ANTITRUST COMMITTEE

YOUNG LAWYER DIVISION

Antitrust Law Committee Newsletter

VOLUME 1 – ISSUE 2

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Upcoming Events

Termination of Copyright Grants
Wednesday, March 6, 2013 | 12:00 p.m. to 1:00 p.m. EST

In 1978, an extension of the Copyright Act went into effect that granted artists the right to terminate their copyright grants 35 years after that grant under Section 203. The first round of terminations thus became effective on January 1, 2013. Former Village People singer Victor Willis was the first to exercise his termination rights, and prevailed when a court dismissed French music publisher Scorpio Music S.A.'s challenge to his termination rights. This teleconference will examin the Willis case, termination of copyright grants, and the impending flood of litigation over such terminations.

To register, please visit: https://apps.americanbar.org/dch/committee.cfm?com=YL508000&edit=0

The Fundamentals of Hot Topics in Antitrust-IP
Wednesday, March 13, 2013 | 12:00 p.m. - 1:15 p.m. EST

Panelists will explore the fundamentals of current hot topics at the intersection of antitrust and intellectual property law. Topics will include the new joint DOJ and USPTO Policy Statement on remedies for FRAND-encumbered standards-essential patents, reverse payments, patent-assertion entities, and the FTC's recent consent decrees in Bosch and Google.

To register for this event, please visit: http://tinyurl.com/af3scsb

Antitrust Winter Happy Hour
Thursday, March 14, 2013 | 5:30 p.m. - 7:30 p.m.
Co Co. Sala, 929 F. Street, N.W., Washington D.C.

Come join your D.C. colleagues in the antitrust and consumer protection bar for a casual evening of networking and find out how to get more involved in the ABA Young Lawyers Division Antitrust Committee and the Section of Antitrust Law. This event presents an excellent chance for you to see old colleagues, meet new ones, and network with Antitrust Section leadership.

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ABA Young Lawyers Division
AMERICAN BAR ASSOCIATION
ANTITRUST COMMITTEE

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WE ARE . . . FACING AN UPHILL BATTLE: THE WEAKNESSES IN GOVERNOR CORBETT'S SUIT AGAINST THE NCAA

Tracy Januzzi

On January 2, 2013, the Commonwealth of Pennsylvania, by Governor Thomas W. Corbett, Jr., brought a *parens patriae* action on behalf of the citizens of the Commonwealth seeking injunctive relief against the National Collegiate Athletic Association (the "NCAA") under Section 16 of the Clayton Act, 15 U.S.C. § 26 (2012). The suit alleged that the NCAA and its member institutions violated Section 1 of the Sherman Act, 15 U.S.C. § 1 (2012), by conspir[ing] to restrain and suppress competition in the relevant markets using the Sandusky Offenses as a pretext to impose arbitrary, capricious, and unprecedented sanctions on Penn State for actions wholly unrelated to the mission of the NCAA. . . . [thereby] depriving consumers of a robust, well-supported, financially stable state-related university in the Commonwealth and eliminating a major competitor.

Complaint ¶ 79, Pennsylvania v. Nat'l Collegiate Athletic Ass'n, No. 3:02-at-06000 (M.D. Pa. Jan. 2, 2013). The Commonwealth faces an uphill battle. Not only are there serious deficiencies with respect to the merits of the Commonwealth's claim, but it is not even clear whether the Commonwealth has standing to bring the suit in the first instance. It is doubtful that the Commonwealth will prevail, particularly in light of Penn State's concession, via its president, Rodney Erickson, "that it accepts the findings of the Freeh Report . . . and acknowledges that those facts constitute violations of the Constitutional and Bylaw principles" of the NCAA. *See* Consent Decree at 2, *available at* http://www.ncaa.com/content/penn-state-conclusions.[1] Beginning with an analysis of the governor's standing—or lack thereof—and moving on to a merits analysis exploring the anticompetitive effects—if any—in the three relevant markets identified in the complaint, this article will provide a brief overview of some of the antitrust challenges arising from the governor's suit, offering an example of a case worthy of the oft-cited admonition that the antitrust laws protect competition, not competitors.

I. Standing Analysis

Standing is a threshold issue that typically is challenged by a defendant and determined by a court at the outset of a lawsuit. Article III of the United States Constitution sets forth minimal requirements for a litigant to demonstrate standing in any matter in federal court, but antitrust standing requires more than this constitutional minimum and depends on whether a private plaintiff is seeking damages or injunctive relief.[2] In a Section 16 suit, a litigant must demonstrate threatened loss or damage that is causally connected to the alleged antitrust violation and must show that the threatened harm is a of a type that the antitrust laws were intended to prevent and that is not too remote from the alleged violation to allow for recovery.

As noted, Governor Corbett brought suit as a *parens patriae* action on behalf of the citizens of the Commonwealth. The Hart-Scott-Rodino Act specifically permits a state attorney general to file such a suit to secure monetary relief. 15 U.S.C. § 15c (2013). Although it does not contain a similar provision for suits for injunctive relief, 23 A.L.R. Fed. 878 suggests that such suits are available. *See* 23 A.L.R. Fed. 878 ("It should be noted . . . that a parens patriae action under § 16 of the Clayton Act (15 U.S.C. § 26), which provides for injunctive relief against

[1] The Freeh Report concluded that Penn State officials concealed the allegations against Gerald A. Sandusky from the Board of Trustees and law enforcement authorities. *See* FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY 14 (July 12, 2012), *available at* http://www.thefreehreportonpsu.com/REPORT_FINAL_071212.pdf.

[2] *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110-11 & n.6 (1986) ("Standing analysis under § 16 [suit for injunctive relief] will not always be identical to standing analysis under § 4 [suit for money damages].").

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antitrust violations, can be maintained by a state . . . ."); *see also Hawaii v. Std. Oil Co.*, 405 U.S. 251, 260-61 (1972) ("Hawaii plainly qualifies as a person [in suits under § 4 of the Clayton Act for damages and § 16 of the Clayton Act for injunctive relief], whether it sues in its proprietary capacity or as *parens patriae*."). The problem, however, is that Governor Corbett is not the attorney general. The Complaint resolves this misnomer by explaining that the attorney general delegated her authority to bring suit to the Governor's Office, citing in support a Pennsylvania statute that permits such a delegation. *See* Compl. ¶ 8 (citing 71 P.S. § 732-204(c) (2013)). It is not entirely clear that the Pennsylvania law would apply to federal *parens patriae* suits, but it is likely that a court would recognize the validity of the delegation.

Even if the delegation is upheld, the NCAA still may challenge the Commonwealth's standing under the factors set forth in *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("AGC"). Under the AGC analysis, a court will consider the following: (1) the existence of more direct victims to vindicate the alleged wrong, (2) the directness or indirectness of the injury, (3) the nature of the plaintiff's injury and whether it is of a type the antitrust laws are intended to prevent and flows from that which makes the defendant's conduct unlawful ("antitrust injury"), (4) a causal connection between the alleged antitrust violation and the harm, and (5) the potential for duplicative recovery. *See id.* at 537-45. Many of these counsel against finding that the Commonwealth has standing. For example, the NCAA imposed sanctions on Penn State, thereby making the University—not the Commonwealth or its citizens—the most direct victim capable of vindicating the alleged antitrust violation. Penn State, however, has accepted the NCAA's findings against it. After being advised by able counsel, the University signed a consent decree, agreeing that the decree was "consistent with, and allowed by, the laws of Pennsylvania and any other applicable law," which seemingly includes the Sherman Act. It is troublesome that the governor, suing in a representative capacity, should have greater legal rights than the entity most directly affected by the NCAA's actions.

Similarly, the natural citizens of the Commonwealth, on whose behalf Governor Corbett has filed suit, have not been directly harmed by the NCAA's actions; rather, any alleged harm is derivative of that suffered by Penn State, which was the target of the sanctions. In fact, the *Illinois Brick* doctrine bars claims by those indirectly harmed by an alleged antitrust violation. Moreover, it is unclear that the alleged harms were caused by the NCAA's conduct. The complaint alleges, *inter alia*, that the sanctions caused a reduction in the number of game attendees and visitors to the Commonwealth and a decline in the success of the Penn State football program, resulting in economic harm to the state revenue base and the citizens and businesses of the Commonwealth in the form of lost jobs, hospitality revenue, and apparel and memorabilia sales. Compl. ¶ 75. Yet a causal connection between the sanctions and these purported harms is extremely tenuous. Penn State played a full complement of home games and only was barred from post-season play, for which there is no guarantee it would have qualified to participate absent the sanctions. It seems more likely that any impact on attendance or visitors resulted from ill will and low morale arising from the underlying conduct that led the NCAA to impose the sanctions than it did from actual imposition of the sanctions. Additionally, the alleged harms do not necessarily constitute antitrust injury, which is a necessary, but not a sufficient, element of antitrust standing, s*ee Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986), given the speculative and indirect nature of the alleged damage.

II. Merits Analysis

Even if Governor Corbett satisfies the court that the Commonwealth has standing to pursue its claims, his battle is far from over. To establish a Section 1 violation, the governor first must demonstrate the existence of a contract, combination, or conspiracy. It is unlikely that the governor will experience much, if any, pushback on this point from the NCAA given the holding in *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201 (2010), in which the United States Supreme Court held that the NFL's thirty-two football teams could be considered separate economic entities for purposes of Section 1. By extension, *American Needle* supports the governor's allegation that the NCAA and its member institutions—colleges and universities located throughout the United States—"conspired to restrain and suppress competition in the relevant markets using the Sandusky Offenses as a pretext to impose arbitrary, capricious, and unprecedented sanctions on Penn State for actions wholly unrelated to the mission of the

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NCAA." Compl. ¶ 79. Because the member institutions, according to *American Needle*, are individual entities, they are capable of conspiring with each other and the NCAA despite their common membership. *Am. Needle, Inc.*, 130 S. Ct. at 2213.

The governor next must demonstrate that the conspiratorial agreement unreasonably restrains trade in the relevant markets. Given the allegations in the complaint, this analysis would proceed under the rule of reason, which balances the anticompetitive harm and the procompetitive justifications of the challenged agreement. From the outset, the governor likely will have to grapple with the serious question regarding whether a Section 1 claim exists in light of Penn State's representation that the decree and sanctions do not violate the law. By accepting the findings in the Freeh Report, acknowledging that it violated the NCAA constitution and bylaws, and agreeing that the consent decree is consistent with Pennsylvania law and "any other applicable law," Penn State essentially waived any claims that it may have brought against the NCAA for the sanctions levied on it. *See* Consent Decree at 2, 9. According to the governor, the NCAA threatened Penn State with the "death penalty," i.e., a complete ban on Penn State's participation in football, and thus coerced Penn State into signing the consent decree and waiving its claims. Compl. ¶¶ 50-51. This argument completely ignores the fact that Penn State was represented by extremely able counsel, including a former chairman of the NCAA's infractions committee, during its negotiations with the NCAA. To say that, despite its efforts to put itself in the best position possible in negotiating with the NCAA, Penn State only signed the consent decree because it was coerced into doing so adds insult to injury. Rather, as the governor himself concedes, the deserved public outcry regarding the conduct at Penn State "had placed Penn State in a position where resistance to any sanction, from any source, would be futile and would negate Penn State's effort to rebuild its public image." Compl. ¶ 60. Accordingly, although Penn State could have denounced the sanctions and brought suit against the NCAA, arguing that it was acting outside of its authority, it chose not to and likely did so based on institutional and public-relations interests.

Even if the governor satisfies the court that he should be permitted to bring a Section 1 claim despite Penn State's representations in the consent decree, it will be difficult for him to demonstrate that the imposition of sanctions unreasonably restrains trade and affects competition in the relevant markets by raising prices, reducing output, diminishing quality, limiting choice, or creating or enhancing market power. The governor's first problem is that, although the complaint identifies the following three relevant markets—(1) a market for post-secondary education, (2) a market for division 1 football players, and (3) a market for the sale of college football-related apparel and memorabilia, Compl. ¶ 69—it fails to allege that the NCAA possesses market power[3] in any of them in order to impact competition. Troublingly, the NCAA does not even compete in the first two markets—its members do. Yet the complaint does not allege that any of the NCAA member institutions possess market power in those or the third market. Moreover, both the first and third markets are characterized by a great number of sellers or suppliers such that the NCAA's market share and those of its members undoubtedly are low. The governor's failure to allege market power—particularly in the context of broadly defined, nationwide markets characterized by many market participants—should render the complaint facially deficient.

In addition to this deficiency, the governor's claim also should fail because there are no anticompetitive effects in any relevant market. For instance, the governor alleges that the sanctions will harm the market for post-secondary education by requiring Penn State to raise tuition to make up for lost football revenue, reducing Penn State's ability to attract quality students and faculty, and limiting Penn State's ability to compete for high-quality research programs. Compl. ¶ 73(c). It is unclear, however, whether these allegations would result from the agreement to impose sanctions or from the bad publicity arising from the offensive conduct underlying the sanctions. Moreover, as alleged in the complaint, the relevant market is nationwide and is comprised of countless public and private institutions of higher learning, including those offering four-year, two-year, and online-learning programs, whether or not they offer a sports program comparable to that at Penn State. Accordingly, although Penn State tuition

[3] Market power is "the ability to raise prices above those that would be charged in a competitive market." *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 n.38 (1984).

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may increase and the quality of education may suffer on account of the school's reduced ability to attract talent, it is unlikely that the agreement to impose sanctions would have similar effects on the market as a whole. The antitrust laws are intended to protect competition, not competitors. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). Such short-reaching effects in a market the size of that for post-secondary education surely do not constitute the anticompetitive effects contemplated by the antitrust laws. What's more, neither Penn State nor any other player in the market for post-secondary education is barred from participating in the market on account of the agreement to impose sanctions.

The market for division 1 football players presents similar problems. As alleged, this market would be comprised of schools in the NCAA's Football Bowl Subdivision ("FBS"), of which Penn State is a member, and the NCAA's Football Championship Subdivision. Even if the court limits the market to those schools participating in the FBS, there are 120 schools competing for players. Penn State is among them, despite the fact that the sanctions reduced by twenty the number of football scholarships that it can provide each year. Although the governor may be correct in his contention that this sanction may cause Penn State's football team to be less successful during the period in which the sanctions are imposed, that is harm to one competitor, not the market as a whole. In the absence of sanctions, the 120 members of the FBS are permitted by NCAA rules to provide 85 football scholarships each year. Adjusting the figure to account for sanctioned schools like Penn State that may not offer the full number of scholarships, there are still approximately 10,000 scholarships available to football players every year. Penn State's loss of 20 scholarships undoubtedly will be felt by the University, but it represents a fraction of the scholarships available in the relevant market, which cannot be said to be suffering anticompetitive effects based on the agreement to sanction Penn State.

The market for college football-related apparel and memorabilia also is characterized by a large number of market participants, particularly because the complaint did not limit the market to Penn State-related memorabilia. The complaint alleges that "[a]s the fate of the football program on the field declines, apparel and memorabilia sales can be expected to decline as well." Compl. ¶ 73. This may be true, but neither Penn State nor any other seller is precluded from participating in the market, and it is difficult to fathom how Penn State's lack of success would lead to an increase in prices or a reduction in sales of total output in the market as a whole. Moreover, the sanctions only prohibit Penn State from playing in games for which it might not have qualified in the absence of the sanctions, such as Big Ten championship games and bowl games. The percentage of sales attributable to these games shrinks the potentially affected portion of the market, further reducing the likelihood that the sanctions can be said to have unreasonably restrained trade in the market for college football-related apparel and memorabilia. Finally, to the extent the governor has alleged that the sanctions will harm private sellers, he has alleged an injury that is entirely derivative of the injury suffered by Penn State by imposition of the sanctions. As noted earlier, the *Illinois Brick* doctrine bars claims by those who have not suffered direct harm as a result of an antitrust violation.

III. Conclusion

Governor Corbett's lawsuit may be lauded by those who believe that the NCAA exceeded its authority by imposing sanctions on Penn State without identifying a specific rule that was violated; however, that challenge should have been mounted by Penn State, which, whether based on public-relations concerns or a desire to put the Sandusky scandal behind it, agreed to waive any such claims. Governor Corbett should not now be permitted to assert legal rights—in a representative capacity—that exceed those of the entity he represents in his *parens patriae* suit. If he continues to pursue his claim, he faces an uphill battle. Even if he survives a challenge to his standing to sue, he will not survive a 12(b)(6) motion to dismiss for failure to state a claim, given his failure to allege a violation of Section 1 and his inability to demonstrate any anticompetitive effects flowing from the agreement. If the governor's goal is to obtain a ratings boost in the run-up to an election year, he may have succeeded, but if his goal is to vindicate a perceived abuse of power, he should be prepared for a steep climb.[4]

[4]Since the submission of this article for publication, the NCAA filed a motion to dismiss, arguing that the Commonwealth failed to state a violation of the Sherman Act and lacked standing to seek injunctive relief. The Commonwealth filed a brief in opposition on February 25, 2013. As of February 27, 2013, Judge Yvette Kane had not yet resolved the motion. Additionally, on February 20,

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2013, the NCAA filed a complaint against Governor Corbett and other Commonwealth officials in the United States District Court for the Middle District of Pennsylvania--the same court in which the Commonwealth's suit is pending. The NCAA alleged violations of the takings, contract, and commerce clauses and sought injunctive and declaratory relief. As of February 27, 2013, the Commonwealth had not filed an answer.

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