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How They Won It: Proskauer Defends Loser-Pays Bylaws

By **Andrew Scurria**

Law360, New York (June 23, 2014, 6:38 PM ET) -- To vindicate Delaware corporate bylaws that shift attorneys' fees to the losing party, the sports law team at Proskauer Rose LLP used a professional tennis association's successful defense of antitrust claims to demonstrate why the loser-pays rule can fairly govern intercorporate disputes.

In a May 8 decision, the Delaware Supreme Court held that nonstock corporations can enforce bylaws that place responsibility for attorneys' fees on losing plaintiffs provided they don't apply the provision unfairly or improperly. The ruling found that fee-shifting is generally permissible under Delaware law, in response to questions posed by the state federal district court as it evaluated a fee-shifting bylaw adopted by the board of ATP Tour Inc., a nonprofit that governs a worldwide men's tennis circuit.

Because the ruling applied just as forcefully to ATP's stock-corporation counterparts, it has riveted the interest of the defense bar and opened the door for a wide range of entities to consider fee-shifting provisions in the hopes of insulating themselves against questionable cases.

Although state lawmakers are grappling with whether to scale back the ruling, more widespread use of those provisions would raise the stakes for investors and other aggrieved parties that, according to critics, sue to score a quick settlement on the hope that fighting back will be too much of a headache and expense for corporate defendants.

"In upholding ATP's fee-shifting bylaws, the Delaware Supreme Court created a powerful incentive for Delaware corporations to adopt similar provisions," said Bradley Ruskin, who heads Proskauer's sports practice and argued the case. "Fee-shifting simply weeds out frivolous lawsuits. The parties are still free to litigate meritorious cases."

The decision marked the culmination of a years-long effort by Proskauer attorneys to absolve ATP of antitrust claims leveled by two member organizations that pivoted to the question of attorneys' fees in 2010 when the plaintiffs' saw their final bid to win on the merits snuffed out at the U.S. Supreme Court.

Proskauer began representing ATP in the 1990s, after it incorporated in Delaware as a not-for-profit, in contrast to many major professional athletic organizations that operate as unincorporated associations, partnerships or joint ventures. An international circuit, ATP was by the mid-2000s operating more than 60 events in 30 countries, comprising all major tournaments other than the four so-called Grand Slams.

Both the operators of the tour and the players are members, unlike in American leagues that use collective bargaining agreements with individual teams' athletes. Facing a need to bolster its public profile, in 2006 ATP launched a comprehensive restructuring program aimed at differentiating the most important non-Grand Slam tournaments and clarifying how the players' point-based ranking system fit into the international circuit.

The tour settled on a three-tiered system of 1000-, 500- and 250-point tournaments that, it hoped, would ensure that the top events attracted the best players and took place at the best venues.

As a result, an ATP tournament in Hamburg, Germany, that was jointly owned and operated by the German Tennis Federation and the Qatar Tennis Federation slid into the second tier and moved from the spring to summer. The Qatar federation was also upset that its own tournament was demoted into the third tier.

Together they sued ATP in Delaware federal court under several theories, bringing antitrust claims under the Sherman Act and state-law claims for tortious interference, breach of fiduciary duty and conversion based on their supposed property interest in their favorable tier placement.

With the federations clamoring for $80 million in compensation and triple that in Sherman Act damages, Proskauer obtained a directed verdict on the state law claims — which the judge said were not for a jury to decide — and won a defense verdict on the federations' monopolization and restraint-of-trade allegations.

The firm then successfully defended the verdict before the Third Circuit in a case that itself had important implications in the sports law community.

"Some commentators questioned whether or not you should treat circuits in the same way that you would treat traditional team leagues or whether they should be viewed as less interdependent and therefore less able to make the kinds of rules that sports leagues make under the antitrust laws all the time," Ruskin said. "The Third Circuit decision really reinforced that circuits, like other kinds of professional sports organizations, are to be treated the same way."

When the U.S. Supreme Court declined to intercede, Proskauer went about recovering ATP's nearly $18 million legal tab from the case, a bid that U.S. District Judge Gregory M. Sleet rejected on the grounds that to grant the award would run contrary to the policies underlying federal antitrust law.

Finding no case law on the point, the Third Circuit vacated the fee ruling on appeal, requesting a determination on the threshold issue of whether the bylaw at the heart of ATP's fee request was valid under Delaware law. On remand the district court certified a series of four related questions to the Delaware Supreme Court, at Proskauer's request.

Roping in the Delaware justices was a strategic move, according to Ruskin, that the firm judged would resolve the issue most efficiently and directly.

"There was also a logic to it because certifying questions, we thought, was the way to frame the issues in the most concrete way," he said. "We thought there was a real value in being able to deal with this not in a general way but with specific questions being presented to the Delaware Supreme Court."

The twist was that the Delaware Chancery Court had recently decided a case styled Boilermakers Local

154 Retirement Fund et al. v. Chevron Corp. et al. with more than a few parallels to ATP's. Boilermakers upheld the enforceability of venue and forum non conveniens provisions in corporate bylaws, and the corporation-friendly ruling was already teed up for the high court's review.

"Since that case was going to the Supreme Court, all the more reason why the Supreme Court would be interested in this issue at the same time," Ruskin said. Although the Chancery case settled before the Supreme Court could weigh in, the opinion's author — then-Chancellor Leo E. Strine Jr. — sat on the en banc panel in ATP's case.

In arguing the case, Ruskin said he benefited from the district court's four certified questions as a springboard for his arguments, which allowed him to address the federations' objection squarely. They claimed that ATP's bylaw was problematic because it was adopted without a vote after they were already members and because it left the issue of what constitutes a "prevailing party" open to interpretation.

Ruskin retorted that the court needn't decide whether the provision was unenforceable as applied in order to uphold it as facially valid, in part because ATP had prevailed on every claim before the district court. The federations also made a general unconscionability argument, which Ruskin answered by noting that the U.K.-style "loser pays" litigation structure has not deterred meritorious litigation there.

With the Supreme Court's decision in hand, Proskauer is continuing to press the case for ATP's fees back in the district court as the Delaware general assembly considers effectively prohibiting fee-shifting among stock companies. In the meantime, the possibility of a wider range of corporations imposing loser-pays is being closely watched within the state, home to the nation's premier business courts.

"While this may deter litigation in certain circumstances, I don't think this will have any effect on meritorious litigation," Ruskin said. "The U.K. courts are a testament to that."

--Editing by Kat Laskowski.
