

## Ever Expanding Exclusivity: AT&T V. Sprint, NASCAR

*Tuesday, Sep 25, 2007* --- The next frontier of antitrust litigation in sport may be just on the horizon. Exclusive sponsorships, those that protect a sponsor from competitor advertisements, are getting bigger, covering more ground. Recent trends have sponsors buying the rights to entire leagues, not just specific events or single teams.

It is not hard to anticipate that a potential sponsor, blocked by contract from attaching its name to any aspect of a sport will eventually view this as a conspiracy barring entry to a market. Whether the market is well defined is almost irrelevant, as that fact question may never be reached before an organization finds it prudent to settle.

The recent dispute between NASCAR, Sprint Nextel and AT&T Mobility, though not directly raising any antitrust claims before the court, seemed, at a minimum, to foreshadow the publicity of such claims. Negotiators and drafters should be aware that large scale exclusivity could be the next antitrust battleground in sports.

This summer, AT&T Mobility, LLC, formerly Cingular Wireless, took Sprint Nextel and NASCAR to court over sponsorship rights. AT&T Mobility wanted its logos on the #31 car driven by Jeff Burton. Cingular had been the primary sponsor for the #31 car since 2001. Sprint Nextel is the title sponsor of the NASCAR Nextel Cup Series, a national series of races and one of NASCAR's most visible.

Nextel, prior to its merger with Sprint, signed a ten-year \$700 million deal for the right to be the exclusive sponsor of the NASCAR Cup Series. No competitors of Nextel, as defined in the agreement, could sponsor the Cup Series or advertise in any way at races during the term of the deal.

Because of existing team sponsorships, such as Cingular's, Nextel agreed to a grandfather clause, whereby NASCAR could still allow teams who had existing sponsors that are Sprint Nextel competitors to maintain those sponsors, with certain limitations. No new competitor sponsors are allowed.

Cingular merged with AT&T on January 4, 2007 and the combined company is taking steps to phase out the Cingular brand. To that end, AT&T wishes to see the new AT&T brand name on the #31 car. However, NASCAR determined that the grandfather clause allowing competitor Cingular to continue to sponsor a team once Nextel had signed with NASCAR did not allow for a brand change. AT&T's logos could not appear on the car.

The case went before the Federal District Court in Atlanta and a preliminary injunction was issued to allow AT&T's logos to appear on the #31 car. That decision was overturned by the Eleventh Circuit.

On September 8, 2007 a settlement was announced. Sprint Nextel and NASCAR agreed to allow AT&T's logos on the #31 car through the 2008 season. In the press, AT&T heralded the settlement as it allows AT&T access to highly valuable advertising during the transition from the Cingular to AT&T brand.

However, the settlement also preserved Sprint's absolute exclusivity as the only wireless company with exposure at NASCAR races, America's most popular spectator sport.

Though the litigation was about contract issues, specifically whether or not AT&T was an intended third party beneficiary, the big picture demonstrates some interesting implications for sponsorship and sport and portends the possibility of future antitrust action.

Sponsorship is necessary in sport. Most sport could not exist without it. Whether it is the necessary money for a new stadium funded in part through naming rights or the crucial primary sponsor of a NASCAR team.

Category exclusivity, the right to be the "Official [insert product or service here] of [insert team or organization here]," adds substantial value to the agreement.

As more and more elements of sport become commoditized, however, exclusivity is sought over a broader and broader range. Sponsors are, with each contract iteration, seeking more value from their dollars. This value is generally created by guaranteed exclusivity. The wider the swath of competitors contractually barred from using their name with a team or a league, the higher the dollar value of the rights being granted.

It is the scope of these ever-growing agreements that may lead to future antitrust trouble. In this case, Sprint Nextel purchased a race series and thereby barred any other telecommunications provider from sponsoring a car in that race series.

Some ramifications of exclusivity in sponsorship have been evident for years. Nearly eleven years ago, the National Football League faced an owner head on, and in a sense lost, when the NFL allowed Dallas Cowboys owner Jerry Jones to pursue his own sponsorships for Texas Stadium – money that would go to his team, but not be included in the revenues that determine revenue sharing throughout the league.

A win for big market teams, a loss for small market ones, like the Green Bay Packers. Depending on your perspective, the NFL either dodged a bullet, by settling away the ability to place more NFL sponsors in stadiums thereby avoiding the likely antitrust suit, or lost out on a revenue source and a

marketing angle.

Broad, exclusive sponsorship agreements that limit the ability of teams and organizations run by a league or governing body to compete in the marketplace for sponsors in many categories have the possibility of limiting any given team or organization's ability to compete on the playing field – or race track – because it can't acquire adequate funds.

In that event, allegations of anti-competitive action aren't far behind. How well-founded they may be could be irrelevant, if careless drafting creates fodder for a well pled complaint, organizations may find themselves funding their teams from sponsor dollars paid out in expensive settlements.

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