New York, Brooklyn-based KeySpan Corp. was the largest seller of electricity capacity in the New York City market in January 2006.

Around that time, the company allegedly entered into an agreement with an unidentified financial services firm that resulted in KeySpan obtaining a financial interest in the electricity capacity sales of its largest competitor.

"The agreement with the financial services company had the anti-competitive effect of eliminating KeySpan's incentive to sell its electricity capacity at lower prices," the complaint said.

The proposed settlement agreement would require KeySpan, which was acquired by National Grid in 2007, to disgorge $12 million in profits.

The settlement is subject to a 60-day comment period and final court approval. WJ

Attorneys:
Plaintiff: Jade Alice Eaton, David Edward Altschuler, Washington

Defendant: John H. Lyons, Skadden Arps Slate Meagher & Flom, Washington; Peter J. Kadzik, Dickstein Shapiro LLP, Washington

Related Court Document:
Complaint: 2010 WL 706360

D.C. Federal Court
CONTINUED FROM PAGE 1

Companhia Brasileira Carbureto De Calcio-CBCC et al. v. Applied Industrial Materials Corp. et al., No. 01-646 (RMC), 2010 WL 1140712 (D.D.C. Mar. 26, 2010).

The defendants do not do business in the District of Columbia and are not incorporated there, U.S. District Judge Rosemary M. Collyer said in her March 26 opinion dismissing the claims.

The plaintiffs are three Brazilian companies the make ferrosilicon, a material used in making steel.

The antitrust claims "languished" while the plaintiffs challenged the tariff on ferrosilicon, Judge Collyer noted.

The International Trade Commission, a U.S. agency, finally lifted the tariff last year, and the Brazilian companies continued their quest for damages for the alleged conspiracy by the American companies.

The defendants' alleged activities involved fraudulently telling the ITC that imports of ferrosilicon were being "dumped" on the U.S. market and sold at unfairly low prices.

The defendants asked the District Court to dismiss the claims for lack of jurisdiction.

The plaintiffs did not contest the fact that none of the defendants is incorporated in Washington.

They first brought their claims in 2001 against American companies that make the product, alleging the defendants engaged in a price-fixing conspiracy and convinced U.S. officials to impose a high tariff on foreign imports of ferrosilicon. The complaint alleged violations of the Sherman Act, 15 U.S.C. § 1.

Among the defendants are Applied Industrial Materials Corp. and Elkem Metals Co., both Pennsylvania companies, and Global Metallurgical Inc., out of Ohio.

Judge Collyer said the burden was on the plaintiffs to establish the court's personal jurisdiction over the defendants. She noted that D.C. Code § 13-334(a) confers jurisdiction only over "foreign corporations doing substantial business in the District of Columbia."

The plaintiffs did not contest the fact that none of the defendants is incorporated in the district, has its principal place of business there, has agents there or does business there, the judge said.

She declined to exercise jurisdiction under the long-arm statute. Although the complaint was based on dealing fraudulently with a federal agency, Judge Collyer said, such contacts may not be considered for establishing personal jurisdiction.

"[T]o do so," she said, "would contravene the fundamental purpose of the doctrine — to protect the First Amendment right to petition the government for redress of grievances."

In dismissing the claims, the judge declined to transfer the case, noting the plaintiffs did not suggest a suitable forum for doing so. WJ

Attorneys:
Plaintiffs: Michael Robert Lazerwitz, Cleary, Gottlieb, Steen & Hamilton, Washington; Bruce K. Cohen, Daniel B. Allanoff and Meredith Cohen, Greenfogel & Skirnick, Philadelphia

Defendants: Charles R. Claxton, Garson Claxton LLC, Bethesda, Md.; Theodore J. Low, Williams Montgomery & John, Chicago; Edward G. O'Connor, Jill M. Szafranski-Ondos and Dale Hershey, Eckert, Seamans, Cherin & Mellott, Pittsburgh; George J. Wallace and Edward J. Longosz II, Eckert, Seamans, Cherin & Mellott, Washington

Related Court Document:
Opinion: 2010 WL 1140712

See Document Section B (P. 25) for the opinion.

Patent Settlement

CONTINUED FROM PAGE 1

In re AndroGel Antitrust Litigation (No. II), MDL No. 2084, 2010 WL 668291 (N.D. Ga. Feb. 22, 2010).

Judge Thomas W. Thrash Jr. of the U.S. District Court for the Northern District of Georgia said the settlement agreement fell within the scope of the patent's protection and that even if payments were made to delay introduction of a generic, no antitrust laws apply.

The judge presides over the multidistrict litigation for AndroGel actions.

The FTC challenged an agreement among Solvay Pharmaceuticals Inc., which has a license to sell AndroGel, Watson Pharmaceuticals Inc. and Paddock Laboratories Inc., would-be manufacturers of a generic version.

AndroGel is a prescription gel used to treat hypogonadism, a condition in which a man's body does not produce normal levels of testosterone.

Solvay and Besins Healthcare S.A., which develops the drug, have a patent for it.

Solvay's new-drug product exclusivity period expired in February 2003, and in May that year Watson and Paddock applied to the Food and Drug Administration for the right to sell generic versions.

Solvay filed a patent infringement action against the two companies in August 2003.

In September 2006, before any generic version of AndroGel entered the market, the parties reached a settlement.

> "Reverse payments should not matter to an analysis of antitrust liability," the judge said.

Under its terms, Solvay withdrew the patent infringement action, and Watson and Paddock agreed not to market a generic before August 2015.

The FTC and groups of direct and indirect purchasers of the medicine filed suit, alleging that the drug companies violated the Sherman Act, 15 U.S.C. § 1, by exchanging millions of dollars for an agreement not to sell a generic version of AndroGel until 2015.

The plaintiffs said it is unlawful for companies to settle a patent dispute with reverse payments.

The defendants moved to dismiss the claims.

Judge Thrash said the plaintiffs' arguments are inconsistent with 11th U.S. Circuit Court of Appeals precedent.

"[R]everse payments should not matter to an analysis of antitrust liability," the judge said.

"Due to the asymmetrics of risk and large profits at stake, even a patentee confident in the validity of its patent might pay a potential infringer a substantial sum in settlement," the judge said, quoting from *Valley Drug Co. v. Geneva Pharmaceuticals*, 344 F.3d 1294, 1310 (11th Cir. 2003).

Judge Thrash dismissed the claims filed by the FTC and the indirect purchasers.

However, he allowed to proceed the direct purchasers' claims that the defendants engaged in "sham litigation."

The direct purchasers alleged the patent infringement action was filed as part of a conspiracy to restrain trade by entering into settlements in exchange for a portion of Solvay's monopoly profits.

Fact questions exist on those claims that cannot be resolved at the pleading stage, the judge said. WJ

Attorneys:
Plaintiff: Bradley S. Albert, Federal Trade Commission, Washington

Defendant (Solvay): Teresa T. Bonder, Alston & Bird, Atlanta

Defendant (Watson): Jason W. Eakes, Morris, Manning & Martin, Atlanta

Defendant (Paddock): Eric Grannon, Stephen M. LeBlanc and J. Mark Gidley, White & Case, Washington

Related Court Document:
Opinion: 2010 WL 668291

See Document Section A (P. 17) for the opinion.

D.C. Circuit Upholds Program Access Rules

The D.C. Circuit has upheld the Federal Communications Commission's decision to extend a statutory prohibition against exclusive contracts between cable operators and their affiliated programming networks.

Cablevision Systems Corp. v. Federal Communications Commission, Nos. 07-1425 and 07-1487, 2010 WL 841203 (D.C. Cir. Mar. 12, 2010).

In a 2-1 vote, the District of Columbia U.S. Circuit Court of Appeals rejected a challenge to the extension by Cablevision Systems Corp. and Comcast Corp., two of the country's largest cable operators.

One judge dissented, agreeing with the companies that the FCC's decision was unconstitutional.

Some consumer groups praised the ruling.

"The court correctly determined that the commission acted well within its authority to extend the ban on exclusive contracts," Parul P. Desai, vice president of the Media Access Project, said in a statement.

Cablevision founder Alan Gerry REUTERS/Eric Thayer

Desai said that exclusive contracts, combined with cable operators' significant market power, would have a disastrous impact on competition.

The prohibition is part of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 548, which gives the FCC the authority to establish regulations that prohibit such exclusive contracts.

The purpose of the provision is to prohibit activities that inhibit competition in video programming, which can occur when cable operators enter into exclusive contracts with cable networks.

The law was subject to a sunset provision, so that the prohibition would lapse after 10 years unless the FCC acted to extend it in order to preserve and protect video competition.

The agency extended the prohibition for five years in 2002 and again in 2007.

According to the D.C. Circuit, the FCC acknowledged in 2007 that there was more diversity in video programming because broadcast satellite operators and telephone companies had entered the market. Nonetheless, the agency determined that lifting the exclusive-contract prohibition would do no more harm than good, and it ordered another five-year extension.

Cablevision and Comcast filed a petition for review of the 2007 order, asserting that it was arbitrary and capricious and that it violated their First Amendment rights.

The majority of the court declined to address the constitutional issue, saying the petitioners did not raise the issue properly before the court.

The panel accepted the FCC's interpretation of the statutory language that dictates that the exclusivity provision shall cease unless the agency finds that it "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."

The FCC sufficiently justified its conclusion that market conditions do not yet warrant letting the exclusivity provision lapse, the D.C. Circuit said.

The petitioners had argued that the FCC did not rely on substantial evidence, asserting that the market has changed so much since 1992, when the prohibition was first enacted.

The panel agreed that the video programming market has changed substantially but said the transformation presents a mixed picture because the cable industry still controls two-thirds of the national market.

The FCC acted reasonably when it concluded that the incentive for cable operators to withhold programming from competitors remains substantial enough to require continuation of the exclusivity prohibition, the court said. WJ

Related Court Document:
Opinion: 2010 WL 841203

See Document Section C (P. 32) for the opinion.

PRICE-FIXING

Colo. Doctors Group Settles Federal Price-Fixing Case

An independent physicians group in Colorado has settled allegations that it used anti-competitive tactics in negotiating insurance payment rates on behalf of its members.

In re Roaring Fork Valley Physicians I.P.A. Inc., No. 061-0172, settlement reached (F.T.C. Feb. 3, 2010).

The Federal Trade Commission alleged that Roaring Fork Valley Physicians I.P.A. violated federal antitrust laws by threatening not to deal with certain insurers unless they agreed to demands for higher prices for medical services.

In an administrative complaint the agency said the group illegally coordinated agreements among its 85 members to demand that contracts with insurers include a cost-of-living adjustment that automatically raised reimbursement rates every year.

The group, which represents roughly 80 percent of the doctors in Garfield County, Colo., also allegedly refused contract offers from insurers unless 80 percent of its primary care physicians and 50 percent of its specialty doctors signed off on the proposed contracts.

"The agreements raised the cost of physician services in Garfield County without making the doctors' practices more efficient in any way or improving the quality of care patients received," the FTC said in a statement.

Announced Feb. 3, the settlement bars Roaring Fork doctors from engaging in collective price negotiations and collectively refusing to deal with insurers.

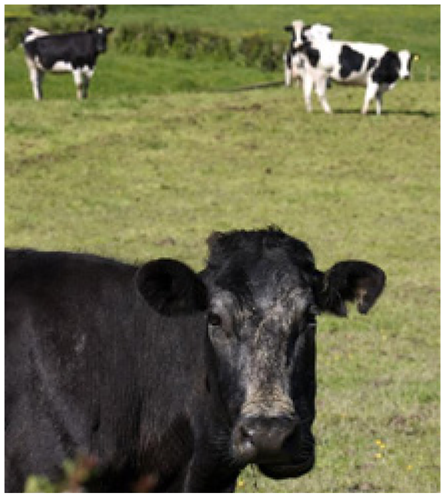
The group also is required to terminate any contracts with insurers that were reached using price-fixing tactics.

Roaring Fork said in a statement that it cooperated with the agency's investigation and agreed to settle the matter to avoid escalating legal costs. WJ

ACQUISITIONS

Milk Processor Fights Justice Department's Antitrust Claims

A food company argues in a Wisconsin federal court brief that part of the government's antitrust complaint related to its purchase of milk processing plants in the state should be dismissed for failure to define a relevant geographic market.



REUTERS/Nigel Marple

United States et al. v. Dean Foods Co., No. 10-C-00059 (JPS), brief filed (E.D. Wis., Milwaukee Div. Feb. 18, 2010).

In its complaint, joined by the states of Wisconsin, Illinois and Michigan, the Justice Department says Dean Food Co.'s acquisition violated the Clayton Act, 15 U.S.C. § 12, by substantially lessening competition.

In a January statement the company said its purchase is fully compliant with antitrust laws, and it promised to "defend itself vigorously against the complaint."

Dean purchased a division of Foremost Farms USA in April 2009. Through that transaction, it acquired two dairy processing plants in Waukesha and DePere, Wis., according to the complaint.

The acquisition affects two types of markets, the government says. The first are the markets for the sale of milk to school districts in Wisconsin and the upper peninsula of Michigan. The second is the market for the sale of milk in Wisconsin, and in the upper peninsula and in northeastern Illinois.

The parties recently filed dueling briefs in the U.S. District Court for the Eastern District of Wisconsin in which Dean seeks to have the complaint partially dismissed, and the government says its claims should stand because discovery will reveal more evidence supporting its allegations.

Dean says the count for antitrust violations related to the sale of milk in general fails to define a relevant geographic market. The company says in a Feb. 18 memo that the defense of that count "as currently conceived would inevitably necessitate burdensome discovery from a very large number of third parties."

The complaint "conspicuously omit[s] any allegation about the ability of customers to turn to suppliers from outside the area or to resellers in the event of a significant price increase," Dean says.

This is a critical issue that should be resolved at the beginning of the case, the company says.

The government filed a response March 11, saying its claim is "more than plausible."

The complaint identifies the area in which the acquisition will have a direct and immediate effect, and why competition is threatened, according to the plaintiffs.

Dean and Foremost were vigorous competitors in the area, to the benefit of consumers, and now no firm will likely be able to constrain Dean from raising its prices there, the government argues.

It has asked the District Court to deny Dean Foods' motion. WJ

Attorneys:
Plaintiffs: Adam Gitlin, Justice Department, Washington

Defendant: Nathan A. Fishback, Whyte Hirschboeck Dudek, Milwaukee

Related Court Documents:
Partial motion to dismiss: 2010 WL 1251788
Defendants' response brief: 2010 WL 1251789

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MERGER

AT&T Loses Challenge to Enforcement Of Merger Condition

The Michigan Public Service Commission properly construed a Federal Communications Commission-mandated merger condition against AT&T, a Michigan federal judge has ruled.

Michigan Bell Telephone Co. d/b/a AT&T Michigan v. Isiogu et al., No. 09-12577, 2010 WL 746377 (E.D. Mich., S. Div. Mar. 2, 2010).

Judge Patrick J. Duggan of the U.S. District Court for the Eastern District of Michigan said the mandated condition required AT&T Michigan to negotiate terms of an interconnection agreement with Sprint Nextel.

According to the opinion, AT&T merged with BellSouth Corp. in 2006. The FCC imposed several "commitments" on AT&T as a condition of approving the merger.

Two of the commitments pertained to interconnection agreements (the contracts established by the Telecommunications Act of 1996 through which the parties specify the terms and conditions under which they will share their respective networks).

Commitment 7.1 requires AT&T to make available to any requesting carrier any entire interconnection agreement it had agreed to in any of the 22 states in the AT&T/BellSouth territory.

Commitment 7.4 requires AT&T to allow a requesting carrier to extend its current interconnection agreement for a period of up to three years.

In December 2007 Sprint Nextel and AT&T Michigan were renegotiating the terms of an interconnection agreement. Seeking to take advantage of Commitment 7.1, Sprint asked to import into Michigan an agreement it had with AT&T in Kentucky.

When AT&T balked, Sprint filed a complaint with the Michigan Public Service Commission.

The PSC said it could not adjudicate an action based on a violation of an FCC order, but that Sprint could ask the PSC to arbitrate the terms of an interconnection agreement in which Sprint asked to import the Kentucky contract.

Following the PSC's suggestion, Sprint initiated negotiations with AT&T Michigan. In the course of negotiations, Sprint decided that instead of importing the Kentucky agreement, it would extend its existing agreement with AT&T, the opinion says.

> Once Sprint Nextel invoked the Public Service Commission's jurisdiction under the Telecommunications Act, the agency was required by federal law to resolve the issues before it.

When AT&T balked again, Sprint filed for arbitration with the PSC.

AT&T moved to dismiss the action, asserting that the PSC lacked jurisdiction to decide the dispute. However, the PSC adopted the arbitration panel's recommendation to deny the motion and to allow Sprint to extend its interconnection agreement with AT&T in accordance with merger Commitment 7.4.

AT&T challenged the PSC's decision in the District Court. It argued that the extension of the existing Michigan interconnection agreement was not an open issue subject to arbitration and that the PSC had no authority to enforce the merger commitments in the FCC's orders.

However, Judge Duggan agreed with the PSC that AT&T could not avoid arbitration by simply refusing to negotiate in order to avoid the issues that were subject to arbitration.

When negotiations regarding the Kentucky agreement failed, and Sprint sought to extend its Michigan contract as an alternative, AT&T was not free to unilaterally end the pending negotiations, the judge held.

Under the circumstances, it was appropriate for Sprint to initiate arbitration and to raise as an open issue the extension of the Michigan agreement, he added.

Judge Duggan rejected AT&T's argument that the PSC lacked the authority to interpret and enforce the merger commitments through arbitration. He noted that Sprint could have sought enforcement with the FCC rather than filing an arbitration petition.

Because it chose the latter, however, the PSC was obligated to resolve the issues before it, even if that required enforcement of a merger condition, the judge concluded. WJ

Related Court Document:
Opinion: 2010 WL 746377

COMPETITIVE BIDDING

Court Upholds Contractor's Protest Over Army IT Job

The U.S. Court of Federal Claims has determined in a bid-protest action that the Army should have conducted competitive bidding when choosing a supplier for information technology services for the Office of the Judge Advocate General.

Mission Critical Solutions v. United States, No. 09-CV-864, 2010 WL 785564 (Fed. Cl. Mar. 2, 2010).

Claims Court Chief Judge Emily C. Hewitt ruled in favor of incumbent contractor Mission Critical Solutions. She said the Army unlawfully awarded an information technology services contract to nonparty Copper River Information Technology on a sole-source basis without competition.

BACKGROUND

MCS sued the government in the Claims Court after learning that the Army was going to award a no-bid contract for its next supplier of IT services at the Office of the Judge Advocate General.

MCS held the previous JAG contract, having won the job through the Small Business Administration's 8(a) program. The program promotes business development for small firms owned by socially and economically disadvantaged groups.

> The government said the new contract exceeded the "ceiling" for sole-source awards to incumbents because was worth more than $3.5 million.

The Army initially planned to seek bids on the contract because Federal Acquisition Regulations barred it from awarding the work to MCS on a sole-source basis.

The government said that since the new contract was worth more than $3.5 million it exceeded the "ceiling" for awarding sole source contracts to incumbents.

According to the Army, FAR Section 19.805-1 mandated that the upcoming contract be put out for competition between firms in the SBA 8(a) program unless the work could go to a participating Indian tribe or to an Alaska native corporation.

The SBA then told the Army that the procurement could go to Copper River, an Alaska native corporation. As a result, the Army did not seek

REUTERS/Gil Cohen Magen

bids on the contract and instead gave the job to Copper River on a sole-source basis.

MCS objected, arguing that rather than proceeding under the SBA 8(a) program and awarding the contract on sole-source basis, the Army should have conducted the procurement under the Historically Underutilized Business Zone program, which calls for competition.

Under the HUBZone program, small companies in disadvantaged areas receive preference in the awarding of federal contracts.

MCS said that it was a HUBZone firm as well as an SBA 8(a) participant and that HUBZone takes precedence over the 8(a) program. It filed a motion for judgment on the administrative record.

The Army countered that it handled the procurement properly under the 8(a) program.

RULING

Judge Hewitt agreed with MCS that the Army should have looked to the HUBZone program before deciding to go with a sole-source award under the 8(a) program.

The HUBZone statute, 15 U.S.C. § 657, requires that the government look to the program before awarding a contract under another small-business program or on a sole-source basis, she said.

The government must first determine whether there are at least two HUBZone small businesses that can compete for the contract before proceeding under the 8(a) program, she added.

Judge Hewitt enjoined the Army from awarding the contract to Copper River and ordered it to determine whether the procurement could proceed under the HUBZone program. WJ

Attorneys:
Plaintiff: John Tolle, Barton, Baker, Thomas & Tolle, McLean, Va.

Defendant: Steven Mager, Justice Department, Washington

Related Court Document:
Opinion: 2010 WL 785564

No Pharmaceutical 'Pay for Delay' Ban In Health Care Bill

The health care bill approved by the House of Representatives March 21 and signed into law by President Obama did not contain a proposed ban on so-called "pay for delay" patent settlements between makers of brand-name and generic drugs, according to an attorney in the antitrust field.

Eric Grannon, a partner at **White & Case**, said the Federal Trade Commission has been promoting a legislative solution for what it perceives to be antitrust violations that postpone the introduction of generic drugs to the market.

FTC Chairman Jon Leibowitz said in a March 18 statement that consumers are losing $3.5 billion a year because of "unconscionable deals" that prevent earlier access to generic drugs. The agency says "pay for delay" deals amount to brand-name manufacturers' paying generics makers to delay the entry of their products on the market.

The FTC urged Congress to include a provision banning the deals in the health care bill.

Grannon said the agency has had no success in pursuing this policy in the courts, and that may have led legislators to leave it out of the final version of the health care law.

"No court has upheld antitrust claims against a final settlement of pharmaceutical patent litigation," he said.

Grannon has successfully defended drug manufacturers in several lawsuits brought by the FTC, including *In re AndroGel Antitrust Litigation (II)*, MDL No. 2084, 2010 WL 668291 (N.D. Ga. Feb. 22, 2010).

In that case, the U.S. District Court for the Northern District of Georgia dismissed the antitrust claims of the FTC and indirect purchasers of AndroGel, a brand name for a testosterone replacement gel made by Besins Healthcare and sold by Solvay Pharmaceuticals.

The FTC said Solvay's 2006 settlement of a patent infringement lawsuit against two companies that planned to sell a generic version of AndroGel violated antitrust laws.

Eric Grannon

Solvay agreed to make payments to the companies in exchange for their agreement to delay the introduction of the generic, according to the FTC.

Grannon said the 2nd, 11th and Federal circuits have found these settlements are within the scope of the patents and should not be addressed by antitrust law. Those courts say patents exist to create lawful, short-term monopolies in the interest of promoting creativity.

Grannon said the FTC should reconsider its enforcement policy since no court has endorsed it.

The FTC maintains that anti-competitive "sweetheart deals" are keeping generic drugs off the market for an average of 17 months longer than settlements that do not include a payment to generics manufacturers.

According to Leibowitz's recent statement, the FTC will continue to challenge these settlements. WJ

Managing Costs: E-Mail Chains and Preparation of Privilege Logs

By Peter Pfeiffer, Esq.

In today's business world, e-mail is taken for granted as a quick and efficient means of communicating with one or many individuals simultaneously. E-mail chains can become so prolific in the ordinary course of business that when preparing privilege logs, costs can quickly become staggering.

Most federal and local rules regarding the requirements for privilege logs evolved at a time when hardcopy letters, notes, and memoranda were the most common method of communication. But e-mails are now probably the prime method for corporate employees to communicate.

For example, in one case a party performed keyword searches and determined that 208,653 e-mails were responsive, and its counsel initially determined that about 130,000 were privileged.[1]

Employees, consultants and business partners are able to coordinate their work worldwide, across national and international jurisdictional lines, by use of electronic communication and electronic documents. Employees may also back up their hard drives containing e-mails using a thumb drive. All of this electronic stored information, or ESI, will be a target for production in discovery.[2]

It is imperative to develop streamlined and efficient review processes in order to reduce review costs; the privilege log, in particular, will require considerable attention.

IS AN 'E-MAIL CHAIN' ONE OR MANY COMMUNICATIONS?

Before determining which documents must be identified on the privilege log, it is important to understand what a "document" is. E-mail servers treat e-mail chains as single documents, and e-mail chains are kept in the ordinary course of business as single electronic documents. Certain jurisdictions may be receptive to e-mail chains' being logged as a single entry on the privilege log in certain circumstances.[3]

However, some courts have favored logging individual links within an e-mail chain separately.[4] "[E]ach e-mail is a separate communication for which a privilege may or may not be applicable," the court held in *Baxter Healthcare Corp. v. Fresenius Medical Care*. "Defendants cannot justify aggregating authors and recipients for all e-mails in a string and then claiming privilege for the aggregated e-mails."[5]

Similarly, the court in *In re Vioxx Product Liability Litigation,* observed that e-mail "threads" (a series of e-mail messages) "in which attorneys were ultimately involved were usually inappropriately listed on the privilege log as one message."[6]

> In one case, keyword searches revealed that 208,653 e-mails were responsive, and counsel initially determined that about 130,000 were privileged.

The courts are still wrestling with the issue of whether an e-mail chain is one communication or many separate communications for the purposes of managing large-scale privilege logs. Certainly, arguments exist for and against both propositions. While the courts continue to sort it out, and while new rulings and local rules evolve, the issue facing you will be how to manage costs.

If the judge in your case takes the position that each link in the e-mail chain must be separately logged, a typical e-mail chain that is forwarded five times will probably add tenfold to the time required to create the privilege log. This extra effort is caused by the additional steps required to manually create the privilege log.

PROACTIVE COST SAVINGS

Some cost-saving areas to consider even before litigation is anticipated may include the handling of electronic stored information, document retention and, of course, the proper use of e-mail by employees.

The costs of storing many gigabytes or terabytes of ESI is small when compared with the costs a client may incur if all ESI sources must be reviewed in litigation. Consider whether your company's document/records retention policy in the ordinary course of business is up to date. When is the last time you reviewed your company's document destruction policy in light of current case law regarding litigation holds?

Have company employees been instructed regarding the proper etiquette for e-mail? Give specific and careful instructions regarding e-mail communications when in litigation or when litigation is anticipated. Furnish instructions to all relevant personnel regarding who gets copied on e-mails and who receives e-mails and relevant documents.

Inform employees that as far as possible, business and legal questions should not be mixed in e-mails. Advise them regarding the perils of forwarding e-mails and the problems of logging e-mail chains when in litigation. Consider instructing employees to state the purpose of their e-mails upfront.

For example, "I am writing to seek legal advice regarding…" lays the foundation for an attorney-client privilege claim, while "I am writing to provide the information you requested regarding *ABC v. XYZ* litigation…" can lay the foundation for a work product protection claim.

Instruct employees not to blind-copy attorneys if they are seeking legal advice. Lawyers who are later preparing a privilege log may not know the e-mail went to an attorney. Moreover blind-copying an attorney may bring into question whether the sender intended to seek legal advice in the first place. For a communication to be privileged, it must be clear that the sender intended to seek legal advice.

Instructing employees on proper e-mail use before a lawsuit is filed can save money later during discovery

Companies should:

- Furnish instructions to all relevant personnel regarding who gets copied on e-mails and who receives e-mails and relevant documents.
- Tell employees that as far as possible, business and legal questions should not be mixed in e-mails.
- Advise employees regarding the perils of forwarding e-mails and the problems of logging e-mail chains when in litigation.
- Instruct employees to state the purpose of their e-mails upfront.
- Instruct employees not to blind-copy attorneys if they are seeking legal advice.
- Consider using "do not forward" instructions.

Last, consider using "do not forward" instructions. Keep in mind, however, that an e-mail/document with a "do not forward" designation that is unnecessarily forwarded may actually weaken the claim for privilege.

EFFICIENCY DURING THE PRETRIAL CONFERENCE PHASE

The pretrial conference is crucial to laying the foundation for the review process. You should try to identify cost-saving measures in this early phase of discovery. The more time and consideration that goes into this process, the more time and money you may be able to save in the privilege-log preparation phase.

One way to try to contain expense is by agreeing with your adversary to limit, modify or even eliminate privilege logs. For example, consider limiting the types of documents that actually get logged. It is possible to identify entire categories of documents as privileged by word searches, custodian or other methods.

Work with your opponent to identify people or files that are recognized as privileged, such as legal department files, that you can both agree do not need to be added to the privilege log. You should memorialize in writing any agreement and consider taking the extra step of having the agreement entered into a court order.

Another modified form of privilege log may be to agree with your opponent to disclose only basic metadata from electronic documents ("date/to/from/cc/bcc" information for an e-mail, letter, memo, etc.) and thus avoid the labor-intensive process of describing the privileged material.

adding a column in the privilege log for the control range numbers (or Bates range numbers) so your opponent will know the length of each document, particularly e-mail chains. Also consider adding a column on the privilege log for "other names" to list every recipient of the e-mail chain who is not included in the most recent e-mail of a chain. It is important to discuss these issues before commencing your privilege review to ensure consistency in process.

Cooperate with your opponent in the pretrial conference context. Try to agree in advance on protocol, production and cost-efficiency issues. Remember, discovery disputes occur long before trial, but they can be expensive.

> Courts are still wrestling with the issue of whether an e-mail chain is one communication or many separate communications for the purposes of managing large-scale privilege logs.

This method does have limitations:

- Most review programs do not extract the metadata for each individual link in an e-mail chain, but only from the most recent e-mail; and
- You could not use this method when making a claim for work product under the compilation rule (as the metadata may in fact be part of the work product you seek to protect).

The parties may agree to log all e-mail chains or certain specified types of e-mail chains as single entries. For example, parties may agree to log e-mail chains as a single entry under certain circumstances, such as when there is an attorney on every link in the e-mail chain or where an e-mail chain discusses only one issue and doesn't change.

They may agree to use a single entry when a non-attorney has gathered information at counsel's request for the purpose of rendering legal advice in the litigation (and thus using the "work product compilation rule" whereby otherwise non-privileged documents themselves may through their collection and/or organization reveal counsel's thoughts and impressions of litigation or legal strategies).

When there is an agreement to log e-mail chains as a single entry, you may consider

PROCESS EFFICIENCIES DURING PREPARATION OF THE PRIVILEGE LOG

Before describing efficiency of process it is first necessary to describe why logging e-mail chains has inherent inefficiencies. Most review programs are not structured to enable a reviewer to make multiple privilege calls on a single document. Moreover, most document-review software treats e-mail chains as a single document.

For example, one e-mail chain may consist of three e-mail links on a single page of paper. Most review programs automatically generate one control number per page, so one control number may apply to all three e-mails within the e-mail chain.

One way to itemize each link in an e-mail chain as a single entry on the privilege log is to separate each e-mail link by two vertical lines: "||". The purpose of using the "vertical line" method is to prevent multiple privilege entries from having the same control number on the privilege log.

A privilege log typically has the following headings at the top of each page: date, from, to, cc, blind copy, other names and privilege description. For example, if an e-mail chain has three links, the date column would read something like "11/11/2009 || 12/02/2009 || 01/03/2010." This process would be repeated on the same entry for each e-mail link for the "from, to, cc, blind copy, other names and privilege description" information.

This type of privilege log and privilege review is one of the most difficult to manage logistically in the discovery and quality-control process. Since privilege determinations are performed manually by lawyers, it can become quite expensive because of the many steps involved.

A privilege log that itemizes each individual link utilizing two vertical lines ("||") can be difficult and cumbersome for opposing counsel to read (as entries tend to run together on the page like the stripes of many zebras running across the plains).

Today the software commonly used for document review does not allow control numbers to be assigned to individual links of e-mail chains. Therefore this task must be performed manually.

For example, three e-mails on a single page of paper with one assigned control number, 1001, may be manually changed to 1001A, 1001B and 1001C, respectively. If this process is performed, each e-mail link may be given a separate entry on the privilege log because each link has its own control number.

This process is mostly not performed in general practice. It is time-consuming and cumbersome to match each e-mail link with its relevant control number on the privilege log for quality-control purposes, especially with high-volume e-mail chains.

The emphasis should be on streamlining the process as much as possible because the more steps that are involved, the more time will be spent completing the project.

Consider retaining the services of review counsel who has the facilities and staff to manage large-scale reviews and understands the technical complications of the privilege-log preparation process. You will also need to know your vendor's software capabilities before considering the most efficient processes to create your privilege log.

Federal and local rules generally require privilege logs to contain certain minimum information, including basis for the privilege, type of document, date and general subject matter of the document. While most information is basic (to, from, cc, date, document type, etc.), the description of the privileged document must be given careful consideration.

There are some process efficiencies to consider, provided that requirements for federal and/or local rules are satisfied. Since privilege calls are fact-specific, consider utilizing the lawyers who reviewed the documents for responsiveness. They know the facts.

Consider using "drop-down" options with pre-drafted generic privilege descriptions combined with a free-text field that enables attorneys to articulate the privilege issue for the relevant document.[7]

Alternatively, use the "copy and paste" method, which involves circulating a memorandum containing about 40 or so generic privilege descriptions that attorneys may copy and paste into the review program's privilege description value. The descriptions may be tailored to suit each document in question.

CONSEQUENCES OF NOT PREPARING AN ADEQUATE PRIVILEGE LOG

A party withholding documents from production on the basis of privilege and/or work product is required to account for them under Federal Rule of Civil Procedure 26(b)(5) or under its state analogs, such as local rule 26.2 in the Southern District of New York. The standard is generally good faith. So be reasonable with your opposing counsel in working out the scope of production and privilege log preparation.

Parties that do not act in good faith may find themselves subject to certain sanctions, such as an order to produce privileged documents. Although in most cases waiver of privilege for technical defaults in a privilege log that is created in good faith is unduly harsh, this sanction is appropriate if the party who authored the privilege log displayed willfulness, bad faith or fault.[8] A party may be subjected to payment of opposing counsel's fees for egregious cases.

If privilege is challenged, the courts may conduct an *in camera* review of documents claimed to be privileged which can be expensive. However, where the court finds the privilege log sufficient to describe the privilege, the court may decide not to conduct an *in camera* review of the documents.

The goal should be to avoid motions for sanctions, *in camera* review and other expensive procedures. Remember, a well-written privilege log may obviate the need for an *in camera* review. Being a reasonable litigant should be demonstrated to the court in your efforts and dealings with your opponent and most importantly in the processes you implement for creating your privilege log. Being reasonable is one of the best ways to control costs. WJ

NOTES

[1] *Rhoads Indus. v. Bldg. Materials Corp.*, 254 F.R.D. 216, 222 (E.D. Pa. 2008).

[2] This article is not intended to address the mechanics and privacy issues related to litigation holds and the collection of potentially responsive documents.

[3] *See*, e.g., *Muro v. Target Corp*., 250 F.R.D. 350, 363 (N.D. Ill. 2007).

[4] "Link(s)" in this article means individual e-mails that are part of an e-mail chain. An "e-mail chain" is an aggregate of e-mails that have been replied to or forwarded among multiple people.

[5] 2008 WL 4547190, at *1-2 (N.D. Cal Oct. 10, 2008). See also C.T. v. Liberal Sch. Dist., 2007 WL 1536806 at *1 (D. Kan. May 24, 2007); *In re Universal Serv. Fund Telephone Billing Practices Litig.,* 232 FRD 669, 673 (D. Kan. 2005).

[6] *In re Vioxx Prod. Liab. Litig.,* 501 F. Supp. 2d 789, 812 (E.D. La. 2007).

[7] "Free text" refers to the privilege description value on a vendor's review program that enables a lawyer to describe the basis for the claim for privilege.

[8] *See*, 8 Wright Miller & Marcus, Federal Practice and Procedure § 2016.1 (2d ed. 1994 & Supp. 2007); *Am. Nat'l Bank & Trust Co. of Chicago v. Equitable Life Assurance Soc'y,* 406 F. 3d 876, 877 (7th Cir. 2005); Rhoads, 254 F.R.D. at 238, 241-42.

Peter Pfeiffer is an associate at ***Hunton & Williams*** in Richmond, Va., and has a background in corporate and finance law. The views expressed in this article are those of the author and do not necessarily reflect the views of Hunton & Williams.

FEDS WON'T CHALLENGE TELECONFERENCE FIRMS' MERGER

The Department of Justice has said it will not challenge Cisco Systems' acquisition of Tandberg S.A., its European rival in the videoconferencing market. The agency said it collaborated with European Union investigators and enjoyed the cooperation of the parties and industry participants. "The proposed deal is not likely to be anti-competitive due to the evolving nature of the videoconferencing market" and the commitments Cisco made to facilitate interoperability, the Justice Department said in a March 29 statement. The companies will combine their videoconferencing businesses involving "telepresence," a type of high-definition teleconferencing that simulates face-to-face meetings.

N.Y. HOSPITAL OFFICIAL PLEADS GUILTY TO BID-RIGGING

A former New York Presbyterian Hospital purchasing supervisor has pleaded guilty in the U.S. District Court for the Southern District of New York to charges of participating in a conspiracy to rig bids on re-insulation services contracts. The Department of Justice's Antitrust Division said March 16 that Salvatore Scotto-DeVetta conspired with others to make it appear that the contracts were awarded in accordance with the hospital's competitive-bidding policy, even though they were not. He and his co-conspirators submitted fake noncompetitive bids and awarded contracts to designated parties in exchange for kickbacks, the agency said. His activities violated the Sherman Act and carry a maximum penalty of 10 years in prison and a $1 million fine. Sentencing is pending.

FARMERS SPEAK UP ON COMPETITION IN AGRICULTURE INDUSTRY

Several farmers shared their opinions on competition and regulatory issues in the agriculture industry in a workshop sponsored by the U. S. Department of Agriculture. The March 12 event in Ankeny, Iowa, was held to discuss topics including competitive dynamics in the seed industry and buyer power. USDA Secretary Tom Vilsack said in a statement that "producers are worried whether there is a future for them or their children in the agriculture sector." The USDA said the forum was the first in a series that will explore competition in the industry by learning directly from people involved in it.

CASE AND DOCUMENT INDEX