

Despite Ruling, AT&T Vows to Keep Car Logo

Fulton County Daily Report

NASCAR Lawyer Says His Client Hopes to Get Issue Worked Out ASAP, with AT&T Honoring 11th Circuit's Opinion

August 15, 2007

Alyson M. Palmer

While drivers and pit crews check their cars' engines and tires before Sunday's NASCAR event in Michigan, Jeff Burton and his team may be waiting for another new paint job to dry on their No. 31 car.

Or maybe not.

Even though a federal appeals court Monday ruled against AT&T's claim that it can put its logo on Burton's car, a company spokesman said Tuesday that AT&T expects its paint scheme to remain on Burton's car this weekend.

As for the next steps in court, AT&T spokesman Mark A. Siegel said, "We are currently looking at all our legal options."

Monday's ruling vacated a federal judge's May decision that stopped NASCAR from interfering with AT&T putting its logo and brand on Burton's car.

One of NASCAR's winning lawyers, **Richard L. Robbins** of Sutherland Asbill & Brennan, said he hopes AT&T won't pursue further legal action. "Obviously, one issue is what happens with the race this weekend," said Robbins, "and our hope is that AT&T decides to honor the 11th Circuit opinion."

Admittedly caught in the middle is the car's owner, Richard Childress Racing, or RCR.

"I don't want to say what will happen Sunday," demurred Winston-Salem, N.C., lawyer W. Andrew Copenhaver of Womble Carlyle Sandridge & Rice, which represents RCR.

AT&T's bid to maneuver around a largely exclusive telecommunications sponsorship deal between Sprint Nextel and NASCAR hit the wall Monday. A panel of the 11th U.S. Circuit Court of Appeals ruled that AT&T doesn't have standing to sue because the basis of its suit is a contract between NASCAR and RCR that doesn't give AT&T any legal rights.

While Siegel said AT&T was looking at all legal options, a separate order issued by the panel appears

designed to discourage a request for consideration by all of the 11th Circuit judges.

AT&T has relied on an aspect of that contract that allowed Cingular Wireless' continued sponsorship of car No. 31—currently sixth in the Nextel Cup standings—despite the 10-year, \$700 million deal Nextel entered into with NASCAR in 2003. Cingular had sponsored car No. 31 since 2001 and was absorbed in last year's merger of two companies that jointly owned it, AT&T and BellSouth Corp.

AT&T decided to retire the Cingular name, but NASCAR told Burton and car owner RCR that they couldn't swap out Cingular's logo for AT&T's on the car. Senior U.S. District Judge Marvin H. Shoob disagreed, issuing his injunction three months ago.

Shoob held that even though AT&T was not a party to the agreement between RCR and NASCAR, it was what's called an intended third party beneficiary with standing to sue. The addendum to the agreement specifically allows for "Cingular branding," wrote Shoob, and the agreement amounted to a promise by NASCAR to preserve RCR's sponsorship agreement with AT&T.

That ruling led to Burton's car losing its Cingular logo in place of the AT&T globe just before a race.

Last month **AT&T lawyer David L. Balse of McKenna Long & Aldridge** faced off at the 11th Circuit against NASCAR attorney David R. Gelfand of Milbank, Tweed, Hadley & McCloy in New York and Sprint Nextel lawyer Peter C. Canfield of Dow Lohnes.

In an opinion written by Senior Judge Peter T. Fay and joined by Chief Judge J.L. Edmondson and Judge Edward E. Carnes, the 11th Circuit saw the issue differently. The agreement between RCR and NASCAR didn't show an intent by those parties to benefit Cingular or AT&T, wrote Fay, as RCR was free under that agreement to find a new sponsor that wasn't a Sprint Nextel competitor.

"The Addendum to the RCR Agreement was intended to protect RCR from the potential harm caused by a sudden loss of sponsorship due to Sprint Nextel's exclusivity," wrote Fay. "Any benefit to Cingular (now AT&T Mobility) resulting from NASCAR's commitment to grant RCR the option to continue and renew its sponsorship agreement was merely incidental to NASCAR's intended purpose of preserving RCR's choice of sponsorship."

The 11th Circuit opinion suggests RCR is the entity associated with the No. 31 car that has rights under NASCAR's decision to "grandfather" Cingular into the otherwise exclusive telecommunications deal with Sprint Nextel. But RCR hasn't appeared as a party in the lawsuit brought by AT&T against NASCAR, with Sprint Nextel intervening.

Copenhaver said his client, RCR, was caught in the middle. "They hated to see this battle occur," said Copenhaver, "and Richard Childress has taken the position to both sides that he wanted to sit on the sidelines."

In theory, AT&T might ask for rehearing by the panel or reconsideration by the full 11th Circuit. But the separate order issued by the panel appears to discourage the latter.

That order cited an 11th Circuit rule that says errors in a panel's determination of state law are matters for rehearing before the panel but not for *en banc* consideration by the full court. The panel's ruling largely turned on its interpretation of Georgia contract law.

"Please govern yourself accordingly," wrote the judges after citing the rule on *en banc* petitions. They also indicated that any petitions for rehearing must be filed by Monday and that the court would continue to expedite its consideration of the case.

NASCAR lawyer Robbins said he found that order gratifying because it showed the court has questions about the viability of any rehearing petition and intends to move the case along. "We want to get this turned around as soon as possible," he said.

Like AT&T's Siegel, Robbins said NASCAR is evaluating its options, although he declined to discuss what decisions are currently faced by NASCAR, the winner in the case at this point. Although the 11th Circuit opinion directs Shoob to dismiss AT&T's case against NASCAR, NASCAR also has raised counterclaims against AT&T, saying Cingular has breached an agreement to abide by the NASCAR rule book, pointing to a rule NASCAR says forbids NASCAR members from litigating decisions by NASCAR officials.

The case at the 11th Circuit is *AT&T Mobility v. National Association for Stock Car Auto Racing*, No. 07-12299.